DRAFT PAPER

Information and Communication Technology in the light of the European PIL-instruments: consumer protection in an e-era.

ICT undoubtedly facilitates cross-border transfers of information. Exchange of information can take place in a contractual context and is a crucial element in drafting contracts as well. An essential characteristic of an agreement is the information on which parties agree. Moreover, information is the key of the development of marketing in a electronic context. A decade ago scholars were occupied by the question whether and how the Internet could fit in the "private international law"-framework for cross-boundary behavior. Though scholars tend to accept that what happens by means of the use of ICT doesn't escape from state jurisdiction or remains within the limits of a cyber-jurisdiction, special dedication to the applicability of private international law-rules remains required, especially in the perspective of some new European PIL-instruments (Regulation 44/2001, 593/2008, 864/2007). An analysis of the new community rules regarding international jurisdiction and choice of law in the light of their applicability to information and communication technology needs to be envisaged. Hereby the contractual context – with special attention to consumer contracts – and extra-contractual context can be taken in to account.

Bertel De Groote (University College Ghent – Faculty of Business Administration and Public Administration)
Contact details: Bertel.DeGroote@hogent.be

Introduction

1. ICT undoubtedly facilitates cross-border transfers of information. This contribution analyzes how their 'transboundary' characteristic influences the determination of the legal order applied to this information or to relations with juridical relevance they led to.

   The analysis takes into account some European private international law instruments. As far as international jurisdiction is meant, Regulation 44/2001 is taken into account. In order to determine the applicable law, one may refer to Regulation 593/2008 and Regulation 864/2007.

2. The exchange of information often takes place within a contractual context. Information is a crucial element leading to the conclusion of an agreement as well as for its drafting. An agreement in essence marks parties' mutual approval of exchanged information. In this regard, marketing is an important tool. It is used to inform other parties on the market – for instance customers with which a company wants to enter in a contractual relation. It is used to pass information regarding the party that expresses the offer, the conditions of the offer, the characteristics and nature of the offered service/good,.. It informs the parties on the market it is addressed to about what the party who expresses the offer is prepared to agree upon and invites them to join the offer. It therefore contains the 'bricks' for the conclusion of the contract. In order to make sure that the agreement expresses exactly what both parties had in mind a clear-cut drafting of what they agreed upon – the exchanged information that got their mutual consent – is essential.

   On the one hand, the development of marketing in an electronic context essentially relies on information that is passed to the market. On the other hand, the information on which parties agree is the essential characteristic of an agreement.

3. From these points of view *information* has to be analyzed as a relevant factor for the determination of the legal order that determines the contractual relation it establishes[1].

   This analysis is built around the recent Judgment of the Court of Justice of the European Union in the so called *Alpenhof*-case[2].

   For this reason, the contribution will mainly express some ideas regarding the specific private international law rules for consumer contracts – in view of jurisdiction as well as of

[1] Apart from that the legality of the offer and how it is presented in itself can be assessed in view of the market regulation. The concerned jurisdiction and choice-of-law questions regarding non-contractual obligations will not be dealt with in this contribution.

[2] Judgment in joined cases C-585/08 and C-144/09, 7 December 2010, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v. Oliver Heller*. The Judgment as well as the Opinion of Advocate-General TRSTENJAK, delivered on 18 May 2010, can easily be consulted on the website of the Court of Justice of the European Union (http://curia.europa.eu).
For the Judgment, see as well: *OJ* C 55, 19 February 2011, 4.
For a commented summary: R. STEENNOT, "Hof van Justitie preciseert bevoegd gerecht bij verkoop via internet", *Juristenkrant* 23 Februrary 2011, 7.

applicable law – and how their application can be triggered. Crucial in this regard is to know where a trader *directed* his activities to. Though the analysis of and comments on the *Alpenhof*-case it has to be made clear what kind of information, available on an internet-platform, leads to the application of consumer protective PIL-rules in *Brussels I* and *Rome I*. The content as well as the presentation of the information will be taken into account.

4. Though the case concerns Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[3] (hereinafter: *Brussels I* or *Regulation 44/2001*), of which art. 15 will be the focal point of this contribution, it seems evident that the judgment clarifies the application of *Regulation 593/2008* (hereinafter also called *Rome I*) as well[4].

Regulatory framework: Brussels I and Rome I

Brussels I

5. Regulation 44/2001 comprises specific rules for consumer contracts. Being more favorable to the consumer 's interests than the general rules – laid down in art. 2[5] and 5 (1)(a)[6] - they have to protect him as the weaker party[7] in order to correct the presumed imbalance between consumer and trader.

   Thus, consumer contracts are determined by a specific set of rules of jurisdiction.

   They apply when the contract is concluded by a consumer, for a purpose which can be regarded as being outside his trade or profession, if it is a contract for the sale of goods on

[3] *OJ* L 12, 16 January 2001, 1.
[4] Comp. Recital 7 in the preamble to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
See *OJ* L 177, 4 July 2008, 6.
[5] Art. 2(1) *Brussels I* provides: "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."
[6] Art. 5(1)(a) *Brussels I* reads as follows: "A person domiciled in a Member State may, in another Member State be sued:
1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question."
[7] Recital 13 in the preamble to *Regulation 44/2001*.

instalment credit terms or if it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods.

6. Apart from these cases, in order for the protection to be accorded to the consumer, the contract has to be concluded with a person who pursues commercial or professional activities in the Member State[8] of the consumer's domicile or, by any means, directs such activities to that Member State[9]. Moreover the contact has to fall within the scope of such activities.

7. If the aforementioned conditions, laid down in art. 15, are fulfilled, according to art. 16 the consumer can 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[10].

[8] The European Commission recently launched a 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 (14 December 2010, COM(2010) 748 final – 2010/0383 (COD) – C7-0433/10), whereby it proposes to extend the jurisdiction rules of the Regulation to disputes involving third country defendants.
Compare the Green paper on the review of Council Regulation (EC° No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(2009) 175, 3-4).
This would bring *Brussels I* in line with *Rome I.* Art. 2 of the latter embeds the principle of the universal application. The law appointed by its conflict of law-rules apply regardless of whether they it's the law of a Member State.
The extension of the territorial scope of Brussels I may have an important impact. Since a consumer or a trader, as defendant, brought before court in the state where the consumer is domiciled or the trader, brought in court in the state of his domicile by the consumer, may, if third countries are involved, find themselves confronted with conflict-of-law rules differing from *Rome I* and being maybe less consumer-friendly as judges in third countries are not bound by Rome I.
It has to be mentioned that in view of the territorial scope of *Rome I* and *Brussels I*, Denmark is seen considered being third country.

[9] Or to several States including that Member State.

[10] See art. 15(1) *Brussels I*, stating that if the conditions of applicability are met in matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by Section 4 of Chapter II (without prejudice to article 4 and point 5 of article 5).
Thus, if the conditions of applicability set out in art. 15 are met, the general jurisdiction rule of ar. 2 (*forum rei*), stating that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State – and the special additional jurisdiction rule of art. 5(1) regarding contracts cannot be applied. Art. 5(1) gives jurisdiction to sue a person domiciled in a Member State in another Member State, in the courts for the place of performance of the obligation in question.
Art. 5(1) reads as follows: "Article 5
A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

Proceedings by the other party against a consumer however, may only be brought in the courts of the Member State in which the consumer is domiciled. Therefore the consumer, whether defendant or actor, can never be deprived of the advantage of the "home player"[11].

8. Interesting in this regard is the shift in the wording of the conditions for the applicability of the protective rules of private international law.

In the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter: *Brussels Convention*), art. 13(3) foresees the protection for contracts for the supply of goods or for the supply of services, whereby the conclusion of the contract was preceded in the State of the consumer's domicile by a *specific invitation* to the latter or by *advertising*.

Moreover, the consumer must have taken the necessary steps for the conclusion of the contract in the concerned State[12].

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;".

[11] See: art. 16(2) *Brussels I.*
The jurisdiction rules do not affect the right to bring a counter-claim in the court in which, in accordance, with Section 4 ("Jurisdiction over consumer contracts") of Chapter II ("Jurisdiction") the original claim is pending.
Art. 17 *Brussels I* contains the conditions under which it can be departed from the provisions regarding jurisdiction over consumer contracts by an jurisdiction agreement.
Jurisdiction clauses have effect when parties entered into them after the dispute has arisen or when they allow the consumer to bring proceeding in courts other than those indicated in art. 16 – i.e. the *courts* of the Member State in which the consumer's counter-party is domiciled or the *court* of the place where the consumer is domiciled (stressed by the author). Lastly the provisions of the Section regarding jurisdiction over consumer contracts may be departed from by an agreement which is entered into by the consumer and the other party to the contract when both are domiciled or habitually resident in the same Member State at the time of conclusion of the contract. Moreover the agreement must confer jurisdiction to the courts of the latter Member State and it may not be contrary to the law of the concerned State.

[12] Art. 13(1) of the *Brussels Convention* was worded as follows:

Influence of the interpretation of Brussels I on the interpretation of Rome I

9. As recital 24 in the preamble to *Regulation 593/2008* stresses the importance of *consistency* regarding the interpretation of the concept of 'directed activity' as a condition for the application of the consumer protection rule, it seems useful to expand the considerations regarding the interpretation of art. 15 *Regulation 44/2001* to *Regulation 593/2008*[13] . In both instruments the applicability of the consumer protective PIL-rules are depending on whether the trader, using an e-platform for his commercial activities, has directed his activities to the Member State where the consumer is domiciled/has his habitual residence.

