EU private international law and the application of EU consumer law: towards a EU PIL method

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Abstract

The Rome I Regulation on the law applicable to contractual obligations provides for special protective conflict rules to determine the law that is applicable to cross-border consumer contracts. However, in some cases, they are considered insufficient to ensure the application of mandatory provisions contained in EU consumer directives. Certain gaps and inconsistencies derive from the coordination between the Rome I Regulation and EU consumer directives, resulting in legal uncertainty and damaging the EU objectives of consumer protection. This publication discusses the existing inconsistencies deriving from that coordination, such as the exclusion of 'mobile consumers' from Article 6 Rome I. Also, the possible private international law (PIL) approaches to ensure the application of EU consumer directives according to their scope are debated. Finally, this article proposes a more EU-focused PIL method that would be able to deal with harmonised areas of EU law such as EU consumer law.

1. Introduction

The European Union has enacted numerous directives regarding consumer protection, since the protection of consumers is essential for the EU internal market, both at an economic and social level. As part of the rules of EU private international law (PIL), the conflict rules of the Rome I Regulation on the law applicable to contractual obligations (hereinafter: Rome I Regulation)[1] determine the law that is applicable to contracts in cross-border situations. If, as a result of the operation of the conflict rules of the Rome I Regulation, a law of a non-Member State becomes applicable to a consumer contract, the protective mandatory provisions of EU consumer directives are not applied. To ensure the application of EU consumer protection rules as per the scope of their application, EU PIL conflict rules and EU law must be coordinated.

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1 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ* 2008, L 177/6.

In that context, this article aims to evaluate whether EU conflict rules and EU secondary law are well coordinated regarding the protection of consumers and, if not, how they could achieve a mutual understanding.

Historically, two main PIL methods have been used to answer the question of which law applies to a legal relationship in cases that have connections with more than one legal order: the unilateral method and the multilateral method.[2] The unilateral approach consists of determining the spatial reach of a rule to determine its applicability, having as a starting point the norm itself. The multilateral approach consists of designating the applicable law through objective connecting factors based on the legal relationship, regardless of whether it is the law of the forum or a foreign law. The current EU PIL system is based to a large extent on the traditional multilateral conflict of laws method proposed by Savigny.[3] However, methodological purity has been rejected.[4] Also, numerous criteria and principles are part of our PIL system, such as party autonomy, the weaker party protection principle or the doctrine of overriding mandatory rules, as can be seen in the Rome I Regulation.[5]

However, the effectiveness of the Rome I Regulation to ensure the application of mandatory provisions of EU consumer directives can be questioned. Some EU consumer directives – especially the second generation of EU consumer directives[6] – include a so-called scope rule that interferes with PIL. Such scope rules generally provide for the application of the protection provided by the EU consumer directive when the situation is closely connected with the EU and they adhere to a unilateral PIL approach. In contrast, other more recent directives refer the conflict of laws issue to the Rome I Regulation.[7] Among scholars, the general view is that the

2 K. Siehr, 'Private International Law, History of', in: J. Basedow and others (eds.), *Encyclopedia of Private International Law*, Cheltenham: Edward Elgar Publishing 2017; J. Basedow, 'Private International Law, Methods of', in: J. Basedow and others (eds.), *Encyclopedia of Private International Law*, Cheltenham: Edward Elgar Publishing 2017.

3 F.K. von Savigny, *System des heutigen römischen Rechts*, Vol. 8, Veit und Comp 1849. *System des heutigen römischen Rechts* is Savigny's treatise composed of eight volumes published between 1840-1849. The eight-volume *System des heutigen römischen Rechts* (Berlin, 1849) in itself constitutes a treatise on the conflict of laws. An English translation is found in F.K. von Savigny, *Private International Law. A Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time (Translated by William Guthrie)*, W. Guthrie (ed.), T & T Clark 1869.

4 Nowadays, the conflict of laws system is characterised by the existence of a plurality of methods, since after the 1960s the exclusivity of the multilateral method has been questioned, and the need for certain flexibility and adaptation to the social and legal reality of the time was demanded: J. González Campos, 'El paradigma de la norma de conflicto multilateral', in: *Estudios jurídicos en homenaje al Profesor Aurelio Menéndez*, Madrid: Civitas 1996, p. 5239-5242; P. Mayer, 'Le mouvement des idées dans le droit des conflits de lois', *Droits* 1985, p. 129; B. Audit, 'Le caractère fonctionnel de la règle de conflit', *Collected Courses of the Hague Academy of International Law* 1984, p. 223, p. 219.

