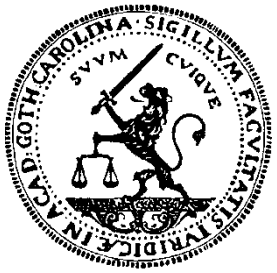

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Internet Jurisdiction over B2C Contracts under the Brussels I Regulation after the CJEU's Decision in Joined Cases *Pammer and Alpenhof* - Online Retailing

Master thesis
30 credits

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Private International Law

Spring 2012

Contents

Summary

Cross-border e-commerce gives rise to a number of legal issues. One particular difficulty, discussed by legal commentators all over the world, is how to allocate jurisdiction when disputes arise over e-contracts.

The Brussels I Regulation contains certain semi-mandatory jurisdiction rules which apply in relation to contract disputes between traders and consumers. These rules give the consumer a right to sue the trader in either his home country or the country where the trader is established. The trader, on the other hand, may only sue the consumer in the country where the consumer is domiciled. There are, however, a number of necessary preconditions that have to be satisfied in order for the consumer protective rules to be triggered. The most interesting precondition, in the context of e-commerce, is to be found in article 15(1)(c), which stipulates that consumer protective jurisdiction will apply when the trader directs his activity to the Member State where the consumer is domiciled. This essay examines when an online retailer directs his activity, within the meaning of article 15(1)(c), to the consumer's domicile if he uses a website in order to sell goods or commodities to consumers. In addition, the essay addresses the practical importance of article 15(1)(c) in the context of online retailing.

The concept of "directed" activity was interpreted by the CJEU in *Pammer* and *Alpenhof*. The Court held that it should be ascertained whether, before the contract with a consumer was concluded, it is apparent from the website and the trader's overall activity that he *envisaged doing business* with consumers domiciled in other Member States, including the Member State of that consumer's domicile, in the sense that it was *minded* to conclude a contract with those consumers. The CJEU adopted a non-exhaustive list of features, which constitute evidence of such intention. The national court seised of the dispute will have to decide whether the conditions are fulfilled.

It is my conclusion that article 15(1)(c) has a wide scope and that it will be relatively clear in most cases whether or not the necessary preconditions are fulfilled. However, intricate legal situations arise in scenarios where the online retailer either occasionally or mistakenly contracts with consumers domiciled in other Member States. In such situations, the circumstances of the individual case will have to be examined in detail.

The practical importance of article 15(1)(c), in the context of online retailing, should, however, not be exaggerated. The special features of these transactions do not make litigation an attractive way of solving disputes that arise over these contracts. However, article 15(1)(c) can work in conjunction with other consumer protective provisions and induce online retailers to adopt friendly consumer policies which in turn could promote consumer confidence.

Sammanfattning

Gränsöverskridande e-handel ger upphov till en del juridiska problem inte minst då tvister uppstår mellan avtalsparterna. Något som diskuterats särskilt bland rättsvetare världen över, är vilket lands domstol som ska ha jurisdiktion när avtalstvister uppstår i detta sammanhang.

I Bryssel I-förordningen finns vissa delvis tvingande domsrättsregler som är tillämpliga då avtalstvister uppstår mellan näringsidkare och konsument. Dessa bestämmelser innebär något förenklat att konsumenten endast kan bli stämd i sitt hemvistland medan näringsidkaren kan bli stämd både i det land där denna är etablerad samt i konsumentens hemvistland. Det finns dock villkor för att dessa regler ska bli tillämpliga. Det mest intressanta villkoret, från ett e-handelsperspektiv, är det som stadgas i artikel 15(1)(c) som anger att dessa konsumentvänliga regler blir tillämpliga om näringsidkaren ”riktar” sin verksamhet till konsumentens hemvistland. Föreliggande uppsats behandlar dels frågan om när artikel 15(1)(c) blir tillämplig då en näringsidkare säljer produkter till konsumenter via internet och dels den praktiska betydelsen av ovannämnda regel.

Innebörden av begreppet ”riktar” i artkel 15(1)(c) berördes genom EUD:s avgörande i *Pammer* och *Alpenhof*, från december 2010. EUD angav att det avgörande blir att pröva huruvida det – innan ett avtal ingås med konsumenten – framgår av webbsidan och av näringsidkarens verksamhet i stort att denne avsåg att handla med konsumenter med hemvist i den aktuella medlemsstaten, i den bemärkelsen att näringsidkaren var beredd att ingå avtal med dessa konsumenter. EUD angav ett antal omständigheter som talar för att en verksamhet är riktad till ett visst annat land. De av EUD angivna omständigheterna avsågs inte utgöra en uttömmande förteckning. Det ankommer på den nationella domstolen att ta ställning till huruvida förutsättningarna är uppfyllda.

Slutsatsen är att artikel 15(1)(c) har ett vitt tillämpningsområde och att det oftast kommer att vara relativt klart huruvida förutsättningarna är uppfyllda. Vissa problematiska situationer kan emellertid uppkomma då näringsidkaren ytterst sällan eller av misstag ingår avtal med konsumenter från andra medlemsstater. I dessa situationer måste det enskilda fallet analyseras noggrant.

Den praktiska betydelsen av artikel 15(1)(c) inom e-handel ska dock inte överdrivas. Karaktären av de e-handelstransaktioner som denna uppsats behandlar är sådana att eventuella tvister som uppstår oftast inte lämpar sig för domstolsprövning bl.a. eftersom transaktionsvärdena som regel är mycket låga. Stadgandet kan dock, tillsammans med andra konsumentvänliga regler, bidra till att främja e-handel eftersom konsumenter blir mer benägna att handla om de har juridiska rättigheter på sin sida.

Abbreviations

AG	Advocate General
AG	Aktiengesellschaft
B2B	Business-to-business
B2C	Business-to-consumer
CJEU	Court of Justice of the European Union
Co.	Company
CRD	Consumer Rights Directive
DSD	Distance Selling Directive
ECD	Electronic Commerce Directive
EU	European Union
EUD	EU-domstolen
EuGVVO	Brussels I Regulation
EWiR	Entscheidungen zum Wirtschaftsrecht
GesmbH	Gesellschaft mit beschränkter Haftung
GmbH	Gesellschaft mit beschränkter Haftung
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
KG	Kommanditgesellschaft
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
US	United States of America

1 General Information

1.1 Introduction

With the advent of the internet, e-commerce has emerged as a growing trade area and businesses as well as consumers have discovered the possibilities and advantages in doing business online. B2C e-commerce, which involves the sale of goods or services to consumers via the internet is growing by the day. From a legal point of view, e-commerce results in several difficulties compared to "traditional" commerce. The inherent borderless nature of the internet has challenged long-established notions in terms of communication and contracting. One particular difficulty, which has been addressed by many legal commentators during the last couple of years, is how to deal with jurisdictional issues when disputes arise in relation to e-contracts with a cross-border element. More specifically, which court has the competence to hear a dispute that arises over a contract concluded via the internet, where the parties come from different jurisdictions? Naturally, a trader prefers to have the court in the country where he is established as the competent forum, whereas the consumer would prefer a court where he is domiciled.

In Europe, the Brussels I Regulation contains certain consumer protective provisions which apply in relation to B2C contracts. These grant the consumer a right to sue the trader in either his country of residence or the country where the trader is established. However, the trader may only sue the consumer in the country where the consumer is domiciled. The condition for applying the protective jurisdiction rules is provided for in article 15 of the Brussels I Regulation. The most relevant provision in the context of e-commerce is article 15(1)(c), which stipulates that the consumer protective jurisdiction rules apply when the trader pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, *directs* such activities to the consumer's country of residence.

Ever since the adoption of the Brussels I Regulation, the exact meaning of the "directing" concept has created much debate among legal commentators. In particular, the question has been raised when this is fulfilled in a situation where a trader uses a website to conduct business and conclude contracts with consumers in other Member States. The fact that a website is accessible throughout the EU (and the world) creates a risk that a trader could be sued in Member States where he did not expect litigation.

On 7 December 2010, the CJEU issued its long-awaited decision in the two joined cases *Pammer* and *Alpenhof*,[1] where the scope of the "directing" concept was interpreted. Both cases involved services, offered by a trader established in one Member State, to a consumer domiciled in another

[1] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof.*

Member State. Even though the scope of article 15(1)(c) is not limited to services, its application is not completely clear when it comes to other types of cross-border B2C transactions than were dealt with in the decision, such as the sale of goods.

1.2 Purpose and Question Formulation

The aim of this essay is twofold. First and foremost, I examine the meaning of article 15(1)(c) and the concept of "directed" activities in light of the recent decision of the CJEU when it comes to the sale of goods to consumers via the internet. More precisely; what sort of activities might be considered to be "directed" activities within the meaning of article 15(1)(c) when a trader uses a website within his business to sell goods or commodities to consumers. In this respect, a concise comparison is also carried out, in which different solutions under US law are presented. Secondly, I address the practical importance of my findings regarding the scope of article 15(1)(c), i.e., which impact the provision and the recent decision may have in practice in the context of online retailing.

1.3 Delimitations

As indicated above, the essay focuses on the jurisdictional aspects under the Brussels I Regulation. Issues relating to choice of law and enforcement and recognition of judgments fall outside the scope of this work. Furthermore, only contractual disputes are examined. However, the legal complexity which arises in relation to the contract formation process online does not fall within the scope of this essay.[2]

1.4 Method and Material

The essay adopts the perspective of an online retailer, selling goods or commodities to consumers, examining in what situations he could expect the consumer protective jurisdiction rules to be triggered.[3] Since EU law forms the basis of the essay, emphasis has been put on the most relevant legal sources in this respect, namely the provision of the Brussels I Regulation and the recent decision from the CJEU. Regulations constitute secondary sources and CJEU decisions constitute supplementary sources of EU law.[4]

[2] See, e.g., Reed, C., *Computer Law*, 2011, pp. 269-287.
[3] See section 2.1 below, for a clarification of the concepts.
[4] As opposed to primary sources (such as the TFEU and the TEU). See further: http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14534_en.htm (last visited 2012-02-23).

In order to provide an answer to the questions described above, I elucidate some of the difficulties that were discussed in the legislative process, that preceded the adoption of the Brussels I Regulation, as well as different opinions of legal commentators, regarding the meaning of "directing" under article 15(1)(c), that were expressed before and after the judgment. Thus, preparatory works and legal writings are of great value. I also analyse how earlier question marks have been clarified by the CJEU and finally, describe the legal position today. When conducting the analysis, the aim is to pinpoint how the "directing" concept applies in relation to the sale of goods to consumers through the internet.

Regarding the succinct presentation of solutions under US law in section 3.3, case law and legal doctrine from the US have served as main sources. However, other updated comparative studies have also been used in order to simplify the comparison and avoid some of the traps which exist in comparative law.[5] The reason why US-solutions are presented is mainly due to that similar solutions have been discussed under EU law as well.

1.5 Disposition

The essay starts off with a general introduction to e-commerce and online retailing in chapter 2, where the development and nomenclature are described (section 2.1), as well as the recognized need to protect consumers in this type of e-commerce (section 2.2), which has been expressed in EU legislation. In the next chapter (chapter 3), the general features of private international law are succinctly described (section 3.1), together with a description of general problems which arise in relation to e-commerce (section 3.2). After that, a short presentation of solutions to jurisdictional problems under US law is provided (section 3.3).