Art. 6 Rome I, regarding *consumer contracts*, reads as follows:

"1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a

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"In proceedings concerning a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession, hereinafter called 'the consumer', jurisdiction shall be determined by this Section, without prejudice to the provisions of Article 4 and 5(5), if it is:

1. a contract for the sale of goods on instalment credit terms; or
2. a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
3. any other contract for the supply of goods or a contract for the supply of services, and:
    a. 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
    b. the consumer took in that State the steps necessary for the conclusions of the contract."

According to the explanatory memorandum concerning art. 15 of the Commission of the European Communities' Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels, 14 July 1999 – COM(1999) 348 final – 99/0154 (CNS)), *OJ* C 376E 28 December 1999, 1) the removal of the condition in art. 13(3)b) of the Brussels Convention that the consumer must have taken necessary steps for the conclusion of the contract in his home State also has to be seen in the context of contract concluded via an interactive website, since the place where these steps are taken may be difficult/impossible to determine and seem hardly relevant as a link between the contract and the consumer's State. It has to be noted moreover that the relevancy of this can not only be questioned when a contract is concluded via an interactive website. The remark goes for all distance contracts by whatever means they may be concluded. Also the difficulty to determine the place where the necessary steps are taken is not limited to contracts concluded via an interactive website. As the possibilities and the use of mobile applications are rapidly growing the impact of both remarks seems of accruing importance.

[13] Art. 6 *Regulation 593/2008* guarantees consistency with *Regulation 44/2001* regarding the substantive scope of the consumer protective dispositions. The wording of art. 6 Regulation 593/2008 is very close to art. 15(1)(c) Regulation 44/2001.
Nevertheless, while art. 15 *Brussels I* explicitly includes contracts on instalment credit terms (sale of goods on instalment credit terms or loan/other credit repayable by instalments, made to finance the sale of goods), regardless of where the activities in which framework they're concluded are pursued or directed to, art. 6 *Rome I* apply to credit contracts – as mentioned in Brussels I – that do not fit within so-called directed/pursued activities.

purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities".

10. Regarding this concept's interpretation one may refer to a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001.

It deals expressly with the applicability of private international law-rules, especially the aforementioned new European PIL-instruments, in an ICT-context.

According to this declaration the mere accessibility of an Internet site is not sufficient for Article 15 to be applicable. It would implicate that the trader has to be prepared to see himself confronted with the consumer protective rules on a global scale.

A factor will be however that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. Moreover, according to this declaration, the *language or currency which a website uses does not constitute a relevant factor* in this regard.

Thereto comes that the contract must be concluded within the framework of its activities.

Having this declaration in mind, the contribution will analyze the *Alpenhof*-decision. This will clarify where the interpretation given by the Court of Justice of the European Union confirms the Council

and Commission's view on the scope of art. 15, how this view has to be concretized and where nuances are necessary.

The Alpenhof-case

Alpenhof: factual context and main proceedings

11. In December 2010 the Court of Justice of the European Union greatly contributed to the interpretation of the conditions for the applicability of the protective rules regarding consumer jurisdiction.

The so-called *Alpenhof*-case[14] concerned Mr. Heller's refusal to pay his hotel bill for a stay booked on the internet. Heller, who found out about the hotel, reserved by electronic mail. The confirmation of the reservation was effected by email as well. The website of the hotel referred to a specific electronic address that was created for the purpose of reservation.

Heller, residing in Germany, refused to pay the hotel bill. According to him the hotel's services weren't sufficient.

Brought in court in Austria for payment of the bill – a sum of roughly 5000 €,- - he stated that he could only by sued in the courts of the Member State of his domicile, Germany. The *Bezirksgericht Sankt Johann im Pongau* lacked jurisdiction on the contract pursuant to art. 15 (1)(c) *Regulation* 44/2001 read together with its art. 16(1).

The *Bezirksgericht* as well as the *Landesgericht Salzburg*, ruling on appeal, followed Heller's view and dismissed the action. According to them the Austrian courts lacked jurisdiction to hear the case while the protective jurisdiction rules were applicable because *Alpenhof*

[14] Court of Justice of the European Union C-585/08 (*Peter Pammer v. Reederei Karl Schlüter GmbH*) and C-144/09 (*Hotel Alpenhof GesmbH v. Oliver Heller*), 7 December 2010.
Opninion of Advocate General TRSTENJAK delivered on 18 May 2010.

'directed its acitvity' to Germany, where Heller was domiciled[15].

12. According to the aforementioned courts, as the Court of Justice of the European Union states, one can direct its activity as well by operating an *interactive website* enabling a contract to be concluded with the consumer on line as by *advertising on a website*, while not offering the possibility to conclude a contract electronically on the trader's site itself[16].

    Important in this regard is to note that internet advertising crosses borders, which can be seen as directing the activity to consumers in other Member States. One may note that an enterprise that uses the internet as an informational tool, leading to a claim concerning a contractual dispute, occurs a serious risk to find the protective private international law rules for consumer contracts applicable[17].

    The conclusion that internet advertising constitutes 'directing abroad' can only be excluded by an express statement concerning the trader's business contact with consumers domiciled in one or more other specified Member States. One may hereby think of a *disclaimer*[18].

13. While one can disagree, as will be clarified later, with the opinion that contract conclusion with an interactive website is necessary in order to establish the *directed* character of an activity, it is clear as well that the mere presence – i.e. by means of advertising - of a trader on the internet must, given the global reach of this medium, not automatically be seen as sufficient indication for the fact that the activity is directed to wherever the site is available. Once more, this does not preclude that information about a trader's services on the internet via a so-called passive site, followed by a contract conclusion – even by means of another communication channel - can be seen as a trigger for the applicability of the protective jurisdiction rules/choice-of-law rules. On the other hand, the passive site – as the interactive

[15] See: art. 16(1) *Brussels I*.
[16] Paragraph 29 of the *Alpenhof*-case. If hereinafter the references mention only paragraph and the paragraph's number, the author refers to the *Alpenhof*-case.
[17] According to consideration 29 of the *Alpenhof*-case the *Bezirksgericht* and the *Landesgericht* judged that the activity is also directed to the Member State of the consumer where the latter finds out about the trader's services through a website and the subsequent reservation is made by means of the email address, geopgraphical address or telephone number indicated on that website.
[18] In this regards, see number….

site – is not in se to be characterized as a sufficient element for 'directed activities'. The fact that the contract is not concluded by an interactive site or even not by an electronic medium cannot preclude the conclusion that it is a contract within the framework of the activities the trader directed to the consumer's Member State.

14. Since the judgments were appealed by *Alpenhof* on a point of law, the *Oberster Gerichtshof* had to determine whether or not *Regulation 44/2001* was a basis for jurisdiction for the Austrian courts. In order to do so it questioned the Court of Justice of the European Union for a preliminary ruling.

The question the *Oberster Gerichtshof* addressed to the Court of Justice of the European Union[19] reads as follows:

"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'

[19] The Court, questioned as well on art. 15(3) *Brussels I* , disposed as follows:
"1. A contract concerning a voyage by freighter, such as that at issue in the main proceedings in Case C-585/08, is a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of Article 15(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

2. In order to determine whether a trader whose activity is presented on its website or on that of an intermediary can be considered to be 'directing' its activity to the Member State of the consumer's domicile, within the meaning of Article 15(1)(c) of Regulation No 44/2001, it should be ascertained 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.

The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.

On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient. The same is true of mention of an email address and of other contact details, or of use of a language or a currency which are the language and/or currency generally used in the Member State in which the trader is established."

within the meaning of Article 15(1)(c) of Regulation 44/2001?"[20].

An identical question was brought for the Court by the Austrian Supreme Court in the Pammer-case in case the answer to the question whether a 'voyage by freighter' – as booked by Pammer with Reederei Karl Schlüter – could be seen as a package travel, i.e. a contract which, for an inclusive price, provides for a combination of travel and accomodation. Art. 15(3) Brussels Regulation excludes contracts of transport from the application of its Section 4 – Chapter, except if package travels are concerned.

Pammer: parenthesis regarding the notion of a package travel

Before answering the question concerning the interpretation of art. 15(1)(c) in the context of the Pammer-case[21], the Court had to clarify the concept of a contract which, for an inclusive price[22], provides for a combination of travel and accommodation in the light of the voyage by freighter between Trieste and the Far East, Pammer booked. Only *packages* are seen as consumer contracts, subject to the jurisdiction rules in Section 4 of Chapter II[23].