5 M.H. ten Wolde and K.C. Henckel, *European Private International Law: A Comparative Perspective on Contracts, Torts and Corporations*, Groningen: Hephaestus Publishers 2012, p. 9-11.

6 This refers to the EU consumer directives enacted during the 1990s, such as the Unfair Contract Terms Directive (Directive 93/13/EEC, *OJ* 1993, L 95/29). See *infra* section 3.

7 E.g., Consumer Rights Directive (Directive 2011/83/EU, *OJ* 2011, L 304/64). See section *infra* 3.

current situation seems to be chaotic.[8] While it is defended in this article that the application of the EU consumer directives should depend on the operation of the Rome I Regulation, the fact that certain directives intend to cover a broader scope of application should be taken into account to consider whether the current drafting of the existing conflict rules needs to be more EU-focused.

In that context, this article will focus on the scope of EU consumer protection rules in relation to the Rome I Regulation.[9] It will first analyse how the Rome I Regulation determines the law applicable to consumer contracts, focusing on eventual gaps and inconsistencies, especially regarding the protection of consumers in the EU. Second, the applicability of EU consumer directives will be discussed, considering whether a change of approach is necessary in our PIL method. Finally, suggestions concerning the Rome I Regulation and EU consumer directives are made.

2. The Rome I Regulation on the law applicable to contractual obligations and its mechanisms for protecting consumers

2.1 Article 6 Rome I Regulation and the application of EU consumer law

Article 6 Rome I determines the law applicable to cross-border consumer contracts falling within its scope of application.[10] First, it limits the choice of law of the parties to avoid a possible abuse by the stronger party to the contract. Instead of completely eliminating the possibility to choose the law applicable to the contract, it uses the preferential law approach, under which the choice cannot deprive the consumer of the protection provided by the mandatory provisions of the law that is applicable in the absence of a choice.[11] Second, the law that is applicable in the

8 The situation of the co-existence of these scope rules and Art. 6 Rome I has also been described as 'unsatisfactory', 'confusing', 'irritating' or 'unnecessary'. U. Magnus, 'Introduction', in: U. Magnus and P. Mankowski (eds.), *Rome I Regulation – Commentary*, Cologne: Verlag Dr. Otto Schmidt 2016, p. 23, 24; M. Weller, 'Article 23. Relationship with Other Provisions of Community Law', in: G.P. Calliess (ed.), *Rome Regulations. Commentary*, 2nd edn., Alphen aan den Rijn: Kluwer Law International 2015, p. 422, 423.

9 Therefore, problems arising from the interaction between e-commerce or privacy directives and PIL, or from the definition of the consumer in the case of dual purpose or changed purpose, are outside the scope of this article.

10 In order to retain parallelism between jurisdiction and the applicable law, Art. 6 was drafted parallel to Art. 15 Brussels I Regulation (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* 2001, L 12/1) now replaced by Art. 17 Brussels I recast (Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2012, L 351/1).

11 While professionals are normally aware of which law will benefit them, consumers do not know which law the professional wishes to apply. Professionals will invest in gathering information regarding the expected benefits of the application of a certain law, while consumers will only become aware of the quality of the law after problems occur, which is after the conclusion of the contract. It would be of little use protecting the consumer with national (or EU) substantive law if a professional, by inserting a jurisdiction or choice of law clause, can escape the application of such protective provisions of the consumer's law. G. Rühl, 'Consumer Protection in Choice of Law', *Cornell International Law Journal* 2011, p. 569, 574.