Chapter 4 deals with the Brussels I Regulation. A background to the Regulation is presented (section 4.1), together with an account of the most relevant provisions in terms of B2C e-commerce (section 4.2). The subsequent chapter (chapter 5), describes article 15(1)(c), beginning with a general background to the provision (section 5.1), followed by a presentation of ideas from the preparatory works and ideas advocated by legal commentators prior to the decision (section 5.2). Chapter 6 is entirely dedicated to the decision, starting with a presentation of the facts (section 6.1), followed by the judgment (section 6.2), and ending with some general remarks (section 6.3). Chapter 7 contains the analysis.

[5] See, e.g., Bogdan, M., *Komparativ Rättskunskap*, 2006, pp. 56-63, about the intricacies with regard to comparisons.

2 E-Commerce - Online Retailing

2.1 General Concepts and Features

In today's society, internet pervades commercial life in many ways. For example, most businesses operate a website nowadays, either as a means of entering into contracts with customers, or simply to provide information about themselves. The fact that borders are so easily crossed enables businesses to reach out to buyers in many different jurisdictions. Buyers, on the other hand, have a great freedom when choosing the goods or services they need for their particular purpose. Naturally, the simplification of the buying process and the reduced distance are of paramount importance for the global economy.[6]

The term e-commerce (electronic commerce) covers a wide range of different transactions.[7] Reed has expressed the following about the word:

> "So what is electronic commerce? Though the question is easy to ask it is very hard to answer, or at least to answer in a definitive manner, because the technology is so flexible that a wide variety of commercial activities are possible. […]. In its most generic sense electronic commerce could be said to comprise commercial communications, whether between private individuals or commercial entities, which take place in or over electronic networks. The communications could involve any part of the commercial process, from initial marketing to the placing of orders through to delivery of information products and background transaction processing. The subject matter of these transactions might be tangible products to be delivered offline, such as books and DVDs for B2C e-commerce or chemicals for B2B e-commerce, or intangibles such as information products which might be delivered either offline or online. The common factor is that some or all of the various communications which make up these transactions take place over an electronic medium, usually with a high degree of automated processing as opposed to human-to-human communication."[8]

The term thus encompasses both B2B and B2C transactions. The latter involves the sale of goods or services to consumers and is often referred to as B2C e-commerce.[9] These types of transactions constitute the object of this essay, in particular those where the subject matter is tangible products (goods) to be delivered offline, such as books and CDs (hereinafter referred to as online retailing).[10] It should, however, be recognized at the outset that distinctions between different transactions and different types of e-commerce have become increasingly blurred in the e-world. One evident example is computer programs which can hardly be classified as neither goods nor services.[11] As for the purposes of this essay, it suffices to say that the main focus will be on the sale of tangible goods between businesses and

[6] See, e.g., Wang, F., *Internet Jurisdiction and Choice of Law: Legal Practises in the EU, US and China*, 2010, pp. 4-5.
[7] See generally Lindskoug, P., *Domsrätt och lagval vid elektronisk handel*, 2004, pp. 16-19.
[8] Reed, C., *Computer Law*, 2011, p. 268.
[9] Regarding the definition of a consumer, see section 4.2 below.
[10] See, e.g., Garner, B., *Black's Law Dictionary*, 2004, p. 1341 defining retail as the sale of goods or commodities to ultimate consumers.
[11] See, e.g., Hill, J., *Cross-Border Consumer Contracts*, 2008, pp. 28-30.

consumers which is referred to as online retailing.[12] Throughout the essay, the terms online retailing, and online shopping are used interchangeably.

As pointed out above, the great freedom of choice and the simplified buying process have enticed an increased amount of consumers to engage in online transactions. E-commerce, B2B as well as B2C, continues to grow significantly in Europe and is expected to do so in the coming years.[13] However, the vast majority of e-commerce seems to involve B2B transactions. Therefore, the magnitude of B2C e-commerce today needs to be kept in proportion.[14] Most consumers still prefer to buy "offline" and locally. Nonetheless, few people today question the increase of online transactions.

2.2 E-Commerce and Consumer Protection

B2C e-commerce is generally characterized by a small number of strong businesses contracting with many consumers and each particular transaction concerns a relatively small value. The buying process is often standardized which means that there is little or no room for individual negotiation of the contract terms.[15] Furthermore, the consumers are often required to pay in advance, for example by credit or debit card. Thus, the consumers are in a very weak position vis-à-vis the businesses. This inevitably leads to a lack of consumer confidence.

It is generally agreed among economists and legal commentators that this lack of confidence hampers economic growth.[16] Obviously, when consumers feel that they cannot trust the traders, they also become more reluctant to engage in online shopping.[17] Within Europe, it has become the accepted position that state regulation is part of the solution to this problem,[18] and the EU has taken a leading position worldwide when it comes to consumer protection law.[19] Much work has been done within its institutions, which has resulted in the issuing of several directives.

As far as B2C e-commerce is concerned, the two most important directives are the Distance Selling Directive (DSD),[20] and the E-Commerce Directive

[12] Companies such as Amazon.com (global), Adlibris.se (Sweden), and Halens.com (EU) constitute examples of companies active in the field of online retailing.
[13] SEC(2011) 1641, Commission Staff Working Paper, *Online services, including e-commerce, in the Single Market*, p. 5.
[14] Hill correctly emphasises that particularly B2C e-commerce comprises a very small part of the trade within the EU. See further Hill, J., *Cross-Border Consumer Contracts*, 2008, p. 14.
[15] So called "Mass Market Contracting", see further Reed, C., *Computer Law*, 2011, pp. 61-201.
[16] Hill, J., *Cross-Border Consumer Contracts*, 2008, p. 12.
[17] Hill, J., *Cross-Border Consumer Contracts*, 2008, p. 13.
[18] See, e.g., Howells, G. and Weatherhill, S., *Consumer Protection Law*, 2005, pp. 49-51, regarding the rationales for public intervention.
[19] Reed, C., *Computer Law*, 2011, p. 62.
[20] Directive 97/7/EC on the protection of consumers in respect of distance contracts [1997] OJ L144/19.

(ECD).[21] The DSD is explicitly applicable only to B2C relations, whereas the ECD applies to both B2B and B2C relations. The purpose of the ECD is to encourage e-commerce by applying the provisions regarding the country of origin and to impose obligations on the business that conducts e-commerce, to provide information before the conclusion of contracts. The outcome of the country of origin principle is that an online business, established in one Member State, is free to carry out business activities with residents of other Member States, provided that the business complies with its own national law.[22] However, the ECD does not, according to its wording, establish additional rules on private international law.[23]

The DSD lays down certain rules to protect the consumer, in distance contracts, for example, a cooling-off period of seven days in which the consumer can withdraw from the contract.[24] The directive also imposes obligations on the supplier to provide information prior to the conclusion of the contract.[25] As a result, the DSD must be read in conjunction with the ECD, which complements the information requirements set out in the DSD.

In recent years, there has been a great emphasis within the EU, on further developing B2C e-commerce. In 2007, the Commission expressed that:

> "The internal market has the potential to be the largest retail market in the world. Today, it remains largely fragmented along national lines, forming mini-markets instead. The advent of the e-commerce revolution, which has still not reached critical mass, has transformed the potential for integration of retail markets in the EU to give a major stimulus to competitiveness and expand the opportunities for EU citizens. While the technological means are increasingly in place, business and consumer behaviour lags far behind, restrained respectively by internal market obstacles and a lack of confidence in cross-border shopping."[26]

According to the Commission's consumer policy, the aim is that all EU citizens should be able to shop from anywhere in the EU, "from corner-shop to website", confident that they are equally protected. Businesses, on the other hand, should be able to sell anywhere and to anyone, on the basis of a single and simple set of rules.[27]

A further step in this direction was taken through the new Consumer Rights Directive (CRD) which was adopted in 2011.[28] The CRD aims to increase legal certainty for consumers and businesses and thereby foster cross-border

[21] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.
[22] As long as these rules fall within the "coordinated field" (i.e., even if the activities contravene the laws of the customers Member State). See further Reed, C., *Computer Law*, 2011, pp. 302-303.
[23] See ECD article 1(4). This is, on the other hand, very debated among legal commentators. See, e.g., Lindskoug, P., *Domsrätt och lagval vid elektronisk handel*, 2004, pp. 213-225.
[24] DSD article 6.
[25] DSD articles 4-5.
[26] *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy Strategy 2007–2013*, COM(2007) 99 final, p. 2.
[27] *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, EU Consumer Policy Strategy 2007–2013*, COM(2007) 99 final, p. 3.
[28] Directive 2011/83/EU on consumer rights OJ L 304, 22.11.2011.

e-commerce within the EU.[29] The CRD covers the scope of the abovementioned DSD which will be repealed after the Member States have transposed the new directive. The new rules of the CRD will have to be transposed into the national laws of the Member States by 13 December 2013.[30]

Finally, it should be stressed that there is still a great deal of work going on in this area. The Commission's view is that e-commerce has developed a lot but not reached its full potential yet.[31] The aim is, therefore, to continue to develop e-commerce in tandem with consumer protection. This is important to keep in mind when reading the following chapters. As will be described in further detail below, consumer protection has permeated the field of private international law as well.

[29] See, e.g., CRD recital 5.
[30] CRD article 28.
[31] Commission Staff Working Paper, *Online services, including e-commerce, in the Single Market*, SEC(2011) 1641, p. 18.

3 Private International Law and E-Commerce

3.1 Private International Law

Private international law is sometimes referred to as the body of law that aims to solve international or interstate legal disputes between individuals or entities (other than countries or states as such).[32] International or interstate in this sense means that we are dealing with disputes with one or many foreign elements. Such foreign elements may include, but are not limited to, the parties' capacity due to domicile or citizenship, or other kinds of affiliation, such as the location of the goods in the event of a purchase.

Private international law can generally be divided into three branches namely: (i) jurisdiction, (ii) choice of law, and (iii) the recognition and enforcement of judgments.[33] Jurisdiction concerns the identification of the forum where the dispute may be resolved, or in other words, designating which court is competent in relation to the claim. This is the first question that has to be examined by the court in an international dispute.[34] The second issue to be decided is the choice of law, i.e., determining the law applicable to the substance of the dispute. The third and final issue, recognition and enforcement, is of great practical importance as the aim of adjudication is to guarantee that a judgment is complied with. Jurisdiction and applicable law are determined by each country´s internal private international law rules.[35] In the context of European contractual matters, there is a high degree of harmonisation through the adoption of the Brussels I Regulation and the Rome I Regulation.[36]

Traditionally, private international law designates jurisdiction (and applicable law) based on the existence of various objective connecting factors between a particular country and a dispute.[37] From an international commercial perspective, this is satisfactory, as it helps to achieve reasonable

[32] Scoles, E.F., et al., *Conflict of Laws*, 2004, p. 1. The term "Conflict of Laws" is generally used in the US and other common-law countries and "Private International Law" is the nomenclature used in continental countries.
[33] It should be mentioned that in civil-law systems, the question of jurisdiction and that of enforcement and recognition are often referred to as international procedural law. See further Scoles, E.F., et al., *Conflict of Laws*, 2004, p. 3. See also Bogdan, M., *Svensk internationell privat- och processrätt*, 2008 pp. 21-38.
[34] Hill, J., and Chong, A., *International Commercial Disputes – Commercial Conflict of Laws in English Courts*, 2010, pp. 1-3.
[35] See, e.g., Lindskoug, P., *Domsrätt och lagval vid elektronisk handel*, 2004, p. 24.
[36] See chapter 4 below.
[37] According to Briggs, connecting factors generally fall into two broad categories; firstly, those which define the law by looking at the personal connection to a country such as nationality or residence, and secondly, those which define the law in relation to the state of affairs. See Briggs, A, *The Conflict of Laws*, 2008, pp. 20-28.

and foreseeable judicial results, i.e., by allocating jurisdiction to countries with which the dispute has strong connections.[38]

3.2 Jurisdictional Problems with the Internet

With the advent of e-commerce, it has become increasingly difficult to apply traditional connecting factors of private international law which often require the determination of the location where commercial activities take place such as the place of delivery of products and so forth. Internet transactions are carried out online, over a network, and accordingly they do not conform to traditional boundaries. As a result, the location of activities has also, to some extent, lost much of its importance in the e-world.[39] One of the main challenges in contemporary private international law is how to handle such legal obstacles that arise from the ever developing technology.[40]

In the context of e-commerce, the conflicting interests between sellers and buyers create a jurisdictional problem: sellers do not want to litigate in foreign countries while buyers prefer to seek solutions near home.[41] From a business point of view, the scenario of being hauled into court in a foreign jurisdiction is not pleasant. In most cases, however, the parties can avoid much of this uncertainty by inserting a choice of jurisdiction clause into the contract. By doing so, a party limits much of its potential exposure to foreign courts and litigation. It also increases foreseeability for both contracting parties.