[20] An analogous question was raised by the *Oberster Gerichtshof* of Austria in case C-585/05, the so called *Pammer*-case. The case was dealt with jointly with case C-144/09 by the Court of Justice of the European Union. The Pammer-case originated in a dispute between an Austrian resident, Pammer, and Karl Schlüter, a company established in Germany. It concerned a voyage by freighter from Italy to the Far East, giving rise to a contract between Pammer and Karl Schlüter. The voyage was booked through Internationale Frachtschiffreisen Pfeiffer GmbH. This intermediary company has its seat in Germany. It mainly operates via the internet. Convinced that the conditions on the vessel voyage weren't in line with its description on the website, Pammer refused to embark and sought reimbursement for the paid sum. Since he was only partly reimbursed he sued Reederei Karl Schlüter in payment of the balance and interest for the *Bezirksgericht Krems an der Donau in Austria*. Karl Schlüter denied the jurisdiction of the Austrian court, claiming that it didn't pursue any professional or commercial activity in Austria. The Bezirskgericht Krems an der Donau however held that it had jurisdiction on the ground that the voyage contract was a consumer contract, namely a contract for package travel (see in this regard: art. 15(3) that excludes transport contracts from the application of Section 4, Chapter II *Regulation 44/2001* regarding jurisdiction over consumer contracts, except in case of contracts which, for an inclusive price, provide for a combination of travel and accommodation ('package travel')), and that the intermediary company had engaged in advertising activity in Austria on behalf of Reederei Karl Schlüter by means of the internet. In appeal, the *Landesgericht* (Regional Court) *Krems an der Donau* stated that the contract was not a 'package deal'. Though the crossing involved a degree of comform, it couldn't be qualified as a consumer contract. Dealing with Pammer's appeal, the *Oberster Gerichtshof* interrogated the Court of Justice of the European Union since services comparable to a cruise could be involved. That would lead to the conclusion that there is a 'package', i.e. a consumer contract, in which case the criteria had to be determined that have to be met by a website in order for activities engaged in by a trader to be seen as directed to a Member State, in the concrete circumstances the Member State of the consumer's domicile (art. 15(1)(c) *Regulation* 44/2001).

[21] Case C-585/08.

[22] See art. 15(3) *Regulation 44/2001*.

[23] Though art. 15 (3) Regulation 44/2001 doesn't mention the notion 'package travel', a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation - subject to the rules of jurisdiction

Referring to the *Club-Tour*-case[24] the Court has held that, for a service to qualify as a package within the meaning of Article 2(1) of Directive 90/314, it is enough if,

first, it *combines tourist services sold at an inclusive price including two of the three services referred to in that provision*, namely transport, accommodation and other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package,

and second, it covers a period of more than *24 hours or includes overnight accommodation*.

15. Interpreting art. 15(3) *Regulation 44/2001*with referral to the directive's notion of 'package travel', the Court of Justice of the European Union considers that a contract concerning a voyage by freighter, such as that at issue in the main proceedings, is a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation within the meaning of the aforementioned article 15(3).

Criteria to assess whether a trader's activity is directed to a specific Member State

16. The quintessence of the Court decision however, concerns the determination of the criteria on the basis of which a trader can be considered to be *directing* his activity to the Member State of the consumer's domicile.

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laid down in Section 4 of Chapter II – is close to what Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (*OJ* L 358, 23 June 1990) concerns.
Moreover, *Regulation 593/2008* – that intends to cover the same types of consumer contracts as *Regulation 44/2001* (see recital 7 of the preamble to *Regulation 593/2008*) refers in its art. 6(4)(b) to the concept of 'package travel' within the meaning of Directive 90/314.
In paragraph 43 the Court of Justice of the European Union moreover considers that the explanatory memorandum accompanying the proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement in civil and commercial matters (COM(1999) 348 final) uses the term 'package holiday'. The Commission refers expressly to Directive 90/314 to explain art. 15(3) Regulation 44/2001.
See also: paragraph 47 of the Advocate General's Opinion.
[24] Court of Justice of the European Union C-400/00 (Club-Tour, Viagens e Turismo SA v. Alberto Carlos Lobo Gonçalves Garrido, and Club Med Viagens Ld[a]), 30 April 2002, *ECR* 2002 I-4051, par. 13.

The Court especially addresses this question in an IT-context, more specifically to a case in which the trader's activity is presented on its website (or on its intermediary's website).

This may not however lead to the conclusion that art. 15(1)(c) is uniquely or even specifically applicable to e-contracts. Its wording doesn't preclude the application of the protective rules in view of the means by which a trader directs his activities to the consumer's Member State. Be it mass communication or individual communication, with use of a traditional or a 'new' communication platform,…the ratio for the protection doesn't seem affected. While its application seems most evident when distance contracts are at stake, one might even wonder whether art. 15(1)(c) cannot as well be invoked for contracts concluded in the presence of both parties if they fall within the scope of activities directed to the consumer's domicile. The latter activities, rather than the mode for the conclusion of the contract seem to determine the consumer's need to protection and influence the shift in balance between the consumer and the professional he contracted with.

17. In order to facilitate the understanding of the Court's reasoning, the elements that ought to be assessed can be shortly brought in mind.

In C-585/08, Pammer booked a voyage by post after he found out that it existed by consulting Reederei Karl Schlüter's intermediary's website and after having obtained further information form the latter by email.

In C-144/09, Heller contracted with Alpenhof after having found out that it existed by means of the internet, reserved and confirmed the reservation electronically as well.

18. In both cases it seems undoubted that the litigious contract falls within the scope of the trader's activities.

Autonomous interpretation

19. As was the case with art. 13 *Brussels Convention*, art. 15 – replacing it - has to be interpreted, in view of its effectiveness, in an *autonomous* way, taking into account the objectives of the Regulation and in coherence with its system[25].

    While striving for continuity with the interpretation of the consumer protective rules of the Brussels Convention, the Court has to take into account the changes embedded in the wording of art. 15[26].

20. Though the place nor the function – namely the protection of the consumer, considered being the weaker party – of art. 15 *Brussels I* differ from art. 13 *Brussels Convention*[27], it has to be taken into account that the wording of art. 15 *Regulation 44/2001* differs from the wording of art. 13 Brussels Convention.

    Though an adequate protection of the consumer, as the party deemed to be economically weaker and less experienced in legal matters that the other – commercial (and professional) – party, is the common objective, art. 15 words the conditions for application of the protective rules in a more *general* way[28]. Art. 15 therefore seems more general and generous at the same time.

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[25] Paragraph 55, referring to Court of Justice of the European Union C-96/00 (Rudolf Gabriel), 11 July 2002, *ECR* 2002 I-6367, par. 37.

[26] Paragraph 56.

[27] It has to be mentioned that recital 13 of the preamble states that in relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.
See in this regard as well: Court of Justice of the European Union C-180/06 (Renate Ilsinger v. Martin Dreschers, acting as administrator in the insolvency of Schlank & Schick GmbH), 14 May 2009, *ECR* 2009 I-3961, par. 41. Paragraph 41 reads as follows: "In order to answer those questions, it must be observed from the outset that, in so far as Regulation No 44/2001 now replaces the Brussels Convention in relations between the Member States, with the exception of the Kingdom of Denmark, the interpretation given by the Court as regards that convention also applies to the regulation, where its provisions and those of the Brussels Convention may be treated as equivalent. It must be added that, in the system established by Regulation No 44/2001, article 15(1)(c) thereof occupies, as it is clear from recital 13 in the preamble to that regulation, the same place and fulfills the same function of protecting the weaker party as does point 3 of the first paragraph of Article 13 of the Brussels Convention".

[28] In this regard paragraph 58 refers to Court of Justice of the European Union C-27/02 (Petra Engler v. Janus Versand GmbH), 20 January 2005, *ECR* 2005 I-481, par. 39 and Court of Justice of the European Union C-464/01 (Johann Gruber v. Bay Wa AG), 20 January 2005, *ECR* I-458, par. 34.

21. This approach is particularly important in an electronic context, since its more open and general wording than the advertisement and specific invitation[29] required in art. 13 Brussels Convention, tends to ensure better protection for consumers with regard to new means of communication and the development of electronic commerce[30]. The interpretation given by the Alpenhof-decision, as analyzed underneath, has to illustrate so.

Place of fulfillment of steps necessary for the conclusion of the contract

22. Since totally unadapt to the electronic environment the requirement that the steps necessary for the conclusion of the contract have to be taken by fulfilled in the State where he is domiciled[31], included in art. 13 Brussels Convention, has been removed in the wording of art. 15 Regulation 44/2001. Moreover this condition was seen as deficient, since the consumer couldn't rely on protection if his cocontractor induced him to leave his home country to enter into the agreement[32].

Do directed activities require the trader's intention?

23. Regarding the trader's behavior, the necessity of a specific invitation addressed to the consumer or advertisement in the State of the latter's domicile is now replaced by the requirement that the trader – whereby the conditions of applicability concern him alone – pursues its commercial activities in the Member State of the consumer's domicile or directs such activities to that Member State or to several States, including that Member State[33].

    Of specific relevance for the electronic environment seems the addition 'by any means', since the medium/platform or the communication tools that are used may not affect the

[29] One could contend that only an email addressed to the consumer could be doubtlessly seen as a specific invitation.
[30] Compare: Court of Justice of the European Union C-180/06 (Renate Ilsinger v. Martin Dreschers, acting as administrator in the insolvency of Schlank & Schick GmbH), 14 May 2009, *ECR* 2009 I-3961, par. 50.
[31] Paragraph 62.
[32] See in this regard: Proposal for a Council Regulation, presented by the Commission of the European Communities, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (14 July 1999, COM(1999) 348 final – 99/0154 (CNS), *OJ* C 376 E, 28 December 1999, 1.
See especially p. 16 of the Explanatory memorandum.
[33] Moreover, the contract must be within the scope of the concerned activities.

conclusion whether activities are 'directed' to a specific State or not.

24. More important however seems the technology-neutral notion 'directed activities' in itself. If read jointly, its open wording is stressed by the words 'by any means'. As the Court states, while art. 15 encompasses and replaces the concepts used in the *Brussels Convention*[34] it thus covers a wider range of activities[35]. Since not requiring a predefined content or format of behavior and information on the trader's side, it admits advertisements or specific invitations as meant in art. 13 *Brussels Convention* as elements that establish directed activities without limiting the list of elements that can prove such activity to them.