absence of a choice is, in the case of consumer contracts falling under Article 6 Rome I, the law of the habitual residence of the consumer. By designating the law of the country of the habitual residence of the consumer to be applicable, this conflict rule obliges the costs related to the legal fragmentation of the international transaction to be borne by the other party to the contract. A party to an international transaction does not have the security that the rights deriving from its own legal system are the same as the ones deriving from other foreign legal systems, or the security that the rights derived from a legal system can be recognised and implemented in others. The risks involve having to go to a foreign country to commence legal proceedings, to obtain evidence, to request the recognition or enforcement of a decision or to have to gather information and adapt certain conduct to a foreign law. These risks have to be assumed by one of the parties to a cross-border contract. PIL normally allocates the costs derived from these risks to one of the parties. In the case of consumer contracts, when the risks of internationality are created by a foreign professional when approaching the consumer in the consumer's own country, those risks and costs are to be borne by the professional.[12] Because of its limited material and territorial scope, Article 6 Rome I does not cover all consumer contracts. In general, consumer contracts that are not covered respond to the reasonable expectations of the consumer and predictability for the professional (e.g., a consumer actively purchasing a souvenir in another country cannot expect protection under the law of his or her own country of residence, in the same manner that that professional cannot predict the application of that law). However, there are certain 'gaps' in protection that derive from Article 6 Rome I, which result in the non-application of EU mandatory provisions when these seem to have the intention to be applied.

Firstly, as to the exceptions to Article 6(4) Rome I, the first exception of consumer contracts 'for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence' (e.g., accommodation in a hotel, a language course, etc.) – Article 6(4)(a) –, or the exclusion of active consumers, the solution under the Rome I Regulation does not seem to be completely satisfactory.[13] In these cases, the consumer is treated in the same way as the professional, since the general rules of Articles 3 and 4 Rome I become applicable. For example, the case where a Dutch consumer enters into a consumer contract for a Spanish language course held in Spain, and the contract contains a choice of a foreign non-Member State law. Since the consumer is acting within the EU internal

12 F.J. Garcimartín Alférez, 'La racionalidad económica del derecho internacional privado', *Cursos de derecho internacional y relaciones internacionales de Vitoria-Gasteiz* 2002, p. 128, 131-133, 147. Art. 6 Rome I, Art. 17 Brussels I recast and the related case law (e.g., *Pammer and Alpenhof* case, ECJ 7 December 2010, Joined cases C-585/08 and C-144/09, ECLI:EU:C:2010:740, *NIPR* 2011, 78) define the criteria to determine when a professional is directing its activities at the consumer's country of habitual residence. However, the entry into force of the Geo-blocking Regulation (Regulation (EU) 2018/302, *OJ* 2018, L 601/1) in the EU has given rise to a discussion regarding the risk of some professionals – especially SMEs – facing international complications when relying on the existing criteria. For a discussion regarding the PIL aspects of the Geo-blocking Regulation, see: M. Campo Comba, 'The new Geo-blocking Regulation: general overview and private international law aspects', *NIPR* 2018-3, p. 512.

13 Also, it has to be noted that the situation in Art. 6(4)(a) Rome I would fall under the protective jurisdiction rule for consumer contracts (Art. 17 Brussels I recast) but it is excluded from the protective applicable law rule of Art. 6 Rome I on the grounds that, in such cases, the consumer cannot reasonably expect protection under his own law. Giuliano-Lagarde Report, *OJ* 1980, C 282/1, p. 24.

market, he/she might expect the minimum EU protection to be applicable.[14] However, according to the Rome I Regulation, Article 3 Rome I would allow the choice of any foreign law, and mandatory EU consumer protection would only be applicable if all the relevant elements of the situation are located in the EU (Art. 3(4) Rome I).[15] For example, if the language course is provided in Spain by a US-based company providing language courses, it can be considered that not all the relevant elements are located within the EU and, as a result, the Dutch consumer would lose the EU consumer protection.

Secondly, mobile consumers that are targeted by a professional in a Member State other than their Member State of habitual residence are excluded from the territorial scope of Article 6 Rome I. For example, if a Moroccan company directs its activities towards tourists in the south of Spain, and a German consumer on holiday there takes part in a tour offered by this company or purchases some household appliances offered by that Moroccan company, the German consumer falls outside the protection of Article 6 Rome I.[16] Since the activities were not directed towards his country of habitual residence, but towards Spain, the German consumer would not be protected by Article 6 Rome I. As a result, the general rules of the Rome I Regulation will apply: if the contract provides for a choice of Moroccan law, Article 3 Rome I will determine that Moroccan law is applicable and, in the absence of a choice, Article 4 will generally point to the law of the habitual residence of the professional. However, a Spanish tourist could rely on the protection of Article 6 Rome I, and Spanish mandatory rules on consumer law would be applicable. The German tourist could only rely on the protection of Article 6 Rome I if the Moroccan company was also targeting Germany (e.g., approaching them in the German language, the terms and conditions were drafted in German, etc.). Thus, 'holidaying' or 'mobile' consumers are excluded from the territorial scope of Article 6 Rome I. However, it may seem