As mentioned earlier in the essay, the Brussels I Regulation contains certain consumer friendly jurisdictional provisions.[42] This is somewhat unexpected since the methodology of private international law traditionally has ignored questions of fairness. Its methodology instead, usually, depends on value-free and objective connection factors.[43] However, since the 1960s, consumer protection has become of great importance within the EU and with time also permeated private international law.[44] This makes sense if one considers the inequality of bargaining power in B2C contracts. It is not fair to expect that consumers should travel far away in the event of a dispute. These are the considerations behind the pertinent provisions described in chapter 4 and 5.

[38] Tang, Z.S., *Electronic Consumer Contracts in the Conflict of Laws*, 2009, pp. 9-10.
[39] See, e.g., Bogdan, M., *Jurisdiktions- och lagvalsfrågor på Internet*, Ny Juridik, vol. 4, 1999, pp. 7-26, p. 8.
[40] See further Wang, F., *Internet Jurisdiction and Choice of Law: Legal Practises in the EU, US and China*, 2010, pp. 7-8.
[41] Wang, F., *Internet Jurisdiction and Choice of Law: Legal Practises in the EU, US and China*, 2010, p. 19.
[42] These rules are sometimes referred to as semi-mandatory. See below section 4.2.
[43] Tang, Z.S., *Electronic Consumer Contracts in the Conflict of Laws*, 2009, pp. 4-8.
[44] Tang, Z.S., *Electronic Consumer Contracts in the Conflict of Laws*, 2009, p. 5.

3.3 Concise Introduction to Solutions under US Law

3.3.1 Introduction

Before the Brussels I Regulation is examined in more detail, something should be said about the situation in the US. The aim is not to provide a comprehensive presentation of American jurisdiction, but rather to describe the basic features and elucidate some of the most common solutions in the area of internet jurisdiction. There are mainly two reasons for such an approach. First, the US is probably the country with most internet-related cases where jurisdictional considerations have been assessed.[45] Second, some of the American solutions have also been advocated in the European discussion. Therefore, it is valuable to have a basic knowledge about them.[46]

American jurisdictional law is based on two important clauses of the Constitution, namely the Full Faith and Credit Clause and the Due Process Clause.[47] The former basically provides that US State courts must respect the "public acts, records, and judicial proceedings of every other State".[48] The latter protects the defendant's right not to be coerced except by lawful judicial power.[49]

Generally, US jurisdictional law distinguishes between four fundamental types of jurisdiction; *in rem*, *quasi in rem*, *status*, and *in personam* jurisdiction.[50] *In rem* jurisdiction and *quasi in rem* jurisdiction concern jurisdiction over property. *Status* jurisdiction involves matters related to the relationships of persons such as divorce and custody. *In personam* jurisdiction (hereinafter personal jurisdiction) deals with all sorts of proceedings that do not fall within the scope of the other three. As far as e-commerce and internet usage are concerned, the latter is the most important and therefore the only type that will be further examined in this essay.

[45] Wang, F., *Internet Jurisdiction and Choice of Law: Legal Practises in the EU, US and China*, 2010, p. 65.
[46] For other concise comparative presentations of US jurisdiction in the field of e-commerce, see, e.g., Wang, F., *Internet Jurisdiction and Choice of Law: Legal Practises in the EU, US and China*, 2010, pp. 65-78; Tang, Z.S., *Electronic Consumer Contracts in the Conflict of Laws*, 2009, pp. 107-119; Lindskoug, P., *Domsrätt och lagval vid elektronisk handel*, 2004, pp. 139-147; and Debusseré, F., *International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?*, International Journal of Law and Information Technology, vol. 10, no. 3, 2002, pp. 344-366, p. 345.
[47] See further Scoles, E.F., et al., *Conflict of Laws*, 2004, p. 285.
[48] US Constitution article IV.
[49] In other words, the Due Process Clause protects a defendant against arbitrary assertions of jurisdiction by other courts. See Fourteenth Amendment to the US Constitution.
[50] For an explanation of the differences of the concepts, see, Scoles, E.F., et al., *Conflict of Laws*, 2004, p. 295-305.

3.3.2 Personal Jurisdiction and Minimum Contacts – Recent Developments

Personal jurisdiction encompasses both general and specific jurisdiction. This distinction emanates from the famous *International Shoe* case from 1945,[51] which involved interstate business activities. The Supreme Court adopted a "minimum contacts test" when determining whether the exercise of personal jurisdiction satisfies the Due Process Clause. In order for a court to exercise jurisdiction over an out-of-State defendant, the defendant must fulfil the minimum contacts test. The Court held that a corporate defendant could be subjected to jurisdiction if it conducts "continuous and systematic" business activities in the State, even if these activities are unrelated to the dispute at hand (general jurisdiction). In addition, the Court held that far less substantial contacts can give rise to jurisdiction if the underlying claims arise out of, or are related to, the defendant's forum-related activities (specific jurisdiction).[52] Most states have so called "long-arm statutes" establishing the State's guidelines for when its courts can assume jurisdiction over out-of-State defendants.[53]

The terms "continuous and systematic" activities cover, *inter alia*, defendants with establishments or other kinds of presence in the relevant State and therefore it is difficult to find situations where internet activity against one State amounts to "continuous and systematic".[54] However, when it comes to specific jurisdiction, there are many decisions where courts have declared jurisdiction over out-of-State defendants with websites. In determining whether specific jurisdiction exists in a particular case, it is necessary to consider two requirements; whether the contacts are related to the dispute and whether the contacts are "constitutionally sufficient".[55] Contacts are generally regarded as "constitutionally sufficient" if the defendant *purposefully availed* himself to the pertinent jurisdiction.[56] The requirement of purposefully availment could, *inter alia*, be fulfilled if the trader delivers his products into the *stream of commerce* of the forum State and at the same time, in one way or another, targets the relevant State.[57] A further requirement of the minimum contacts test has traditionally been that the exercise of jurisdiction must be considered "reasonable".[58] Naturally, the exercise of jurisdiction must also be allowed under the State's long-arm statute. US courts have traditionally been fairly liberal to exercise

[51] *International Shoe Co. v. Washington* 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945).
[52] For a detailed description, see Scoles, E.F., et al., *Conflict of Laws*, 2004, p. 305.
[53] See further Spencer, A.B., *Jurisdiction to Adjudicate: A Revised Analysis*, University of Chicago Law Review, vol. 73, 2006, pp. 617-672, p. 649.
[54] Tang, Z.S., *Electronic Consumer Contracts in the Conflict of Laws*, 2009, p. 108.
[55] Scoles, E.F., et al., *Conflict of Laws*, 2004, p. 307.
[56] See, e.g., *World-Wide Volkswagen Corp* v. *Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) and *Burger King Corp v. Rudzewicz* 471 U.S. 462, 105 S. Ct. 2174, 85 L.Ed.2d. 528 (1985).
[57] See, e.g., *Asahi Metal Industry Co. v. Superior Court* 480 U.S. 102, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987). See further Floyd, C.D. and Baradaran-Robison, S., *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 Indiana Law Journal, vol. 81, 2006, pp. 601-666, p. 608.
[58] *Asahi Metal Industry Co. v. Superior Court* 480 U.S. 102, 107 S. Ct. 1026, 94 L.Ed.2d 92 (1987).

jurisdiction over B2C contract disputes when an online retailer in State A has sold goods to consumers in State B and operated through a website.[59]

It should be noted though, that the minimum contacts test has been heavily criticized among US legal commentators. For instance, Scoles et al. noted in 2004 that "the whole enterprise of judicially-supervised jurisdictional law carries with it uncertainty".[60] This criticism has been particularly noticeable in cases involving internet activity both in terms of torts and contracts.[61] US courts have traditionally been reluctant to view mere availability of a website as minimum contacts.[62] There must be some kind of additional element. Over the last years, some courts have struggled to apply traditional analyses in internet cases, while others have adopted completely new and specialized tests.[63] For a long time, legal commentators have lamented the uncertainty and asked for Supreme Court guidance.[64] Recently, however, in June 2011, the Supreme Court delivered its judgment in *Nicastro*,[65] that concerned personal jurisdiction. Even though the case did not specifically deal with internet activity, the findings of the Court are likely to have great influence on the area of internet jurisdiction.

Without delving into the details, the case involved a products-liability suit in a State court in New Jersey against J. McIntyre Machinery, Ltd, a company incorporated and operating in the UK. The plaintiff (Mr. Nicastro), injured his hand when using a shearing machine that the defendant had manufactured in the UK. After the machine had been manufactured, it was sold through the defendant's exclusive US distributor established in Ohio, and shipped to the plaintiff's employer, Mr. Curcio in New Jersey, where the accident occurred.

The main issue was whether the contacts between the defendant and the forum amounted to "minimum contacts" and thus allowed for the exercise of jurisdiction. It was noted, *inter alia*, that the US distributor agreed to sell the defendant's machines in the United States and that officials of the defendant attended trade shows in several States but not in New Jersey. In addition, the defendant had no office in New Jersey, neither paid taxes nor owned property there, and it had never advertised in the State.[66]

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[59] Hill, J., *Cross-Border Consumer Contracts*, 2008, p. 140 and case note: X, X., *Personal Jurisdiction - Stream-of-Commerce Doctrine: J. McIntyre Machinery, Ltd. v. Nicastro*, Harvard Law Review, vol. 125, 2011, pp. 311-321, p. 319.
[60] Scoles, E.F., et al., *Conflict of Laws*, 2004, p. 293.
[61] Case note: X, X., *Personal Jurisdiction – Minimum Contacts Analysis, Ninth Circuit Holds that Single Sale on eBay Does Not Provide Sufficient - Minimum Contacts with Buyer's State - Boschetto v. Hansing, , 539 F.3d 1011 (9th Cir. 2008)*, Harvard Law Review, vol. 122, 2009, pp. 1014-1021, p. 1014 ("The resulting picture of internet personal jurisdiction is muddled and confused").
[62] Wang, F., *Internet Jurisdiction and Choice of Law: Legal Practises in the EU, US and China*, 2010, p. 67.
[63] Regarding these so called "internet-specific tests", see below section 3.2.3.
[64] Floyd, C.D. and Baradaran-Robison, S., *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 Indiana Law Journal, vol. 81, 2006, pp. 605-614.
[65] *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). (available at: http://www.supremecourt.gov/opinions/10pdf/09-1343.pdf (last visited 2012-02-07)).
[66] *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), p. 11.