25. The idea that the development of internet communication increases the vulnerability of consumers with regard to traders' offers seems to be at the origin of this broader approach. Nonetheless, this need doesn't affect the need for protection for consumer confronted with more traditional, or must one say old-fashioned, means to direct activities to their home States. As soon as activities are directed to a certain market, by whatever means, the power-balance seems that much broken that protective rules have to re-install the equilibrium. Therefore, while the concepts 'advertisement' and 'specific invitation' seem especially in an e-context too narrow, in a more traditional context the power-balance can be ruptured by initiatives from/on behalf of the trader that do not specifically fit within the concepts used in art. 13 *Brussels Convention*.

26. Though the scope of art. 15 *Brussels I* may be broader than the reach of art. 13 *Brussels Convention*, it remains unclear however whether this increase requires an interpretation whereby the words 'directs such activities' encompasses an activity that is ***de facto*** turned towards one or more Member States or that the intention of the trader to do so has to be involved as well[36] .

    In the latter scenario it will have to be determined in what form this intention must manifest

[34] In this regard, see art. 13.
[35] Pargraph 61.
[36] Paragraph 63.

itself in an electronic context.

27. A major difference between advertising by means of the internet and in a classic form[37] concerns the outlay of expenditure – that can be significant in the latter case – by the trader in order to make itself known in other Member States. This expenditure demonstrates the trader's intention.

    The worldwide reach of communication is on the contrary inherent to the internet. Therefore the aforementioned intention cannot be derived from the worldwide accessibility of webvertisement.

    The Court of Justice expresses this idea as follows:

    "Since this method of communication inherently has a worldwide reach, advertising on a website by a trader is in principle accessible in all States, and, therefore, throughout the European Union, without any need to incur additional expenditure and irrespective of the intention or otherwise of the trader to target consumers outside the territory of the State in which it is established"[38].

28. Though advertisement by means of the internet – contrary to other forms of advertisement - doesn't automatically implicate the 'intention' to be present on the markets of all the States where the advertisement can be seen, the mere accessibility of a website has not to be seen as in line with the words "directs activities to". This doesn't has to be contrary to the statement that the latter concept may be broader than the notion 'advertisement'. The accessibility of webvertisement in a Member State, while there are no indications that the advertiser wanted

[37] See: Court of Justice of the European Union C-96/00 (Rudolf Gabriel), 11 July 2002, *ECR* 2002 I-6367, par. 44. According to this Court decision art. 13 Brussels Convention covers all forms of advertising carried out in the Contracting 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, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman.
[38] Paragraph 68.

to affect to market in the concerned State, does not meet the condition, set out in art. 13(3)(a) *Brussels Convention* that the conclusions of the contract has to be preceded in the State of the consumer's domicile by advertising. The same can be defended *a fortiori* if there are indications that the advertisement didn't intended to reach that State. This is the case for instance if the trader expressly limits the geographical scope in the advertisement itself.

Another assessment of 'accessibility' of information leads to the risk that the consumer protection gets an absolute character[39]. So, it wouldn't have sense to limit the application of the protective rules to the direction of the trader's activities to a Member State.

29. In this regards, one can mention the Advocate General's observation that in view of a teleological interpretation of the litigious concept the interests of the consumer and of the trader, who wants to avoid jurisdiction in the place of the consumer's domicile if he hasn't knowingly directed his activities to that Member State, have to be balanced. Protection of the consumer therefore requires sufficient connectivity between the contract and the Member State of the consumer's domicile[40]. If the European legislator on the contrary shared the opinion that the ICT-environment *in se* made the consumer's protection indispensable he'd have drafted art. 15 differently, rather referring to accessibility. Since this is not the case, one may conclude that mere presence on the internet – accessibility of a website – does not trigger the consumer protection rules.

The Court clarifies that whilst seeking to confer further protection on consumers, the European Union legislature did not go as far as to lay down that mere use of a website, which has become a customary means of engaging in trade, whatever the territory targeted, amounts to an activity 'directed to' other Member States[41].

[39] See in this regard paragraph 70, referring to Court of Justice of the European Union C-215/08 (E. Friz GmbH v. Carsten von der Heyden), 15 April 2010, par. 44 [to be consulted electronically on the website of the Court of Justice of the European Union (http://curia.europa.eu/) or via Eur-Lex (Access Portal to European Union Law - http://eur-lex.europa.eu/)], concerning Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (see: *OJ* L 37, 31 December 1985, 31).
[40] Advocate General TRSTENJAK in paragraph 64 of his opinion subscribes in this regard – correctly - the point of view of the Netherlands government.
[41] Paragraph 72.

30. Accessibility can therefore not be seen as a manifestation of the intention to establish commercial relations with 'foreign' consumers, necessary for the involvement of consumer-friendly rules[42].

In this regard reference can be made to a joint declaration by the Council and the Commission on Article 15 of Brussels I[43], echoed in recital 24 of the preamble to *Rome I* since it states that for article 15(1)(c) to be applicable it is not sufficient for an undertaking to *target*[44] 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.

Moreover, and more relevant for the sake of this analysis, the Council and the Commission clarify 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.

One may mention in this regard paragraph 73 of the Court decision and footnote 37 of Advocate-General TRSTENJAK's Opinion of 18 May 2010.
Recital 13 of the preamble of the Proposal for a Council Regulation, presented by the Commission of the European Communities, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (14 July 1999, COM(1999) 348 final – 99/0154 (CNS), *OJ* C 376 E, 28 December 1999, 1), stated that account must be taken of the growing development of the new communication technologies, particularly in relation to consumers. In particular, electronic commerce in goods or services by a means accessible in another Member State, constitutes – according to the proposed recital – an activity directed to that State. Where that State is the State of the consumer's domicile, the proposed recital, clarified that the consumer is protection-worthy when he enters into a consumer contract by electronic means from his domicile. According to the Advocate General (footnote 37 of his opinion) the recital could be seen as a confirmation that the consultability of a website in the so-called consumer's State should lead to the application of the specific provisions for consumer contracts. As the recital was omitted in the regulation itself, the Advocate General is convinced that this suggests that accessibility is not sufficient to meet the conditions of applicability set out in art. 15(1)(c).
It has to be mentioned that the European Parliament amended the Commission's proposal in a sense that comforts the Advocate General's opinion. The Parliament suggested the wording that electronic commerce by a means accessible in another Member State constitutes an activity directed to that State *where the on-line trading site is an active site in the sense that the trader purposefully directs his activity in a substantial way to that other State* (*OJ* C 146, 17 May 2001, 97)(See: European Parliament legislative resolution on the proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 - C5-0169/1999 - 1999/0154(CNS)), *OJ* C 146, 17 May 2001, 101).
[42] Paragraph 75.
[43] Statement of the Council and the Commission on Articles 15 and 73 of Regulation 44/2001.
The statement can be consulted on the website of the European Judicial Network in civil and commercial matters (http://ec.europa.eu/civiljustice) .
Follow the hyperlink: http://ec.europa.eu/cilviljustice/homepage/homebage_ec_en_declaration.pdf.
Last consultation of the site: 30 May 2011.
[44] Stressed by the author.

The wording of the joint statement clarifies as well that the mere conclusion of a contract doesn't necessarily mean that the contract was solicited for. Both elements, the contract and the directed activity it fits in, have to be present in order to meet the conditions of applicability set out in art. 15.

31. According to that statement the language or currency used on a website cannot be seen as a 'relevant' factor to qualify a website as a means of targeting commercial activities to a specific (number of) Member State(s). As will be pointed out, the *Alpenhof*-decision contains some interesting considerations regarding this pretended irrelevancy.

32. Thus, the joint statement confirms the interpretation that the use of ICT has to give evidence of the intention to establish commercial relations in the Member State of the consumer's domicile. The conclusion of a contract with a consumer therefore has to preceded by elements that demonstrating that the trader 'envisaged' doing business in the concerned state, i.e. minded to conclude contracts with consumers there[45].

33. The Court of Justice of the European Union is brought to a two-step reasoning. After having determined that activities can only intentionally be directed, the Court draws up an exemplary list of elements that indicate this intention. It gives way to criteria to assess the trader's information about his activities as well as how that information is transferred and presented.

Elements establishing a directed activity: the Alpenhof-assessment

Black list

34. In order to assess the use of ICT, especially the information it bears and how this information is presented, the *Alpenhof*-decision inspires to a three-layered approach. In order to clarify

[45] See in this regard paragraph 76.

the assessment this contribution introduces a black, white and grey list of elements.

35. In paragraph 77 of the *Alpenhof*-decision the Court of Justice of the European Union clearly excludes some mentions on a trader's website from being evidence that the trader envisaged doing business abroad.

    The exclusion concerns :

    - the trader's email address

      or

    - the trader's geographical address

      or

    - the trader's telephone number without an international code.

36. This exclusion can be justified as this information is as necessary for a consumer domiciled in the Member State where the trader is established –especially in view of a distance contract - as a consumer from abroad needs it to get in touch with the trader. This type of information therefore can be considered as neutral for the assessment of the trader's intention.

37. Thereto comes that the Directive on electronic commerce contains a general information duty and requires the provider of information society services to disclose at least the geographic address at which the service provider is established and details – including the service provider's electronic mail address – allowing him to be contacted rapidly and communicated with in a direct and effective manner[46].