The Supreme Court did not manage to produce a majority opinion but the plurality opinion endorsed the *stream-of-commerce* theory mentioned above and held that the defendant never engaged in any activities in New Jersey that revealed an intent to invoke or benefit from the protection of the State's laws. Therefore, New Jersey was without power to adjudge the company's rights and liabilities and its exercise of jurisdiction would violate due process. The plurality emphasised that the principal inquiry in cases of this sort is whether the defendant's activities *manifest an intention* to submit to the power of a sovereign.

As mentioned above, the plurality abstained from developing an internet-specific solution. Instead, it adopted a rule of rather broad applicability. Nonetheless, *Nicastro* will most likely have far reaching implications on the topic of internet jurisdiction,[67] mostly due to the fact that it is the first Supreme Court decision in roughly two decades to address the issue of personal jurisdiction.[68]

3.3.3 Internet-Specific Tests

One of the most traditional and famous internet-specific tests was developed in the *Zippo* case from 1997,[69] which involved a trademark infringement suit. It should be noted upfront that although the *Zippo* case involved a tort claim, the test has been embraced by lower courts in contract disputes as well.[70] In the case, the District Court for the Western District of Pennsylvania employed a "sliding scale" test in order to determine whether the contacts between the website operator and the forum amounted to "purposeful availment". All commercial websites were divided into three categories:

(i) Active websites; where the trader clearly does business over the Internet. If the trader enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. (ii) Interactive websites; where the trader operates a completely interactive website and the user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website. (iii) Passive websites; where the trader has simply posted information on an internet website, which is accessible to users in foreign jurisdictions. A passive website, which does little more than make

[67] The purposeful availment test is used to decide jurisdiction for all types of claims.
[68] For a detailed analysis of the case, see case note: X, X., *Personal Jurisdiction - Stream-of-Commerce Doctrine: J. McIntyre Machinery, Ltd. v. Nicastro*, Harvard Law Review, vol. 125, 2011, pp. 311-321. For a critical review, see Morrison, A.B., *The Impacts of McIntyre on Minimum Contacts*, The George Washington Law Review Arguendo, vol. 80, 2011, pp. 1-12, p. 11 ("Personal jurisdiction involving activities conducted through the Internet was murky before *Nicastro*, but it will now be in a state of hopeless confusion.").
[69] *Zippo Mfg Co v. Zippo Dot Com*, 952 F.Supp. 1119 (W.D. Pa. 1997).
[70] See, e.g., Tang, Z.S., *Electronic Consumer Contracts in the Conflict of Laws*, 2009, p. 155.

information available to those who are interested in it is not a ground for the exercise of personal jurisdiction.[71]

Despite its popularity, the sliding scale test has also faced much criticism. For instance, it has been argued that it creates an incentive for e-traders to design their websites in a way that limits the utility for customers, i.e., when strictly complying with the *Zippo* requirements, in order to avoid being hauled into court in another State.[72] The test has also been criticized for being difficult to apply in real life, since it is very hard to classify websites into one of the three categories.[73]

Another test commonly applied in internet-related (tort) disputes, is the effects test from *Calder*,[74] which focuses more on the actual effect that the website has in the forum, as opposed to the particular characteristics of the website. According to the effects test, personal jurisdiction might be appropriate if: a) the defendant committed intentional tortious action, b) the defendant expressly targeted the forum, and c) the actions caused harm in the forum State.[75] Due to the nature and features of the effects test, it is very questionable whether it could be applied in contract disputes as well.[76]

3.3.4 Concluding Remarks

It is fair to say that American jurisdiction is complex and the difficulties created by the development of the internet do not make things easier. Much of what has been written on internet jurisdiction so far has circled around the sliding scale. However, it is uncertain to what extent the sliding scale is compatible with the findings of the recent *Nicastro* judgment. For example, it seems as though the Supreme Court's plurality opinion puts more emphasis on the intent of the trader to target the State in question, compared to the sliding scale that focuses more on the features of the website.[77]

Finally, it should be stressed that the legal environment in the US differs to a large extent from that of the EU. This is important to keep in mind when comparing the two systems. For instance, in the US, the principles of internet jurisdiction in B2C contracts are identical to those of B2B, at least

[71] See *Zippo Mfg Co v. Zippo Dot Com*, 952 F.Supp. 1119 (W.D. Pa. 1997), p. 1124.
[72] Stein, A.R., *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, Northwestern University Law Review, vol. 98, 2004, pp. 411-452.
[73] Geist, M.A., *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, Berkeley Technology Law Journal, vol. 16, 2001, pp. 1345-1406, p. 1349.
[74] *Calder v. Jones*, 465 U.S. 783, 104 S.Ct. 1482, 79 L.E d.2d 804 (1984).
[75] The effects test is mainly applicable in cases involving libel and trademark infringement. See, e.g., case note: X, X., *Civil Procedure - Personal Jurisdiction - Ninth Circuit holds that exercise of Personal Jurisdiction Over Company Whose Website Cultivates Significant Forum State User Base Comports With Due Process - Mavrix Photo, Inc. v. Brand Technologies, Inc., 647 F.3d 1218 (9th Cir. 2011)*, Harvard Law Review, vol. 125, 2011, pp. 634-641, p. 634.
[76] See, e.g., Tang, Z.S., *Electronic Consumer Contracts in the Conflict of Laws*, 2009, p. 117.
[77] For similar remarks see case note: X, X., *Personal Jurisdiction - Stream-of-Commerce Doctrine: J. McIntyre Machinery, Ltd. v. Nicastro*, Harvard Law Review, vol. 125, 2011, pp. 311-321, p. 320.

from a constitutional perspective.[78] EU, on the other hand, has a more pervasive consumer protection. Furthermore, US law does not, to the same extent, emphasise the difference between torts and contracts, when deciding jurisdiction, as is the case in the EU.[79]

[78] Wang, F., *Internet Jurisdiction and Choice of Law: Legal Practises in the EU, US and China*, 2010, p. 73.

[79] Because the purposeful availment test is used to decide jurisdiction for all types of claims. See further section 4.1 below. See note 70 above.

4 The Pertinent Provisions of the Brussels I Regulation

4.1 Introduction - Background

The Brussels I Regulation entered into force in March 2002,[80] and superseded its predecessor, the Brussels Convention,[81] in all Member States except Denmark.[82] The structures of the Brussels I Regulation and the Brussels Convention are almost identical. As far as the material rules on jurisdiction are concerned, there are some modifications in the Brussels I Regulation, e.g., in respect of consumer protection. It should, however, be noted that many of the linguistic differences must be seen as codifications from earlier case law laid down by the CJEU.[83] There is also a desire to ensure continuity between the Convention and the Brussels I Regulation, which is explicitly stated in recital 19 to the Regulation. As a result, prior case law relating to the corresponding provisions is still relevant today.

Other important pieces of legislation when interpreting the Brussels I Regulation are the Rome I Regulation[84] and the Rome II Regulation.[85] This is further explained in recital 7 of the Rome I Regulation, which provides that the substantive scope of the provisions of the Rome I Regulation should be consistent with the Brussels I Regulation as well as the Rome II Regulation.

The Brussels I Regulation is generally referred to as the main instrument on European international civil procedure as it deals with the most important issues, namely jurisdiction and recognition and enforcement.[86] The Regulation consists of eight chapters and the direct jurisdictional rules are to be found in chapter II. The general principle of jurisdiction is laid down in article 2, which stipulates that the defendant shall be sued in the courts of the Member State, where the defendant is domiciled (*forum domicilii)*. Article 59 prescribes that in order to determine whether a party is domiciled in a Member State, whose courts are seised of a matter, the court shall apply

[80] COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[81] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.
[82] However, Denmark has signed a separate agreement with the European Union which provides for the application of the Brussels I Regulation to Denmark from 1 July 2007. Consequently, the Brussels I Regulation applies in all Member States. See further Hill, J., and Chong, A., *International Commercial Disputes – Commercial Conflict of Laws in English Courts*, 2010, p. 57.
[83] Magnus, U. and Mankowski, P., *European Commentaries on Private International Law – The Brussels Regulation*, 2007, p. 1 and 11.
[84] REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations.
[85] 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.
[86] Magnus, U. and Mankowski, P., *European Commentaries on Private International Law – The Brussels Regulation*, 2007, p. 325.

its own internal law. As far as companies and other legal persons are concerned, article 60 prescribes how to assess the domicile.

There are, however, exceptions to the general rule in article 2. A defendant may for instance be sued in another Member State than he is domiciled in, in the situations enumerated in articles 5-7 in section 2 (special jurisdiction). Furthermore, sections 3-5 contain certain rules in matters relating to insurance, specific types of consumer contracts, and individual contracts of employment. And according to article 22, the defendant must be sued in the courts of the Member States determined by that particular article, i.e., regardless of domicile (exclusive jurisdiction). There is room for party autonomy in the circumstances described in article 23 (prorogation clauses) and article 24 (tacit prorogation).

In matters relating to contracts, which cover the most important situations in the context of cross-border transactions,[87] article 5(1)(a) stipulates that the courts for the place of performance of the obligation in question have jurisdiction (*forum solutionis)*. Article 5(1)(b) clarifies the concepts of obligation in question and the place of performance. It should be noted that article 5 does not confer exclusive jurisdiction but merely an alternative jurisdiction. It is a prerequisite, for article 5 to apply, that the general requirements in article 2 are fulfilled, e.g., that the defendant has his domicile within the EU. If the defendant is not domiciled in one of the Member States, article 5 is not applicable and internal law of the Member State determines the issue.[88]

The concept of contract is not harmonised within the EU but the CJEU has provided some guidance as regards "matters relating to a contract" within the meaning of article 5(1). According to the Court, it follows that the phrase, as used in Article 5(1) of the Brussels Convention (and now the Brussels I Regulation), is not to be understood as covering a situation in which there is no obligation freely assumed by one party towards another.[89]

In 2010, the Commission issued a proposal for a recast of the Brussels I Regulation, which is still pending.[90] The proposal aims to improve the application of certain of its provisions, further facilitate the free circulation of judgments, and further enhance access to justice (among other things).[91]

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[87] Magnus, U. and Mankowski, P., *European Commentaries on Private International Law – The Brussels Regulation*, 2007, p. 100.
[88] See further Magnus, U. and Mankowski, P., *European Commentaries on Private International Law – The Brussels Regulation*, 2007, p. 93.
[89] Case C-26/91 *Jakob Handte*, para 15. Furthermore, the fact that one party denies the existence of the contract in question, does not, in itself, deprive the court of jurisdiction under this article. See Case C38/81 *Effer*, para 7. See for a detailed description of these issues Hill, J., and Chong, A., *International Commercial Disputes – Commercial Conflict of Laws in English Courts*, 2010, pp. 136-139.
[90] *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)*, COM(2010) 748 final.
[91] See recital 9 of the proposal. See further Cachia, P., *Recent Developments in the Sphere of Jurisdiction in Civil and Commercial Matters*, Elsa Malta Law Review, ed. I, 2011, pp. 69-84.

4.2 Section 4 - Jurisdiction over B2C Contracts

Section 4 of the Brussels I Regulation contains three articles (articles 15-17) which deal with specific types of consumer contracts. Article 15 determines the scope of applicability of the consumer protective rules, whereas article 16 concerns the actual allocation of jurisdiction. Article 17 regulates to what extent the rules may be opted out from by virtue of party autonomy. As mentioned earlier in this essay, the purpose of section 4 is to protect the weaker party by providing rules of jurisdiction, which are more favourable for the consumer than the general rules in articles 2 and 5. Article 16 stipulates that:

> 1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.
> 2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.
> 3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

In other words, the trader will only have one place to sue, whereas the consumer has the opportunity to choose (forum shop) between two different forums. Article 17 limits the rule of party autonomy in article 23. In principle, a forum clause is only valid if it has been entered into after the dispute has arisen or if it allows for additional forums besides those provided for in article 16.[92] This is important to keep in mind since most online retailers provide their own terms and conditions. These terms and conditions often contain a choice-of-forum clause stipulating for example: "Any dispute arising shall be settled by a Swedish court" and so forth. Such clauses are for that reason often void, i.e., when article 17 applies.

However, the consumer protective jurisdiction provisions are only triggered as long as the necessary conditions in article 15 are fulfilled. Article 15(1) provides that there must be (i) a dispute relating to a concluded contract,[93] (ii) between a consumer and a professional, for a purpose, which can be regarded as being outside the consumer's trade of profession. The latter definition stems from the CJEU's decision in *Bertrand* which has been codified.[94] The consumer concept within the Brussels I Regulation is uniform and shall, according to the CJEU, be interpreted narrowly with regard to the nature and aim of the contract and not to the subjective situation of the person concerned.[95] The same person may be regarded as a consumer in relation to certain transactions and as an economic operator in

[92] According to article 17(3) of the Brussels I Regulation, such a clause is also valid if it is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.
[93] See further cases C-96/00 *Gabriel*, Case C-27/02 *Engler*, and Case C-180/06 *Ilsinger*.
[94] Case C-150/77 *Bertrand.* See further Magnus, U. and Mankowski, P., *European Commentaries on Private International Law – The Brussels Regulation*, 2007, p. 308.
[95] Case C-269/95 *Benincasa*, para 16.

relation to others.[96] Moreover, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption fall within the consumer protective provisions.[97] The narrow concept of consumer was further emphasised in the *Gruber* case.[98] The CJEU concluded that the consumer protective rules:[99]

> "cannot as a matter of principle, be relied on by a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it. It would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety."[100]

In this respect, the court held that it is not necessary for the trader to have been aware of the "consumer's" business purpose.[101] Consequently, a consumer that has entered into a contract with a mixed purpose cannot invoke the trader's belief that he (the trader) was contracting with a consumer, when this was not the case. However, it is another situation if the trader was acting in good faith believing that he was entering into a contract with another trader, and had no reason to believe otherwise. In such a case, the transaction ought to be taken outside the scheme of articles 15-17.[102]

In addition to the two requirements in the first paragraph of article 15(1), the contract must fall within the scope of the contracts specified in paragraphs 15(1)(a-c). Article 15(1)(a) concerns contracts for the sale of goods on instalment credit terms and article 15(1)(b) deals with credit contracts, made to finance the sale of goods. Article 15(1)(c), which constitutes the core of this essay deals with "all other cases" and will be discussed separately in the next section.

Article 15(2) explains how to deal with a situation where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States. In these situations, the party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State. Article 15(3) contains a general exception to the applicability of section 4 regarding contracts of transport other than contracts which, for an inclusive price, provide for a combination of travel and accommodation (package travel).[103]

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[96] Case C-269/95 *Benincasa*, para 16.
[97] Case C-269/95 *Benincasa*, para 17.
[98] Case C-464/01 *Gruber*.
[99] Then in articles 13-15 of the Brussels Convention. Now in articles 15-17 of the Brussels I Regulation.
[100] Case C-464/01 *Gruber*, para 39.
[101] Case C-464/01 *Gruber*, para 49.
[102] See, e.g., Case C-464/01 *Gruber*, para 51-12. See also Farah, Y., *Allocation of jurisdiction and the internet in EU law*, European Law Review, vol. 33, no. 2, 2008, pp. 257-270, p. 263 and Lindskoug, P., *Domsrätt och lagval vid elektronisk handel*, 2004, pp. 119-121.
[103] The concept of package travel was further clarified in the CJEU's decision in joined cases C-585/08 *Pammer* and C-144/09 *Alpenhof*.

5 Article 15(1)(c)

5.1 Introduction

Article 15(1)(c) of the Brussels I Regulation lays down the most interesting and debated ground for jurisdiction:

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

The provision replaced a fairly similar provision in the Brussels Convention namely article 13(3). Under the Brussels Convention, the consumer protective rules would apply to:

> "Any other contract for the supply of goods or services, provided that, in the state of the consumer´s domicile, the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and the consumer took the steps necessary for the conclusion of the contract in that state."

Article 13(3) of the Brussels Convention was drafted before the development of the internet and was based on an idea that the non-consumer was "fishing" in other countries for consumers through certain targeting activities such as ads, agents, and the like.[104] The drawback with article 13, however, was that it did not apply when the consumer had been induced, at the non-consumer's instigation to leave his home and travel to another Member State to conclude the contract.[105] Furthermore, it was problematic to establish whether the consumer was present in his domicile and not anywhere else at the exact time when the contract was concluded.[106] Article 15(1)(c) of the Brussels I Regulation was adopted in order to pay regard to the development of the new communication technology such as the internet which did not exist (as we know it today) in 1968 when the Brussels Convention was adopted.[107] As Nielsen notes, the idea is still that the non-consumer is "fishing" for consumers in the other Member States.[108]

The provision in article 15(1)(c) encompasses "all other cases" which is (linguistically) a more comprehensive expression compared to its predecessor in the Convention which was limited to contracts for the supply of goods and services. However, the only substantial difference between the wording of the Brussels I Regulation and the Brussels Convention is that the consumer no longer must take the steps necessary for the conclusion of the contract in his own Member State, i.e., where the consumer is domiciled.

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[104] Magnus, U. and Mankowski, P., *European Commentaries on Private International Law – The Brussels Regulation,* 2007, p. 315.
[105] Hill, J., *Cross-Border Consumer Contracts*, 2008, p. 141.
[106] Hill, J., *Cross-Border Consumer Contracts*, 2008, p. 142 ("The Convention was not well adapted to the realities of e-commerce.")
[107] Proposal for a COUNCIL REGULATION (EC), COM(1999) 348 final, p. 16.
[108] Arnt Nielsen, P., in Magnus, U. and Mankowski, P., *European Commentaries on Private International Law – The Brussels Regulation,* 2007, p. 316.

The Commission opined that that such a requirement would be "difficult or impossible" to determine due to the borderless nature of the internet.[109] Consequently, if the non-consumer directs his activity towards the consumer's domicile, the consumer will be able to sue the non-consumer there notwithstanding whether he was targeted there or not.[110]

The new wording was vociferously contested by the e-commerce sector and a number of legal commentators in Europe. It was argued, *inter alia*, that the new provision would grant the consumers too much protection which in turn would have a chilling effect on cross-border B2C e-commerce. The explanation would be that traders, such as online retailers, would abstain from entering into cross-border contracts out of fear of being hauled into foreign courts and thus being forced to pay high litigation costs.[111] Other legal commentators did not worry and as for now, this seems to have been the most reasonable attitude.[112] The incidence of cross-border litigation between businesses and consumers is in fact very limited.[113] But in view of the specific features of B2C e-commerce, the need to protect consumers is evident.[114] Some commentators argue that consumers generally will be more willing to shop online if they have a reasonable procedural protection and therefore, article 15(1)(c) fosters e-commerce rather than limits it.[115] This is arguably a very reasonable opinion even though the rationality and reason of consumers as a group, should not be overrated.

Article 15(1)(c) requires the contract to be concluded between a consumer and a person who: (i) pursues commercial or professional activities in the Member State of the consumer's domicile or; (ii) 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. There are in other words two alternative sub-grounds for jurisdiction. The content of the first alternative has not lead to as much debate as the second. The wording "pursues commercial or professional activities" seems to require the non-consumer's presence in the market of the country, where the consumer has his domicile. Door-step selling or other forms of canvassing or trade fairs ought to be examples of contracts that probably fall within this alternative.[116] Furthermore, the activities pursued need not only aim at

[109] Proposal for a COUNCIL REGULATION (EC), COM(1999) 348 final, p. 16.
[110] See, e.g., Foss, M., and Bygrave, L.A., *International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law*, International Journal of Law and Information Technology, vol. 8, no. 2, 2000, pp. 99-138, p. 137 and Lindskoug, P., *Domsrätt och lagval vid elektronisk handel*, 2004, p. 132 about the Overspill Effecte.
[111] See, e.g., Pullen, M., *EU's dangerous threat to e-commerce*, Legal Week, 1999.
For a decent description, see, e.g., Øren, J. S.T., *Jurisdiction over Consumer Contracts in e-Europe*, The International and Comparative Law Quarterly, vol. 52, no. 3, 2003, pp. 665-695, p. 671.
[112] See, e.g., Briggs, A, *The Conflict of Laws*, 2008, p. 69-70 ("The suggestion earlier heard, that this will so discourage suppliers that it will, at a stroke, put an end to electronic commerce in the European Union has shown itself to be the utter nonsense it always appeared to be").
[113] There are several reasons why which will be further discussed in section 7.3.
[114] See above section 2.2.
[115] Magnus, U. and Mankowski, P., *European Commentaries on Private International Law – The Brussels Regulation*, 2007, p. 316.
[116] See further Øren, J. S.T., *Jurisdiction over Consumer Contracts in e-Europe*, The International and Comparative Law Quarterly, vol. 52, no. 3, 2003, pp. 665-695, p. 677. ("The decision of whether the requirements of the first alternative are fulfilled should be based on a total assessment of the vendor's

consumer contracts. Therefore, the consumer protective rules may be applicable, according to the first alternative ground, in a situation where a non-consumer sells his products mainly to other non-consumers, but occasionally decides to sell the same products to consumers.[117] The second ground of jurisdiction contains the "directing" requirement which will be described separately.

5.2 The Concept of "By any Means Direct"

5.2.1 The Legal Framework

If a contract has been concluded between a consumer and a person who, by any means, directs commercial or professional activities to the Member State where the consumer is domiciled, or to several States including that Member State, and the contract falls within the scope of such activities, then the consumer protective jurisdiction rules will apply. The requirement that the contract must "fall within the scope of such activities" shall ensure a proper connection between the activities and the contract.[118]

It should be emphasised that it has always been clear that the "directing" concept covers the activities previously covered by article 13(3) of the Brussels Convention. These include, e.g., all forms of advertising carried out in the Member State in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that State.[119] The question has been when activity can be considered as directed through a website. As mentioned above, this was addressed by the CJEU in *Pammer* and *Alpenhof*, which will be described in chapter 6. In this section some earlier notions will be described.

It is essential to emphasise that there is no definition of "directing" in the Brussels I Regulation, neither in the Rome I Regulation nor in any other a Regulation of the EU. However, an identical provision exists in article 6(1)(b) of the Rome I Regulation as regards choice of law. It should be mentioned though that there is recital 24 to the Rome I Regulation, prescribing that:

> "Consistency with Regulation (EC) No 44/2001 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 (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that "for Article 15(1)(c) to be applicable it is not sufficient

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entire business operation in the Member State in question, including e-commerce arrangements, with a particular emphasis on how systematic and continuous these activities have been, demonstrable business arrangements, and the extent of business activities actually carried out in that Member State").

[117] See, e.g., Øren, J. S.T., *International Jurisdiction and Consumer Contracts*, 2004, p. 70.