[46] See art. 5(1) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *OJ L 178, 17 July 2000, 1*.
Art. 5(1) reads as follows:

This duty to disclose contact information is independent of the Member State the trader directs its activity to. It therefore also concerns a trader whose activity is to be qualified as purely 'national'.

38. Neither decisive seems the 'interactive' character of an ICT-platform, enabling contracts to be concluded electronically, or even the question whether or not a trader can be contacted electronically (through the platform)[47].

The 'interactivity' of a website – whereby one may wonder which *degree of interactivity* would be required and can contend that every site's visit at least from a technical point of view requires a degree of interactivity – is not an effective measure of the intended character of the extraterritorial nature of the activities it sustains.

On the contrary, the fact that contact details – be it a geographical address or an electronic address – are mentioned, allows the consumer to inquire with the trader in view of entering in a contractual relation. This opportunity does not however in se proofs the trader's intention to

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"General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

(a) the name of the service provider;
(b) the geographic address at which the service provider is established;
(c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
(d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
(e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
(f) as concerns the regulated professions:
- any professional body or similar institution with which the service provider is registered,
- the professional title and the Member State where it has been granted,
- a reference to the applicable professional rules in the Member State of establishment and the means to access them;
(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment".
Compare in this regard: Court of Justice of the European Union C-298/07 (Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. deutsche internet versicherung AG), 16 October 2008, *ECR* 2008 I-7841, par. 40.

[47] Compare: J.-P. MOINY, B. DE GROOTE, "'Cyberconsommation' et droit international privé", *R.D.T.I.* 2009, 30.

give its activities an extraterritorial grab. In the same line of reasoning the so-called passive character of a website does not preclude this site from containing information that gives evidence of the trader's intention to develop activities in (a) certain State(s).

39. In this regard the Court of Justice of the European Union's *Alpenhof*-decision refines the explanatory memorandum in the Proposal of the Commission of the European Communities for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters regarding art. 15[48].

    The latter seems to connect the applicability of the consumer protective jurisdiction rule (art. 15 (3)) with consumer contracts that are concluded via an interactive website that is accessible in the Member State of the consumer's domicile. A passive website, accessible in the State of the consumer's domicile, giving this consumer knowledge of a service or of the possibility to buy goods, does, according to the memorandum, not trigger the protective jurisdiction.

40. Since the memorandum focuses on a passive site that simply contains information that allows the consumer to enter into a contract[49], that information's character rather than the passive character of the website seems to drive it to the conclusion that 'directed activities' are lacking.

    The memorandum links its assessment of an interactive site to the concept 'directed activities'. This stresses the technology-neutrality of the condition for the application of the

[48] Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 final — 1999/0154(CNS), submitted by the Commission on 7 September 1999, OJ C 376 E, 28 December 1999, 1.
For the explanatory memorandum (see specifically p. 16), the text can best be consulted on the website of Eur-Lex via the hyperlink: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1999:0348:FIN:EN:PDF (last consulted 15 June 2011).

[49] In this regard, the memorandum reads as follows (p. 16): "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 so-called passive site in its purest form contains information, accessible for the visitor. In this site no tools that allow the visitor to communicate with its owner or to place an order are embedded. The contrary goes for interactive sites. Seen on a scale the degree of interactivity can vary depending on the site's functionalities.

specific jurisdiction rules for consumer contracts. It enables the memorandum to state that the ICT-driven medium, though it clearly facilitates extra-territorial commercial relations and the conclusion of cross-border contracts, doesn't lead to another treatment than the treatment of contracts concluded by phone or fax. The latter as well have to be concluded within a framework of activities directed to the consumer's Member State. Moreover, as far as the interactive site illustrates the trader's intention to solicit business in a State a contract that is not concluded by means of that site (for instance by another communication tool for distance contracts), but nevertheless in the framework of the mentioned activities, the application of art. 15 *Regulation 44/2001* is triggered as well.

White list

41. On the other hand the Court of Justice of the European Union seems to draw up a non-exhaustive white list. It contains what the Court considers being 'clear' expressions of the intention to solicit the custom of consumers in a specific State[50].

    Evidence of a 'directed' activity includes for instance[51]:

    - the mention that the trader is offering services or goods in (a) Member State(s) designated by name;
    - The disbursement of expenditure on an internet referencing service to the operator of search engine, in order to facilitate access to the trader's site by consumers domiciled in various Member States[52]. The validity of the Court's reasoning in this regard is limited however to services that themselves have a scope that covers the Member State in which the concerned consumer is domiciled. This means that their activity has to be directed to that Member State in order to be able to contribute to the reach of the referenced website in this State.

[50] See: paragraph 80.
[51] The examples are taken from paragraph 81.
[52] Paragraph 81.

Parenthesis: disclaimer

42. As paragraph 80 refers to clear expressions of the intention to solicit business in specific States, a clear expression of the intention to exclude (a) certain State(s) from business activities has to be considered as valid as well. Such expression can have the form of a disclaimer, whereby the trader mentions that he doesn't offer goods/services to customers in (a) predefined State(s) or that he only deploys activities in (a) specified State(s). Integrating this information in his communication – whatever the platform/tool may be – can be very useful for the trader's risk analysis, since he can manage the risk he occurs to be brought before court in a certain State by excluding it from his activities. Only in the included State(s), that can be clearly limited in the trader's communication, he can be forced to defend himself before court. As States may be included there is few reason not to allow them to be excluded. Furthermore as implied inclusions/exclusions are relevant for considering whether or not activities are directed to certain States, express inclusions/exclusions a fortiori have to be taken into consideration and even given greater weight[53].

    Though there weren't disclaimers in the *Alpenhof*-case, the Advocate General briefly touches the topic[54] and correctly states that the trader's behavior has to be in line with the information he spreads, i.e. the statements on the website. It the facts are not corresponding to the statement, the trader cannot rely on the disclaimer[55]. If however, the trader delivers goods or services in an 'excluded' State because the consumer pretended to be a resident of a State which market is within the scope of the trader's activities, it is unacceptable that the trader should not be allowed to invoke the disclaimer and find himself confronted with the protective PIL-rules[56]. The disclaimer can also not per se be denied effect when the trader – although he acted carefully - erroneously concluded with a consumer in an excluded State or when he concluded while the deceit on the consumer's side was more than obvious. This grey zone has to be assessed case-by-case.

[53] Compare in this regard paragraph 92 of the the Advocate General's opinion.
[54] Paragraph 91 and following of the Advocate General's opinion.
[55] See in this regard paragraph 92 of the Advocate General's opinion.
[56] Compare: J.-P. MOINY, B. DE GROOTE, "'Cyberconsommation' et droit international privé", *R.D.T.I.* 2009, 33.

43. Furthermore, attention has to be given to questions regarding the intelligibility of the disclaimer. If a consumer is confronted with a disclaimer in the website's language that's not the language of the State he's domiciled/habitually residing in, one could contend that he cannot be considered to understand the disclaimer. Therefore it will difficult to invoke the disclaimer against that consumer. On the other hand however, the language of the disclaimer, as it is the language of the site itself, can in itself be seen as an element that the activities are not directed to the consumer's State where this language is not generally used. If he nevertheless contracts, the consumer has to take the risk. Another conclusion is reasonable however if the trader in this situation – regardless of the site's language and the disclaimer – regularly accepts orders from within the concerned country.

The assessment can be different if the disclaimer is drafted in another language than the different website's languages (and not in English). This is especially relevant if one of the website's languages is generally used in the Member State of the consumer's domicile. If not, the website's language could be a relevant factor to conclude that the activities – independent from the disclaimer – are not directed to the consumer's website. If however, the disclaimer is drafted in English, it seems less evident not to take it into account since the overwhelming presence of English on the internet. This is especially so if the website itself is drafted in English. If however, the website is (also) drafted in a language generally used in the Member State of the consumer's domicile and the disclaimer only in English, the latter cannot outweigh the impression of 'directed activity' that is created by the site's language.

Lastly, in order to assess a disclaimer, one may also take into account the trader's efforts to make the visitor of his website aware of it. A disclaimer 'hidden' in the trader's general terms and conditions – for the agreement with which the consumer has to tick a box before ordering a good/service[57] – has less impact, than a clear banner containing a disclaimer on each page of the site or a menu, whereby the consumer has to choose his country and according to this choice can or can't continue the process or purchasing[58]. The last technique helps the trader to behave in line with its disclaimer. This different techniques illustrate that

[57] The *click-wrap agreement* can concern a disclaimer that is not integrated in general terms and conditions as well.
[58] The same goes for a 'positive' list of countries that are 'served' by the trader and whereby the consumer has to pick out the one he confirms living in, before being able to order services/goods.

the 'impact' of the disclaimer on the assessment of the trader's activities can differ. The more prominent and the more difficult to circumvent, by consumer and trader, the greater its impact will be.

44. Referring to EU-instruments that want to create a legal framework that stimulates cross-border commerce[59], the Advocate General doesn't adhere the viewpoint that an express exclusion of certain States from the scope of a trader's activities is necessary, since the risk of legal actions in those States might deter from internet-trading, or more generally trading by all means (i.e. communication platforms/tools) that facilitate cross-border trading, especially in the case of distance contracts[60]. Companies may of course have a multitude of other, legitimate and often business-related, reasons to exclude the directing of their activities to (some) other States/another State. One may wonder however, whether such a decision is not contrary to the idea and the requirements of the internal market, since trader's restrict the consumer's access to services and goods all over the EU – to the latter's detriment - which is a key for the competition within the EU.