[118] See further Lindskoug, P., *Domsrätt och lagval vid elektronisk handel*, 2004, p. 131.

[119] Case C-96/00 *Gabriel*, para 44. See also Magnus, U. and Mankowski, P., *European Commentaries on Private International Law – The Brussels Regulation*, 2007, p. 316.

> 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."

The recital is not binding *per se*, but merely serves as a tool when interpreting the Regulation. Prior to the adoption of the Rome I Regulation, it was quite unclear how to deal with this joint declaration in view of the fact that it did not constitute a legal document.[120] It is obvious from the wording of the provision (and from the recital) that the provision, *inter alia*, aims at commercial activities carried out by means of the internet. Nonetheless, it is (or was),[121] unclear when the activity could be regarded as being directed.

5.2.2 Preparatory Works

The concept of "directing" was heavily debated in the legislative process and much inconsistency existed between the Commission and the Council on one side and the Parliament on the other. As will be shown, it is clear that the Parliament wanted to adopt ideas from the US, whereas the Commission and the Council rejected this and instead advocated other ideas. Below, the main outline of the legislative process is presented. In its initial proposal to the Brussels I Regulation, the Commission expressed that:

> "The concept of activities pursued in or directed towards a Member State is designed to make clear that point (3) [now (c)] applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile. The fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction. The contract is thereby treated in the same way as a contract concluded by telephone, fax and the like, and activates the grounds of jurisdiction provided for by Article 16."[122]

In addition, the Commission's initial proposal contained a recital 13 prescribing that:

> "Account must be taken of the growing development of the new communication technologies, particularly in relation to consumers; whereas, in particular, electronic commerce in goods or services by a means accessible in another Member State constitutes an activity directed to that State. Where that other State is the State of the consumer's domicile, the consumer must be able to enjoy the protection available to him when he enters into a consumer contract by electronic means from his domicile."[123]

The Parliament viewed this as far too disproportionate and suggested that the website´s degree of deliberately targeting the consumer should be

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[120] See, e.g., Mankowski, P., *Neues zum „Ausrichten" unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO*, Zeitschrift- IPRax no. 3, 2009, Köln, pp 238-245, p. 239 and Lindskoug, P., *Domsrätt och lagval vid elektronisk handel*, 2004, p. 127.

[121] Once again, I would like to remind the reader that this was before the judgment of the CJEU.

[122] *Proposal for a COUNCIL REGULATION (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM(1999) 348 final, p. 16.

[123] *Proposal for a COUNCIL REGULATION (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM(1999) 348 final, p. 29.

considered to a larger extent. Therefore, several amendments were proposed, in order to clarify the concept of "direct". Regarding recital 13, the following wording was proposed:

> "Electronic commerce in goods or services by a means accessible in another Member State constitutes an activity directed to that State where the online trading site is an active site in the sense that the trader purposefully directs his activity in a substantial way to that other State."[124]

Furthermore, the Parliament proposed a new paragraph in article 15(1)(c) to define the concept of activities directed towards one or more Member States and thereby took as one of its assessment criteria for the existence of such a directed activity, any attempt by the commercial party to confine its business to transactions with consumers domiciled in certain Member States:

> "The expression "directing such activities" shall be taken to mean that the trader must have purposefully directed his activity in a substantial way to that other Member State or to several countries including that Member State. In determining whether a trader has directed his activities in such a way, the courts shall have regard to all the circumstances of the case, including any attempts by the trader to ring-fence his trading operation against transactions with consumers domiciled in particular Member States."[125]

The proposed amendments were, however, rejected by the Commission:

> "The Commission cannot accept this amendment, which runs counter to the philosophy of the provision. The definition is based on the essentially American concept of business activity as a general connecting factor determining jurisdiction, whereas that concept is quite foreign to the approach taken by the Brussels I Regulation. Moreover, the existence of a consumer dispute requiring court action presupposes a consumer contract. Yet the very existence of such a contract would seem to be a clear indication that the supplier of the goods or services has directed his activities towards the state where the consumer is domiciled. Lastly, this definition is not desirable as it would generate fresh fragmentation of the market within the European Community."[126]

Later on, this view of the Commission was further clarified in a joint statement from the Council and the Commission:

> "The Council and the Commission point out in this connection 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. This provision relates to a number of marketing methods, including contracts concluded at a distance through the Internet.
>
> In this context, the Council and the Commission stress 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."[127]

As already mentioned, the joint declaration is, since the adoption of the Rome I Regulation in 2008, "codified" in recital 24, so nowadays it is more

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[124] Official Journal of the European Communities, 2001, C 146/94-101, p. 97 (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:146:0094:0101:EN:PDF (last visited 2012-02-08)).
[125] Official Journal of the European Communities, 2001, C 146/94-101, p. 98.
[126] *Amended proposal for a COUNCIL REGULATION on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM(2000) 689 final pp. 5-6.
[127] Joint Statement on Articles 15 and 73 (available at: http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf (last visited 2012-02-15).

"legitimate" to take it into consideration, knowing that it is actually part of a binding legal document. However, as will be described below, it has created much debate as well, due to the rather vague and self-contradictory wording.

It is evident that the preparatory works was of little guidance when trying to find out the meaning of "by any means direct" in terms of e-commerce. The core of the inconsistency between the organs was on the emphasis on the purpose, i.e., the subjective element that is required in order for commercial activities to be directed. The parliament, inspired by the US purposeful availment regime, proposed that such a purpose (or intent) should be necessary. The Commission, on the other hand, did not want to amplify such a prerequisite. The only question in which the Parliament, the Commission, and the Council had the same opinion was regarding the "mere accessibility" requirement, namely that mere accessibility of a website as such, does not constitute directing and is therefore no ground for jurisdiction. Again, such a consensus did not help defining the word directing.

5.2.3 The Previous Legal Debate

Some of the problems with the concept of "directing" that have been discussed in the legal literature will be presented in this section. It must be stressed that my intention is not to point out whose ideas were adopted by the CJEU and whose were not. On the contrary, the aim is to examine to what extent potential problems have been solved or dealt with by the CJEU in the recent judgment and which problems that remain unsolved.

One of the main issues that was discussed is how to grasp the joint statement, which is encapsulated in recital 24 to the Rome I Regulation. The wording has been criticized for being vague and self-contradictory.[128] The first paragraph does, however, not give rise to much uncertainty:

> "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."[129]

It follows from the wording of article 15(1)(c) that a contract must have been concluded between a consumer and a non-consumer, i.e., it is one of the necessary preconditions. The second paragraph is more problematic:

> "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."

Two interesting intricacies were discussed when it comes to this second paragraph. Firstly, it was questioned why a consumer who accesses a

[128] See, e.g., Debusseré, F., *International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?*, International Journal of Law and Information Technology, vol. 10, no. 3, 2002, pp. 344-366, p. 360.
[129] See above note 127.

website that solicits the conclusion of a contract via fax should be more worthy of protection than a consumer who accesses a website that is inviting him to go abroad to conclude a contract.[130] Secondly, and more importantly, could a concluded distance contract *per se* constitute directed activity, i.e., irrespective of trader's intent to target the Member State in question?

Two opposite views can be distinguished when it comes to earlier notions among legal commentators regarding the latter intricacy; commentators with a critical attitude towards the joint statement, on the one hand, and those with a more positive attitude, on the other. Commentators of the first group have argued that the result when following the joint declaration is rather strange. The expression that a concluded distance contract is a factor indicating that the activity is being directed, was called a "circular reasoning" and a "redundant statement".[131] Furthermore, the statement that language and currency do not constitute relevant factors was not well received among these commentators, basically because it dilutes the content of direct. Instead, these commentators advocated an overall assessment over the website in question, taking into account; the nature and character of the website, factors such as language and currency (despite the joint declaration), the character of the products sold, disclaimers (which are also respected) and expressed geographical limits and so forth.[132]

Legal commentators of the second group have advocated a so called "single contract rule" or "mere accessibility approach" meaning that if an online business enters into a single (distance) electronic contract with a consumer, then this would amount to directed activity.[133] This view was based on policy considerations, i.e., that consumers should be protected at almost any cost.

[130] Ferrari, F. and Leible, S., *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, 2009, p. 148.
[131] Maunsbach, U. and Lindskoug, P., *Jurisdiction and Internet in Relation to Commercial Law Disputes in a European Context*, Scandinavian Studies in Law, vol. 53, 2010, pp. 303-328, p. 325 and Øren, J. S.T., *Jurisdiction over Consumer Contracts in e-Europe*, The International and Comparative Law Quarterly, vol. 52, no. 3, 2003, pp. 665-695, p. 682 ("If the mere existence of a consumer contract would be sufficient to trigger the protective mechanisms in Section 4, why then, in addition, stipulate a requirement of "directs such activities" to the Member State in question?").
[132] See, e.g., Maunsbach, U. and Lindskoug, P., *Jurisdiction and Internet in Relation to Commercial Law Disputes in a European Context*, Scandinavian Studies in Law, vol. 53, 2010, pp. 303-328, p. 325.
[133] See, e.g., Hill, J., *Cross-Border Consumer Contracts*, 2008, p. 145 and Farah, Y., *Allocation of jurisdiction and the internet in EU law*, European Law Review, vol. 33, no. 2, 2008, pp. 257-270, p. 267. Farah argued that exceptions to this rule could be allowed in situations where the consumer acts in bad faith, e.g., by giving false information about his domicile.

6 The Joined Cases C-585/08 and C-144/09 and CJEU's Interpretation

6.1 Facts and Background

In *Pammer*,[134] the dispute stood between the consumer Mr. Pammer, domiciled in Austria, and Reederei Karl Schlüter (the defendant), a company established in Germany. Mr. Pammer had bought a voyage by freighter from Trieste in Italy to the Far East organized by the defendant company. Mr. Pammer had booked the voyage through an intermediary company. This company operated on the internet and described the voyage on its website, indicating that there would be a fitness room, an outdoor swimming pool, and so forth. Mr. Pammer refused to embark and instead sought repayment of the sum, which he had paid for the voyage, on the ground that the description did not, in his view, correspond to the conditions on the vessel which he had seen on the Internet. Since the defendant reimbursed only a part of the sum, (roughly 3 500 EUR), Mr. Pammer claimed payment of the balance, (roughly 5 000 EUR) before an Austrian district court. The defendant argued that it did not pursue any professional or commercial activities in Austria and objected that the court lacked jurisdiction.

The case went up to the Supreme Court of Austria, which harboured doubts regarding the criteria applicable to the concept of "package travel". According to the Supreme Court, if such a contract was involved, article 15(1)(c) of the Brussels I Regulation could be applicable and it would then be helpful to know what criteria must be met by a website in order for the activities to be regarded as "directed to" the Member State of the consumer within the meaning of that provision.[135]

Therefore, the Supreme Court decided to stay the proceedings and referred two questions to the CJEU for a preliminary ruling. The first question concerned the concept of package travel,[136] while the second read as follows:

> "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(1)(c) of the Brussels I Regulation?"

In *Alpenhof*,[137] the dispute stood between Hotel Alpenhof GesmbH (the claimant), sited in Austria, and Mr. Heller (the defendant), who was

[134] Case C-585/08 *Pammer*.
[135] In other words, the same question this essay concerns.
[136] The discussion about package travel is omitted in the discussion below.
[137] Case C-144/09 *Alpenhof*.

domiciled in Germany, and involved payment of a sum of roughly 5000 EUR for the provision of hotel services. After finding out about Hotel Alpenhof from its website, Mr. Heller reserved a number of rooms for a period of one week. His reservation and the confirmation thereof were effected by email and the hotel's website referred to an address for that purpose. Mr. Heller was not satisfied with the hotel's services and left without paying his bill. Hotel Alpenhof, therefore brought an action before an Austrian court, for payment of a sum of roughly 5 000 EUR. Mr. Heller raised the plea, that the court lacked jurisdiction. He argued that, as a consumer, he could only be sued in the courts of the Member State of his domicile, namely the German courts, pursuant to Article 15(1)(c) of the Brussels I Regulation.

Both the district court and the appellate court dismissed the action before them and Hotel Alpenhof appealed on point of law to the Supreme Court of Austria. Since the court was not sure how to answer its second question in *Pammer*, it considered it necessary to stay proceedings and refer the following question to the CJEU:

> "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 the Brussels I Regulation?"

Due to the similarity between the second question in *Pammer* and the only question in *Alpenhof*, the two cases were joined.

6.2 The Decision

The Grand Chamber of the CJEU issued its long-awaited decision on 7 December 2010. The Court began by emphasising that the concept of "directing" must be interpreteded independently, by reference principally to the system and objectives of the Brussels I Regulation, in order to guarantee its effectiveness.[138] The Court noted that the wording of article 15(1)(c) must be considered to encompass and replace the previous concepts of article 13 of the Brussels Convention.[139] After that, it was confirmed that the change, which aimed to strengthen consumer protection, was made because of the development of internet communication, which inevitably makes it more difficult to determine the place where the steps necessary for the conclusion of the contract are taken. In addition, internet increases the vulnerability of consumers with regard to traders' offers.[140]

The Court pinpointed the legal problem by observing that it is not clear from article 15(1)(c), whether the words refer to the trader's *intention* to turn towards another Member State, or whether they relate simply to an activity

[138] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 55.
[139] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 61.
[140] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 62.

turned *de facto* towards another Member State.[141] The Court noted that *classic* means of advertising such as press, radio, or television involve the outlay of, sometimes significant, expenditure by the trader in order to make himself known in other Member States.[142] Thus they demonstrate an intention of the trader to direct its activity towards those States. However, the Court stressed that such intention is not always present in the case of advertising by means of the internet, due to its inherent worldwide reach.[143]

Thereafter, the CJEU made the important observation that consumer protection is not absolute and with a reference to AG Trstenjak's Opinion,[144] it was emphasised that, had that been the intention of the European Union legislature, it would have laid down, as a condition for the application of the rules relating to consumer contracts, the mere existence of the website and not a "directing" requirement.[145] In other words, mere accessibility is not enough.

Instead, the CJEU adopted a solution where objective intent is required. The trader must have *manifested its intention* to establish commercial relations with the Member State where the consumer is domiciled. It must therefore be determined, in the case of a contract between a trader and a given consumer, whether, before any contract with that consumer was concluded, there was evidence demonstrating that the trader was *envisaging doing business* with consumers domiciled in the pertinent Member State, in the sense that it was *minded* to conclude a contract with those consumers.[146] The Court thus employed a test with a subjective, but also, an objective criterion. The sometimes advocated distinction between interactive and passive websites was rejected.[147]

The CJEU distinguished between *clear expressions* of intention and *other items of evidence.* The former include the trader´s express mention that he is offering his services or goods in one or more Member States or if the trader pays an operator of a search engine in order to facilitate access to the trader's site by consumers domiciled in various Member States.[148]

When it comes to *other items of evidence*, the Court adopted a list of features that could constitute evidence of such intention for example;
- the international nature of the activity at issue, such as certain tourist activities;[149]
- mention of telephone numbers with the international code;[150]

[141] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 63. Compare with the two earlier ideas among most legal commentators. See above section 5.2.3.
[142] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 67.
[143] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 68.
[144] See Opinion of AG Trstenjak delivered on 18 May 2010, para 64.
[145] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, paras 70-71.
[146] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, paras 75-76.
[147] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 79.
[148] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 81.
[149] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 83.
[150] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 83.

- use of a top-level domain name other than that of the Member State in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com' or '.eu';[151]
- the description of itineraries from one or more other Member States to the place where the service is provided;[152] and
- mention of an international clientele composed of customers domiciled in various Member States, in particular by presentation of accounts written by such customers.[153]

The Court stressed that the list of features is non-exhaustive and that the items of evidence could operate together with one another.[154] It is finally up to the national court to decide whether the "directing" condition is fulfilled.

The Court went on to address the debated view, expressed in the joint declaration, that language and currency mentioned on the website, do not constitute relevant factors. The Court held that this is indeed true where they correspond to the languages generally used in the Member State from which the trader pursues its activity and to the currency of that Member State. If, in contrast, the website permits consumers to use a different language or a different currency, the language and currency can be taken into consideration and constitute evidence from which it may be concluded that the trader's activity is directed to other Member States.[155] Thus, the view expressed in the joint declaration constitutes an exception. The general rule is that language and currency do play a role in the assessment.

The CJEU, moreover, expressly excluded some factors from the assessment such as the trader's email address or geographical address as well as the trader´s telephone number without an international code. Mention of such information does not indicate that the trader is directing his activity to other Member States.[156]

In the core of its decision, the CJEU concluded that the crucial question to decide whether a trader directs his activity to another Member State will be whether, "before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them".[157] Also, the fact that intermediary company operated the website in *Pammer* and not the trader, does not preclude the trader from being regarded as directing its activity to another Member States since that company was acting on behalf of the trader.[158]

[151] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 83.
[152] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 83.
[153] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 83.
[154] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, paras 83 and 93.
[155] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 84.
[156] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 79.
[157] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 95.
[158] Cases C-585/08 *Pammer* and C-144/09 *Alpenhof*, para 89.

6.3 Concluding Observations

The question whether a trader directs activity to a specific Member State will thus be decided after an overall assessment by the national court seised of the dispute. The national court must take into account, not only the features of the website, but also the trader's overall activity. This makes sense as the "directing" concept covers more than internet activity.[159]

The solution adopted by the CJEU will arguably lead to some uncertainty. For example, it may be difficult to apply the criteria, adopted by the CJEU, in situations where the items of evidence only partly point towards the Member State of the consumer. The fact that the CJEU held that is must be *apparent* from the trader's overall activity does not make things easier. In most cases, however, it ought to be relatively clear when the trader intends to do business with consumers in a specific Member State. It is fair to assume that most traders try to design their websites in a way that will target consumers in those Member States, which the traders actively choose. The non-exhaustive list of factors will also facilitate the assessment and serve as valuable guidance. However, it remains to be seen whether the reference back to the national court will result in a consistent approach to the interpretation of article 15(1)(c).

The solution adopted by the CJEU seems to be the most reasonable under the circumstances.[160] To opt for a solution where a concluded consumer contract plus mere accessibility of the website constitute "directed activity" would not adhere sufficiently to the "fishing" concept.[161] Such a solution would also, to a large extent, ignore the latter part of the provision stating that the contract must "fall within the scope of such activities". It should, however, be mentioned that the expressed fear if mere accessibility would constitute a ground for jurisdiction is to some extent exaggerated.[162] One must not forget that a *concluded* consumer contract is always a necessary precondition. Thus, the scenario where a trader merely operates a website and gets sued in another Member State does not exist or is at least very rare. The trader must always have entered into a contract with the consumer. And the trader can often take steps to ensure that contracts are not entered into with consumers in other Member States.[163]

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[159] See above section 5.2.1.
[160] For similar remarks see Bogdan, M., *Court Decisions - Website Accessibility as a Basis for Jurisdiction under Art. 15(1) (C) of the Brussels I Regulation: Case Note on the ECJ Judgment Pammer and Alpenhof*, Yearbook of Private International Law 2010, vol. XII pp. 565-569, p. 567 and Gillies, L., *Clarifying the "Philosophy of Article 15" in the Brussels I Regulation: C-585/08 Peter Pammer v Reedere Karl Schluter GmbH & Co and C-144/09 Hotel Alpenhof GesmbH v Oliver Heller*, International and Comparative Law Quarterly, vol. 60, part 2, 2011 pp.557-564, p. 562.
[161] That is, that traders are "fishing" for consumers in other Member States.
[162] See section 5.1 above about the expressed fear among people from the e-commerce sector.
[163] For similar remarks see Mankowski, P., *EuGVVO Art 15*, Entscheidungen zum Wirtschaftsrecht, 1/11, 111, Köln, 2011 pp. 111-112, p. 112 ("Die Befürchtung, dass die bloße Zugänglichkeit einer Website bereits gerichtpflichtig mache, ist für das Internationale Verbrauchervertragsrecht völlig unbegründet: Ohne einen Vertragsschluss gibt es dort keine vertragliche Zuständigkeit. Zur Website muss dort immer der Vertragsschluss hinzukommen – und der Unternehmer kann und sollte auswählen, mit wem er abschließen will und mit wem nicht.").

A solution where a concluded consumer contract plus mere accessibility of the website would amount to directed activity could nonetheless lead to very strange results. For instance, it is possible that a consumer who travelled to another Member State and entered into a contract with the trader in that State could invoke the protective rules if the trader had a website, irrespective of whether that website targeted the consumer or not. Again, such an interpretation would be against the wording of article 15(1)(c). It would perhaps increase foreseeability but the scope of article 15(1)(c) would be too wide.

In my opinion, an overall assessment as suggested by the CJEU is preferable.[164] The fact that the court must consider the features of the website and the trader's overall activity will most likely result in a far-reaching consumer protection. Some commentators have criticized the CJEU for not sufficiently addressing the fact that the trader has entered into contracts with consumers in other Member States in the past.[165] AG Trstenjak argued that the trader manifests an intention to enter into contracts with consumers in other Member States if he has customarily done so in the past. The question that naturally arises is how many consumer contracts it takes. AG Trstenjak held that this will depend upon the circumstances of the individual case.[166] I have the same opinion as the AG in this respect. However, since the CJEU held that it must be *apparent* from the trader's website and the overall activity, it is submitted that it takes more than just a couple of contracts. It must be evident that the trader knows that consumers from other Member States enter into contracts with him.

From a comparative perspective, it can be noted that the solution adopted by the CJEU to some extent resembles the solution later on adopted by the plurality of the Supreme Court in *Nicastro*.[167] In the latter, the plurality inquired whether the trader's activities *manifest an intention* to submit to the power of a sovereign. The CJEU, on the other hand, examined whether the trader *manifested its intention* to establish commercial relations with consumers in a particular Member State. Even though the cases were very different,[168] and therefore not truly comparable, it could be argued that both Courts strived to adopt technologically-neutral criteria. That could be desirable in light of the development of new technologies of contracting. In such an environment, it is not desirable to adopt tests that are too focused on the features of the website.

[164] For a critical view, see Svantesson, D.J. B., *Pammer and Hotel Alpenhof - ECJ decision creates further uncertainty about when e-businesses "direct activities" to a consumer's state under the Brussels I Regulation*, Computer Law & Security Review, vol. 27, 2011, pp. 298-304. Svantesson advocates a "dis-targeting" approach in lieu of the CJEU's "targeting approach".
[165] See, e.g., Mankowski, P., *EuGVVO Art 15*, Entscheidungen zum Wirtschaftsrecht, 1/11, 111, Köln, 2011 pp. 111-112, p. 112.
[166] See Opinion of AG Trstenjak delivered on 18 May 2010, para 80.
[167] See above section 3.3.2.
[168] Again, Nicastro did not even specifically involve internet activity.