45. In this regard the Advocate General, seems to be in favor of the individual business' right to decide on the scope of its activities[61]. The 'free movement' opposes against discrimination of customers but, addressing Member States, may not preclude companies for not developing activities in certain Member States…even if the risk of judicial proceedings in the State inspired them to this decision. Regarding the impact of art. 20 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal

[59] The list found in paragraph 94 of the Advocate General's opinion contains: Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (*OJ* L 199, 31 July 2007, 1), Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (*OJ* L 399 , 30 December 2006, 1), Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (*OJ* L 143 , 30 April 2004, 15), as well as Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ* L 12 , 16 January 2001, 1).

[60] See paragraphs 93 and 94 of the Advocate General's opinion.

[61] In this regard it is interesting to cite from paragraph 95 of the opinion of the Advocate General: "Is the decision to restrict the directing of activities not an individual business decision by the undertaking, which it must be allowed to take – although, of course, subject to compliance with the provisions on the protection of competition? Can undertakings really be required to potentially conduct business with consumers from other Member States too by depriving them of the possibility of expressly stating on their websites to which Member States they direct their activities?".
See also paragraph 99 of the Advocate General's opinion.

market[62] on disclaimers, the Advocate General inter alia considers that art. 20(2) allows differences in conditions of access to a service, even based on residence, where these differences are directly justified by objective criteria, which has to be ascertained on a *case by case*-basis[63].

Grey list

46. While evidence as mentioned in the white list is patent, a third, grey list may contain other items of evidence that are – alone or combined – demonstrating 'directed' activity.

Hereby the idea that the direction that is given to an activity can only be established by patent evidence is overthrown by the Court of Justice of the European Union[64].

An amendment of the European Parliament[65] to the Commission's proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[66] to art. 15 in this view was not maintained in the legislative procedure. It stated that art. 15 had to dispose that the expression 'directing such activities' shall be taken to mean that the trader must have purposefully directed his activity in a substantial way

[62] *OJ* L 376, 27 December 2006, 36.
Art. 20 reads as follows: "Article 20 Non-discrimination

1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.

2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria".

[63] Paragraph 98 of the Advocate General's opinion. The referral to recital 95 in the preamble of the directive (footnote 84) seems to allow a disclaimer, even if the risk of a procedure in the consumer's Member State is its reason. It states that objective reasons (for different tariffs and conditions) can be extra risks linked to rules differing from those of the Member State of establishment.

[64] See paragraph 82, where the Court considers that the European Parliament by its legislative resolution on the proposal for *Brussels I* rejected wording stating that the trader had to purposefully direct his activity in a substantial way to the Member State of the consumer's domicile.

[65] The amendment was part of the European Parliament legislative resolution on the proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348) C5-0169/1999 – 1999/0154(CNS)), *OJ* C 146, 17 May 2001, 98 read jointly with 101.

[66] COM(1999) 348 final – 99/0154 (CNS), *OJ* C 376E 28 December 1999, 1.

to that other Member State or to several countries including that Member State[67]. The European Parliament amended – in vain in the end – the proposed recital 13 in a corresponding way[68].

47. Inspired by the factual context of the main proceedings that led to the preliminary proceedings, the Court enumerates in an non-exhaustive way, some elements that "are capable of demonstrating the existence of an activity 'directed to' the Member State of the consumer's domicile"[69]. One may note – as explained before – that the relevancy of this 'information' is not limited to art. 15(1)(c) Brussels I, but also concerns the Rome I that is in this regard worded identically. Moreover it is justified to assess this 'information' in an identical way.

International character of the activities

[67] The amendment continued, seemingly confirming the relevance of disclaimers as well, that 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.

[68] *OJ* C 146, 17 May 2001, 97 read jointly with 101.
Amended the proposed recital, that didn't make it to the end of the legislative procedure, read as follows: "Account must be taken of the growing development of the new communication technologies, particularly in relation to consumers. *In* particular, electronic commerce in goods or services by a means accessible in another Member State constitutes an activity directed to that State *where the on-line trading site is an active site in the sense that the trader purposefully directs his activity in a substantial way to that other State*…"
The changes due to the amendment are stressed by the author.
In amendment 35(see page 95) (introducing new recitals 41, 4b and 4c) the Parliament stresses the likely deterrent effect on new entrants to the growing electronic-commerce market of allowing consumers to sue in the courts of their domicile.
Regarding the refusal of the amendments, see: Amended proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, presented by the Commission of the European Communities pursuant to Article 250(2) of the EC-Treaty on 26 October 2000, COM(2000)689 final – 1999/0154 (CNS), *OJ* C 62 E, 27 February 2001, 243. The Commission inter alia contends that the definition suggested by the European Parliament 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 Regulation. Moreover, the Commission considers that 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 for the Commission that the supplier of the goods or services has directed his activities towards the state where the consumer is domiciled. Lastly, the definition suggested by the European Parliament is according to the Commission not desirable as it would generate fresh fragmentation of the market within the European Community.
Regarding the deletion of the proposed recital 13, see p. 245.

[69] Paragraph 83.

48. In paragraph 83 the Court of Justice of the European Union first of all mentions the international character of the activity at stake.

    One may defend that tourist activities as developed by Reederei Schlüter and hotel Alpenhof may be considered as having a transnational character. It is interesting to note in this regard that the Court, given the facts of the main proceedings, expressly mentions *certain* tourist activities as having an international nature.

49. Activities in tourism – even if related to different countries (i.e. voyages by freighter from Europe to Asia as in the *Pammer*-case) – do not *per se* aim at foreign markets[70]. This doesn't exclude them from being relevant evidence on the contrary. To assess the activities' scope other evidence regarding the scope of the activities has to be taken into account as well.

    Nevertheless, tourist activities – even if the services are rendered abroad, which is quite common in this sector - can as well be pursued only in one country, i.e. where the trader is established. The location of the service delivery, i.e. where the journey leads to, is not to be confounded with the market the trader directs activities to. The market share strived for can be purely 'internal'. While the offer is national, the services the tourist activities consist of can be rendered globally.

Telephone numbers with international codes

50. An indication for the Court is as well the fact that telephone numbers with an international code are mentioned[71]. The international code can be seen as information that is expressly meant to give international customers easy access to the trade. Therefore, the reasoning of the Court seems to be, that this information has to be assessed as a way to 'invite' foreign customers[72], thus expanding the reach of the trader's activities to (a) foreign market(s).

[70] Comp. Paragraph 90.
[71] Paragraph 83.
[72] Though not necessary being a specific invitation as meant in art. 13 *Brussels Convention.*

Domain names

51. Top-level domain names can be seen as an indicator for the trader's extraterritorial ambition/intention as well, namely if they differ from the one of the Member State in which the trader is established[73].

    One may wonder whether the Court doesn't overestimate the relevance of top-level domain names as an indication of the international ambit of a trader, especially when neutral top-level domain names are involved.

    Other characteristics of the trader's behavior have to be taken into account assess whether the latter are part of the expression of the trader's intention to reach foreign markets and if so to determine whether the scope of its activities can be connected to specific countries. The same goes for the use of some 'exotic' top-levels. Though linked to a country they can be seen as the flag-state of activities with an international or even global reach. Complexity will even be added to the debate when top-level will be linked to regions rather than countries.

    One may therefore wonder whether domain names must not mainly combined with other elements rather than being *in se* a good indicator for a commercial activity that is directed to another State than the one in which the trader is established.

Description of initeraries

52. Fourthly, the Court of Justice of the European Union considers the description of itineraries from (an) other Member State(s) to the place where the service is provided as evidential[74]. A 'How to reach us' or 'How to get there', informing customers coming from abroad about the right itinerary to where the service is delivered proofs the trader's intention to direct his activities to the State in which the itinerary's 'point of departure' is located.

[73] Paragraph 83.
[74] Paragraph 83.

Language and currency

53. As was explained before, in a joint statement on articles 15 and 73 Brussels I, the Council and the Commission expressed serious doubts regarding the relevancy of the language used on an ICT-platform[75]. Neither the used currency was seen as decisive information to evaluate a website as soliciting the conclusion of distance contracts (with consumers in Member State than the one in which the trader is established).

    This approach was echoed regarding the applicable law on contractual relations – and especially the applicability of the consumer-friendly choice-of-law rules in art. 6 – in recital 24 of the preamble of *Rome I*.

54. The Court of Justice of the European Union in consideration 84 subscribes this point of view, as far as languages are concerned that are generally used in the Member State from which the trader pursues its activity.

    The fact that a website contains information in German is not to be seen as an element to establish the trader's intention to direct activities to another country where German is generally used, Austria for instance, if the trader pursues its activity from Germany, or more generally spoken from a country where this language – German – is generally used.

55. One may defend an analogous reasoning for the relevancy of the currency that is mentioned on a website.

    Moreover, within the European Union account has to be taken of the Eurozone. In order to determine the intention of a trader, established in the Eurozone, to reach with his business other Eurozone countries the used currency – i.e. the Euro - seems not decisive. On the other hand the use of the Euro on the website of a trader pursuing activities from a State where

[75] Statement of the Council and the Commission on Articles 15 and 73 of Regulation 44/2001.
The statement can be consulted on the website of the European Judicial Network in civil and commercial matters (http://ec.europa.eu/civiljustice) .
Follow the hyperlink: http://ec.europa.eu/cilviljustice/homepage/homebage_ec_en_declaration.pdf.
Last consultation of the site: 30 May 2011.

another currency is used can be seen as an indicator of his intention to be active on the market of the Eurozone States or one/some of them[76]. To determine whether all or only some Eurozone States are 'targeted' a combination of elements seems necessary. Information thus will have to be assembled.