7 Analysis - Impact on an Online Retailer

7.1 Introduction

This chapter will analyze the questions formulated in the beginning of this essay: Firstly, what sort of activities might be considered to be "directed" activities within the meaning of article 15(1)(c) when a trader uses a website within his business to sell goods or commodities to consumers (section 7.2). Secondly, the intention is to discuss the practical importance of my findings regarding the scope of article 15(1)(c) (7.3). Concluding remarks will be presented in section 7.4.

7.2 When is Consumer Jurisdiction Triggered?

In *Pammer* and *Alpenhof*, the CJEU interpreted the concept of "directs such activities". Both cases dealt with services, offered by a trader established in one Member State, to a consumer domiciled in another Member State. Yet, the scope of article 15(1)(c) is not limited to services. On the contrary, it applies to all types of contracts between business and consumer, if the contract is not specifically covered by another provision of the Brussels I Regulation. As a result, the decision is relevant for the sale of goods as well. It should be noted though, that a number of the findings of the CJEU pertain mostly to services such as certain tourist activities and so forth. This is important to keep in mind when applying the decision to the sale of goods.

Pursuant to the CJEU's decision in *Pammer* and *Alpenhof*, the principal question for an online retailer, when deciding whether the "directing" criterion is fulfilled, will be whether, before the contract with a consumer was concluded, it is apparent from the website and the online retailer's overall activity that the online retailer was *envisaging doing business* with consumers domiciled in other Member States, including the Member State of that consumer's domicile, in the sense that it was *minded* to conclude a contract with those consumers.

In order to determine whether it was intended to contract with consumers, it is necessary to examine the behaviour of the online retailer as well as the features of the website in question. In this respect, we can distinguish between *clear expressions* of intention and *other items of evidence* demonstrating such intention. *Clear expressions* include the online retailer´s express mention that he is offering his goods to consumers in one or more Member States or if he pays an operator of a search engine in order to facilitate access to the retailer's site by consumers domiciled in various

Member States. If the online retailer has satisfied only one of these *clear expressions*, the consumer protection is likely to be triggered.

However, *other items of evidence*, possibly in combination with one another, may also demonstrate sufficient intention. In this respect, the language and currency displayed on the website are two factors provided that it is not a language or currency generally used in the Member State in which the online retailer is established. Another item of evidence is the mention of telephone numbers with an international code. Furthermore, the use of a top-level domain name other than that of the Member State in which the retailer is established, must be taken into consideration. For example, if a Swedish online retailer uses a top-level domain name such as .com or .eu, it constitutes evidence that the activity was directed towards other Member States. A final item of evidence mentioned by the CJEU was the mention of an international clientele composed of customers domiciled in various Member States. Again, the factors described above are not exhaustive and it is for the national courts to decide whether such evidence exists.[169] On the other hand, the mere accessibility of the website will not trigger consumer jurisdiction. Neither will the mentioning of an email address and of other contact details.

In the majority of cross-border contracts between online retailers and consumers, it ought to be relatively clear that there exist an intention of the online retailer to contract with consumers from other Member States. As noted earlier in this essay, it is fair to presume that most online retailers actively decide which Member States they intend to target. When that decision has been made, it is likely that the retailers deliberately design their websites accordingly. Marketing strategies aim to entice consumers and they constitute a manifested intention.

> 1. For example, if a Swedish online retailer decides to sell goods to consumers in Denmark and Finland, it is likely that he designs the website in a way that will entice those consumers for example by using the Danish and Finnish languages on the website. By the same token, if the aim is to contract with consumers from all Member States, it is likely that the online retailer will do his best to design his website in a way that attracts those consumers, for example, by using languages most people understand and expressly making clear that consumers from all Member States are welcome to buy the goods.

A more problematic legal situation arises where an online retailer predominantly sells goods to consumers in one country (and shows his intention to sell only to that country) but occasionally decides to sell to consumers in another country (or countries).

> 2. Imagine that a German online retailer sells DVDs to consumers in Germany. The language used on the website in question is German and the currency is EUR. All other items of evidence point towards Germany. For example, the German online retailer expressly makes clear that he only sells the goods to Germany. However, every now and then, Swedish consumers access the website and order goods, which are subsequently sent to them in Sweden by post.

[169] The CJEU also mentioned the international nature of the activity and mention of itineraries from other Member States for going to the place where the trader is established. Such matters are, however, characteristic for services (such as certain tourist activities).

In the situation described above, it is more problematic to apply the criteria laid down by the CJEU. Even though it is not the most common situation in practice, the situation if far from unlikely to occur. Many Swedish consumers have a decent knowledge of German and can easily order goods through a German website. It is understandable that the national court in Sweden, in the second example above, will hesitate to apply article 15(1)(c), should a dispute occur between the German online retailer and a Swedish consumer. As pointed out earlier in this essay, the fact that the CJEU held that it must be apparent from the trader's activity will not reduce this uncertainty. There are no *clear expressions* of intention in the second example above, but are there any *other items of evidence* demonstrating such intention?

It has to be conceded that the solution adopted in *Pammer* and *Alpenhof* is difficult to apply in these cases. The question is if the situation fall within the scope of article 15(1)(c) at all. I would submit that if the transactions occur more frequently, and if the goods are sent to the consumer's domicile, it ought to be apparent from the online retailer's *overall activity* that the intention was to contract with Swedish consumers. Even though not specifically addressed by the CJEU, contracts that have been concluded in the past ought to fall within the online retailer's overall activity and constitute evidence that he was envisaging doing business with consumers from that Member State.[170]

By the same token, online retailers are probably not allowed to design their websites in a manner that limits the utility for consumers in order to circumvent article 15(1)(c).[171] As elaborated upon below, the advantages of such behaviour of the online retailer would probably not outweigh the disadvantages.[172] It would also result in a weakening of consumer protection which would be contrary do the current development in Europe.

On the other hand, if the German online retailer mentioned in the second example above, mistakenly enters into one contract with a Swedish consumer, the transaction falls outside the scope of article 15(1)(c). The next question would be how many times the online retailer can excuse himself by asserting that he entered into the contract by mistake. Once again, since the CJEU held that it must be apparent, it is likely that it takes more than just a couple of contracts.

The situation where an online retailer mistakenly contracts with consumers in other Member State might seem rather theoretical. However, due the features of online retailing,[173] this is actually not the case. The buying process is often standardized and the online retailer is in many cases a large

[170] Again, this view was also expressed in the Opinion of AG Trstenjak. See Opinion of AG Trstenjak delivered on 18 May 2010, para 80.
[171] Compare with the criticism against the Sliding scale above under section 3.3.3.
[172] See below section 7.4.
[173] See above section 2.1.

company. As a result, the scenario where an online retailer contracts with a consumer by mistake ought to occur quite frequently.

7.3 The Practical Importance of Article 15(1)(c)

In section 7.2, I concluded that the scope of article 15(1)(c) is wide. Indeed, much of what has been written so far in terms of article 15(1)(c) has focused on the strict legal application of the provision. The fact that a website can give rise to jurisdiction in other Member States is fascinating and it is easy to see why the provision has caused so much debate. However, when focusing solely on the legal application, it is easy to draw too far-reaching conclusions about its practical importance. For that reason, the practical importance is focused upon in this section. Roughly ten years after the Brussels I Regulation entered into force and more than one year after the decision in *Pammer* and *Alpenhof* it would be erroneous not to do so.

As noted earlier by some commentators, the incidence of cross-border B2C disputes is in fact very limited, particularly in the context of online retailing.[174] There are two main reasons for this. Firstly, it should be recalled that cross-border online shopping is still not that widespread (albeit increasing by the day). The fact that consumers still prefer to buy goods from domestic online retailers naturally limits the incidence of cross-border litigation. Secondly and more importantly, online retailing often involves transactions of very small values. As a result, there is little incentive for either party to initiate legal proceedings.

Furthermore, due to the fact that online retailers often require pre-payment, there is little scope for the online retailer to have any claim against the consumer. Thus, it is often the consumer that has to initiate these proceedings. An aggrieved consumer is in most cases not ready to take legal action against an online retailer in another Member State just because the goods that he had ordered do not correspond to his expectations. It would cost far too much and take too much time. In addition, most consumers are probably not comfortable with the legal procedure as a way of solving disputes.

All in all, the special features of online retailing do not make litigation an attractive way of solving these disputes. Of course, that does not mean that these disputes will not occur. We have seen that disputes did occur in *Pammer* and *Alpenhof* in the context of B2C e-commerce. But in the context of traditional online retailing, these disputes are more unlikely to occur

[174] On these issues, see, e.g., Hill, J., *Cross-Border Consumer Contracts*, 2008, pp. 43-67; Mankowski, P., *Neues zum „Ausrichten" unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO*, Zeitschrift- IPRax no. 3, 2009, Köln, pp 238-245, p. 238; and Tang, Z.S, *Review Article – Private International Law in Consumer Contrcats: A European Perspective*, Journal of Private International Law, vol. 6, no. 1, 2010, pp. 225-248.

primarily due to the low value of the transactions. Assertions that a wide scope of article 15(1)(c) would have a chilling effect on online retailing are exaggerated in my opinion. It is often easier and cheaper for the online retailer to just give the consumer what he wants in the event of a dispute. As Hill wisely points out, many lawyers and legal commentators tend to focus too much on the way in which disputes are resolved by formal processes.[175] In other words, just because the consumer is dissatisfied with the contract it is assumed that he will sue the trader. The economic reality is that the majority of these disputes do not reach court, for the reasons mentioned. I find it unlikely that article 15(1)(c) would induce the online retailer to abstain from targeting certain Member States merely out of fear of litigation. The online retailer most likely takes several factors into consideration before he decides which countries to target, and article 15(1)(c) is one but definitely not the only one neither the most important. Of course, if the value of each transaction increases, disputes become more problematic.

However, the fact that the practical importance should be kept in proportion does not mean that this rule is irrelevant. Article 15(1)(c) should be studied in a wider context, as one piece among many that aim to induce online retailers to adopt friendly consumer policies which in turn could promote consumer confidence.

7.4 Concluding Remarks

Pursuant to the CJEU's decision in *Pammer* and *Alpenhof*, the principal question for an online retailer, when deciding whether the "directing" criterion is fulfilled, will be whether, before the contract with a consumer was concluded, it is apparent from the website and the online retailer's overall activity that the online retailer was *envisaging doing business* with consumers domiciled in other Member States, including the Member State of that consumer's domicile, in the sense that it was *minded* to conclude a contract with those consumers. The court seised of the dispute will have to decide whether the online retailer had such intention. The CJEU adopted a non-exhaustive list of features which constitute evidence of such intention. The list will serve as valuable guidance for national courts.

In the majority of cross-border contracts between online retailers and consumers, it ought to be relatively clear that there exist an intention of the online retailer to enter into the contract. It is fair to presume that most online retailers actively decide which Member States they intend to target. When that decision has been made, it is likely that the retailers deliberately design their websites accordingly. Marketing strategies aim to entice consumers and they constitute a manifested intention.

[175] Hill, J., *Cross-Border Consumer Contracts*, 2008, p. 65.

However, intricate legal situations arise in scenarios where the online retailer either occasionally or mistakenly enters into contracts with consumers domiciled in other Member States. In such situations, the circumstances of the individual case will have to be examined in detail.

The practical importance of article 15(1)(c) in the context of online retailing should not be exaggerated. The special features of these transactions do not make litigation an attractive way of solving disputes that arise over these contracts. However, article 15(1)(c) can work in conjunction with other consumer protective provisions and induce online retailers to adopt friendly consumer policies which in turn could promote consumer confidence.

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