56. Lastly one may wonder whether the use of English in a website, though by a trader pursuing activities from a country where it is not an official language/not generally used, can be seen as a decisive indicator – at least when not combined with other information – to target other countries.

    English is a very prominent language on the internet and therefore it could, without complementary information, be seen as a non-distinctive characteristic.

    In this line of reasoning the use of English should not in itself be seen as establishing the trader's intention to target countries where English is generally speaking. If it should, other elements would be necessary to determine which particular English-speaking countries fall within the trader's scope. On the other hand, the use of this language should not oppose the conclusion that the trader – if other elements in this sense are present – is directing his activities to a State where English is not generally speaking.

57. The presumption that all internet users can feel addressed if information is in English, because of the prevalence of this language on the internet, justifies the requirement of complementary elements.

    A cautious approach of the use of this language is a prerequisite to avoid that the application of the consumer protective private international law rules can be claimed almost globally.

[76] The assessment requires great care, since the situation might even be more complex. If a trader, pursuing activities from a Member State (whether part of the Eurozone or not) uses the USD as currency this is, due to the global role if this currency, not in itself a reason exclude EU-countries from the reach of those activities.
The use of the Euro can, for the same reason – especially since lot of websites integrate payment by credit card in their website – not in itself be seen as an exclusion of Member States out of the Eurozone or even third countries from the activities' scope.

From this point of view, the use of the English language can better be seen as a weak indicator for the intention to reach countries where English is generally spoken. Otherwise the major role of this language in activities on the net than to easily qualify its use as an indicator for the intention to reach all countries.

58. Notwithstanding this remark, the Court - though (f.i. in the *Pammer*-case) in a context where the language of the website was the trader's language as well – considered that if the website permits consumers to use a *different* language or a *different* currency, the language and /or currency can be taken into consideration. This means that it can constitute evidence from which it may be concluded that the trader's activity is directed to other Member States[77].

59. Anyhow, the wording used by the Court of Justice of the European Union seems not contrary to the care we suggested when assessing the aforementioned elements.

According to the court they *can* be taken into consideration and they *can* constitute evidence from which the trader's intention may be concluded.

The Court doesn't anticipate on the result of the assessment but only points out elements that can be taken into account when assessing. The Court's consideration is therefore very 'conditional'. Moreover, the Court clearly mentions that the website – of the trader or its intermediary – *and* the trader's overall activity must make apparent that the trader envisaged doing business in the Member State of the consumer's domicile[78].

60. Such a *combined* assessment seems very useful as factors as the use of English as the website's language or the use of a widespread currency may on the one hand contribute to the international character of the site, but seems on the other hand non-decisive or neutral regarding the specific countries the activities aim at.

[77] Paragraph 84.
[78] See paragraph 92.

There are two options in that case. The first one leads to the conclusion that the trader in this regard has to bear the risk. This means that his activities are deemed to be global and therefore directed at all the countries the non-specified international character of the website covers, unless other indicator are restricting its reach to (a) specific State(s). This risk of global impact seems contrary to the *ratio legis* of art. 15 *Brussels I.* The second option on the contrary shifts the risk to the consumer. It deprives him of protection as the site's design contributes to the conclusion that it bears internationally oriented activities, though not links them specifically to his Member State[79].

As the broad and non-decisive character of the site may not give way to the trader to circumvent the conditions of application set out in art. 15 Brussels I, the role of complementary characteristics of the trader's activities is crucial[80]. Cases where they're lacking illustrate the weakness of the wording of art. 15 as the non-decisiveness of the direction of internationally oriented activities could deprive a consumer of the protection while the need for protection is not different than if the international scope of the trader's activities are clearly directed to his domicile's Member State[81].

[79] One may think about a website, including the possibility to order online, from a trader established in a country where English is generally spoken, drafted in English, using the USD as currency for the transaction, without a disclaimer and with uniform prices in which the delivery costs are included.
Another example could concern a website with top-level domain *.de* that is only partly drafted in a language different from that of the State from which the activities are pursued (for instance only part of the site is translated in English, while the module for and information on ordering services are only in German since the trader is established in Germany), whereby it seems defendable indeed that the activities are directed beyond Germany/German speaking countries, but remains unclear to which countries, English-speaking as well as where other languages are generally used due to the overwhelming impact of this language, the activities might be directed.
See in this regard: TO BE COMPLETED.

[80] If they are lacking, it seems doubtful that the accessibility in itself – which is global - combined with the 'undefinied' international character of the trader's activity trigger the consumer protective PIL-rules. The activity may in this case not be purely local nor directed to.
See in this regard: TO BE COMPLETED.

[81] See in this regard the following excerpt from the second point of the disposition of the Court in the *Alpenho*f-case, stating that it has to be ascertained whether (…) it is apparent form the website 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.

International clientele and its comments

61. Lastly, the Court of Justice of the European Union mentions in paragraph 83 the trader's mention of an international clientele, composed of customers domiciled in various/a Member State(s) different from the one where the trader is established, as an item of evidence capable of demonstrating an activity that's directed to the concerned Member State(s).

    For the Court this information is particularly relevant if the international nature of the trader's customers can be demonstrated by accounts written by them.

    If the international clientele is presented by means of information originating from them and concerning their evaluation of the trader's products/services, the pretention that activities are directed to them gains is strengthened as it is based on information regarding their contract(s) with the trader.

62. It's neither excluded that the mentioned clientele can, depending on the wording, be an element that sustains the conclusion that activities are directed to all or different Member States. Therefore other elements concerning the business' scope can be relevant. This is even possible in cases where the international clientele referred to doesn't include customers in the targeted Member States[82]. In this case, other elements may be required however to establish the existence of activities directed to the concerned countries. It has to be remarked as well that this information is an element that sustains the conclusion that the concerned activity has an international character.

    On the other hand, mentioning a broad clientele can as well lead to the conclusion that the international activities simply lack a direction[83]. In that case, the international elements seem non-decisive of neutral. As defended above, the qualification of the activities as directed to

[82] The concrete wording can thus be an element that sustains the conclusion that the activities of the trader are directed beyond the concerned Member States (i.e. the Member States in which the mentioned clientele is domiciled).

[83] This conclusion may even not be excluded if there is a reference to clientele of (a) specific Member State(s). The wording can be that 'flat' that the references nevertheless illustrate a broad approach. That approach must not necessary be *directed*.

(a) specific Member State(s) or not will depend on other elements. They'll be relevant to determine the business' scope.

Specific problem – contract concluded on the spot

63. For the Court several items of evidence, enumerated in the so-called 'grey' list, seem apparent in the *Alpenhof*-case.

The hotel however pretends that art. 15(1)(c) *Brussels I* cannot apply since the contract is concluded on the spot and not at a distance. For the Court the fact that the keys are handed over and payment is made on the spot does not prevent the application of art. 15 since the consumer is contractually bound at a distance by the reservation and confirmation[84].

64. Moreover it is not clear whether the wording of art. 15 restrains its application to distance contract.

65. Article 15(1)(c) *Brussels I* concerns *a contract* that is concluded with a person who directs activities to the Member State of the consumer's domicile[85]. For the application of the consumer-protective jurisdiction rules it requires that the contract falls within the scope of the concerned activities. If a trader wants to sell product A in Member State B and offers product C exclusively in its home-country D, a consumer living in who buys product D is not entitled to invoke the protective PIL-rules.

Article 15(1)(c) doesn't prescribe how the contract has to be concluded.

In this regard it is even questionable whether the balance shift between the consumer and the trader – for determining the law applicable to the contractual relationship or of the court that has jurisdiction to settle disputes regarding the contract – in a distance contract differs that

[84] Paragraph 87.
[85] An analogous reasoning can be defended for art. 6 *Rome I*.

much from the need of protection if the consumer, confronted with commercial activities in his home country, concludes the contract where the trader is established and where the consumer rendered himself to. Whatever the means of the conclusion of the contract were, the trader took the initiative to conclude with consumers in a 'foreign' State. He dericted his activities to that State.

The protection of that State's legal order is at stake and it could be contended that if a trader decides to solicit business in that State, he has to be prepared to assured consumers domiciled there that protection. This concludes seems not less justified if the contract itself is concluded where the trader is established.

66. In this regard it has to be mentioned as well that the wording of art. 15 *Brussels I* differs from art. 13 *Brussels Convention.* Art. 15 doesn't require any longer that the consumer took the steps necessary for the conclusion of the contract in his home State. It has to be recalled that the place of conclusion of the contract is often difficult to determine and of limited relevance for consumer's need of protection. This protection is necessary to tackle the imbalance between the latter and the trader. The first being a *one shot*-player and the latter a *repeat*-player.

Specific problem: intermediaries

67. In the *Pammer*-case the question arose whether a trader can be seen as directing its activities to one or more States if the pieces of information that sustain that conclusion are found on the website of an intermediary company.

For the Court of Justice of the European Union it was relevant in this regard that the intermediary was acting *for and on behalf of* the trader. In its assessment the national Court has to take into account:

- whether the trader was or should have been aware of the international dimension of the intermediary's activities;

and

- how trader and intermediary are linked[86].

Concluding remarks

68. The main importance of the *Alpenhof*-decision concerns the balance the Court of Justice of the European Union, asked to explain the notion 'activities directed to' in art. 15(1)(c) Brussels I and echoed in art. 6 *Rome I* sought between the consumer's justified need for protection on the one hand and the trader's quest for a legal framework with enables him to foresee the effects of the activities he develops by means of ICT. Especially in view of facilitating the development of electronic commerce within the European, the Court had to deal very carefully with the effects of the global reach of the internet. The complexity the Court of Justice of the European Union finds itself confronted with is related to the fragile balance of interests it strives for between the necessary protection for the consumers on the one hand and the need for a regulatory framework that stimulates them to conclude transboundary contracts regarding the delivery of services and goods, that are offered by means of the internet.

69. For the Court, the global reach of the internet does not necessary lead to a comparable scope for the activities that are developed by means of the internet. Therefore the Court considered that the accessibility of a website is a sufficient element to establish the 'directed' character of activities.

Since websites are at least principally, and in the absence of measures by the trader to limit the territorial scope of his website, globally accessible, this interpretation would seriously

[86] Paragraph 89.

undermine the relevance of the criteria of applicability set out in art. 15(1)(c) *Brussels I* and art. 6 *Rome I*. Moreover the scope of the consumer's protection would be that broad that it would probably not be limited to those cases where according to the European legislator the balance of power needs to be corrected with protective PIL-rules.

70. The consumer may therefore only invoke protection if the trader intentionally develops business activities in the Member State of the consumer's domicile/place of residual residence. The contract must therefore be framed in an initiative of the trader to be active on the concerned market. This implies as well that the trader may not be taken by surprise.

    As mere 'web-presence' – accessibility – does not meet the burden set out by *Brussels I*/*Rome I*, the Court embraced the idea that on a case-driven basis the presence of elements establishing 'directed activities' has to be assessed. The elements listed in the *Alpenhof*-case have to be considered as non-exhaustive list of relevant indicators derived from the trader's presence on the internet. They be taken into account apart, jointly or combined with other aspects of the trader's activities.

71. As the comments developed on this contribution on the *Alpenhof*-case made clear, the result of the assessment is depending on specific characteristics of the case. One could argue that the flexibility and the preciseness of the assessment that is the result of it, is outweighed by the loss of foreseeability in this approach. While this may be true at first sight, a well-balanced case-oriented approach can be lead to a more foreseeable result than a rigid interpretation, since that result is in line with the reasonable expectations of both parties, based on their behavior[87]. Moreover, this approach seems a better guarantee for a precise assessment of the interests at stake, taking into account the characteristics of every single case.

72. Since the mere accessibility of a website is not sufficient to trigger the specific protective PIL-rules for consumers, a passive website can in itself not lead to the conclusion that the trader is directing his activities to where it can be consulted.

[87] B. DE GROOTE, Onrechtmatige daad en internet, Larcier, Gent,…TO BE COMPLETED.

This doesn't mean however that an interactive website is in itself a synonym for 'directed activity'. The Court of Justice of the European Union's decision is especially important where it denies the relevancy of the passive/interactive character of a website. As well the information on the site, the way in which it is presented, the features of the site as the other characteristics of the activities developed by means of it have to be considered jointly in order to decide on the applicability of art. 15 *Brussels* I/art. 6 *Rome I*.

73. The joint approach is important as well since it is possible that the trader's platform can be considered as internationally oriented, but conceived in a way that it is hard to assess whether it is specifically directing activities to a/some determined Member States. Combining the ICT-platform with other characteristics of the trader's activities can enhance the possibility to determine what States might be targeted.

    This is important as there might be situations where it is not justified to deny a consumer the PIL-protection for the simple reason that he concluded in the framework of activities with a clear international scope, though lacking the characteristics to establish that they're directed to the Member State of his domicile.

74. Taking the above mentioned considerations into account, it is undeniable that the conditions of applicability of the consumer protective PIL-rules have some shadow sides.

    Striving for an equitable balance between the interests of consumer and trader, the interpretation given in the *Alpenhof*-case could lead to some frustration as well. While considers as to broad by the trader, the conditions of applicability might be seen as to professional-friendly by the consumers.

    The Court however, only wants to avoid an interpretation that discourages traders from using ICT-platforms for developing their business abroad. A too narrow interpretation however might negatively affect the consumer's willingness to enter in transactions on the internet.

75. The importance of the scope given to the protective PIL-rules for the development of the e-commerce may therefore not be underestimated. The assessment of information in regard of the suboptimal growth of e-commerce may therefore not be neglected. In the autumn of 2010, the European Commission launched a consultation regarding the need to revise the directive on e-commerce of June 13 2000[88] in which it acknowledged that ten years after the adoption of the directive, the development of retail electronic commerce remains limited to less than 2% of European total retail trade. This might lead to the conclusion that e-commerce is a sector in crisis or at least a sector that doesn't succeed to realize its full potential.

The European Commission is convinced that electronic commerce constitutes an important means to promote cross-border trade. The critical analysis this contribution gave of the protective PIL-rules, and especially their conditions of applicability, in the "European" PIL-instruments has to be considered against this background.

Further research seems necessary to clarify to what extent the PIL-framework for 'consumer contracts' could have a positive effect on consumers' trust in electronic commerce and traders' decision to invest in it.

76. It might be that a clear decision regarding the weight given to the interests of professionals and consumers turns out to be inevitable in the future. As the elements that led the Court of Justice of the European Union in the *Alpenhof*-case illustrate, this decision is far from evident however since there are good elements in favor of both sides.

On the one hand it could be argued that conditions for the applicability of consumer protective rules in favor of consumers have to be drafted/interpreted narrowly. Web 2.0 illustrates that e-consumers growingly emancipate and that their role changed over the years.

[88] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *OJ* L 178, July 17 2000, 1-16).
Public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on Electronic commerce (2000/31/EC)).
TO BE COMPLETED → REFERENCE OF WEBSITE

Ever more frequently the so called consumer offers goods/services as well. The importance of *consumer-to-consumer* transactions (C2C) accrues and if consumer protection is needed, one may wonder whether it's justified to limit that protection to *business-to-consumer* transactions (B2C).

What is mentioned before seems the expression of the idea that the weak consumer, especially in an online context, is a myth. Though mainly for other reasons, namely the meanwhile sufficient degree of harmonization of consumer law in the European Union, it is worth noting as well that the aformentioned consultation regarding the e-commerce directive questions the exclusion of consumer contracts from the internal market clause[89], which could lead to another approach of e-consumers and 'traditional' ones.

77. This question has to be dealt with carefully however. Would it mean for instance that e-consumers are less vulnerable than consumers that are approached with other means of communication, especially in view of the ever growing impact of ICT-platforms. Couldn't it be that treatment of both has to be in line and that the risks a consumer occurs can even be amplified in an e-context[90]. And if not, should consumer protection be abolished or limited to certain kinds of contracts, depending on their content, as is the case in art. 15(1)(a) and (b) *Brussels I*[91]? It has to be noted in this regard that *Rome I* opted for a protection that is not depending on the character of the contract – in this regard the field of application of art. 6 is not *materially* limited – and linked the consumer's protection to the professional's behavior.

78. On the other hand, in the light of the easiness with which international contracts are concluded over the internet, it could be argued as well that consumer protection has to be given a broad scope. Hereby, one could suggest a generous interpretation of art. 15 *Brussels*

[89] Public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on Electronic commerce (2000/31/EC)), especially question 31.
TO BE COMPLETED → REFERENCE OF WEBSITE
[90] From this point of view an extension of the *Brussels I*-jurisdiction rules to third countries could be of major importance for the trust in e-commerce, though it might incite third country traders to avoid trader relations with consumers domiciled in the European Union.
[91] As these contracts concern credit relations, the European legislator takes the approach that, whatever the circumstances under which they're concluded, the competent court has, especially because of their major impact has to be appointed with special care for the consumer's interests.

I/art. 6 *Rome I* or to extend the consumer protection to all distance contracts or even all contracts with consumers[92].

A first argument could concern the overall assessment of the power balance between consumers and professional traders. Thereto comes that a professional who deliberately uses the internet as a business-tool since it facilitates him to solicit business in foreign markets, has to take into account the risk of being confronted with the legal order of countries where he's found present due to the site's accessibility. Technology growingly enables to limit the territorial scope of an e-application and the analysis of the *Alpenhof*-case made clear that also disclaimers can be relied upon.

Moreover, since 'neutral' international sites might deprive the consumer of its protection (art. 6 *Rome I*/art. 15(1)(c) *Brussels I*), a broader scope of protection might be required. One may hereby think about an approach that permits a marginal correction *in concreto*, whereby the trader could contest the consumer protection to be invoked if, taking into account all the efforts he did to exclude (a)(certain) State(s) from his activities, it would be clearly unreasonable to confront him with the protective for having transactions with consumers in that State. This concrete case-oriented approach would then be preferred over the translation of all situations in which consumer protection would not be justified, since it would clearly overestimate the consumer's need for protection and outweigh its interests over those of the professional, *in abstracto* in the overall wording of a jurisdiction or choice-of-law rule.

79. Lastly, for reasons of legislative 'economies', the need to mention specifically 'directed activities' to a Member State can be questioned. Couldn't it be argued that if a trader directs his activities to a Member State and thus solicits business there, he in fact pursues his activities in the concerned Member State(s).

[92] If limits might have to be set, they could be related to the contract's character.

Lastly, one may wonder RELEVANCY PURSUE AND DIRECT