14 P. Lagarde, 'Remarques sur la proposition de règlement sur la loi applicable aux obligations contractuelles (Rome I)', *Revue critique de droit international privé* 2006, p. 331, 317; B. Añoveros Terradas, 'Consumidor residente en la Unión Europea vs. consumidor residente en un estado tercero: a propósito de la propuesta del Reglamento Roma I', *Anuario Español de Derecho Internacional Privado* 2006, p. 379, 393.

15 See *infra* section 2.2. As to which elements should be considered as relevant for the purposes of Art. 3(4) Rome I, authors generally agree that general connecting factors should be considered, such as the habitual residence of the parties, or the place of the performance or the place of the conclusion of the contract. Nationality becomes less important to the situation (it could become more relevant if both parties are non-EU nationals); similarly, the extra-EU place of incorporation becomes less relevant when the consumer was contracted with and is served by an establishment in the EU. Elements such as the currency or the language of the contract should not be considered as relevant when considering whether a contract is an extra-EU contract. However, when several of these elements appear together within the same contractual relationship, they could justify a legitimate interest in a foreign choice of law. A.J. Belohlávek, *Rome Convention – Rome I Regulation*, Huntington: Juris Publishing, Inc 2011, p. 703; S. Leible, 'La importancia de la autonomía conflictual para el futuro del derecho de los contratos internacionales', *Cuadernos de Derecho Transnacional* 2011, p. 214, p. 234, 235; R. Plender and M. Wilderspin, *The European Private International Law of Obligations*, 4th edn, London: Sweet & Maxwell 2015, p. 164.

16 According to the jurisdiction rule for consumer contracts under Art. 17 Brussels I recast, a Member State court could have jurisdiction in this type of situation and would be able to apply the protection of EU consumer directives if provided. Member State courts could have jurisdiction, for example, under Art. 17(1)(a) (if it is a contract for the sale of goods on instalment credit terms), or when the contract contains a choice for a Member State court (Art. 25 Brussels I recast), or under Art. 7 Brussels I recast (the place of performance).

reasonable that a consumer with his/her habitual residence in a Member State and contracting in another Member State after being targeted there by a professional would expect a minimum level of EU consumer protection to be applicable to that consumer contract. This consumer, despite contracting outside of his or her own country, is contracting within the EU market and has been targeted within the EU market.[17] The free movement of goods, services and people guarantees consumer freedom to choose between different offers of products and services among the Member States under the same conditions as consumers who are habitually resident in the specific Member State.[18] Denying protection deriving from the EU consumer directives to a consumer from a Member State who acquired products or services in another Member State is not compatible with EU objectives. Thus, in this case, Article 6 Rome I does not ensure the objectives and protection that the EU consumer directives aim to achieve.

2.2 Article 3(4) Rome I as a possible mechanism for protection under EU consumer law

Some of the deficiencies of Article 6 Rome I would be covered by Article 3(4) Rome I when there is a choice for non-Member State law and all the relevant elements of the situation are located within the Member States. This provision was introduced with the intention of assisting coordination between the general conflict of laws rules determining the law that is applicable to the contract and the specific rules of PIL contained in EU secondary law, or, more broadly, the necessity for compatibility within the EU legal system.[19] To the extent that the rules of the consumer protection directives are mandatory, their application would be ensured against a choice for a non-Member State law when all the relevant elements are located within the EU. Three elements are essential for the application of Article 3(4) Rome I: the choice of a third country law, all of the elements are located in the EU, and mandatory rules. However, even when not all the elements are located within the EU, there are situations where EU consumer directives are intended to apply. For example, the 'scope rules' contained in some of the EU consumer directives require the application of their provisions when the situation is closely connected to the EU.[20] Article 3(4) Rome I cannot be used to justify the application of European provisions when not all the relevant elements are located within the EU. As a result, Article 3(4) Rome I is the subject of debate since it does not fulfil its purpose of coordination and protection against an abuse of the law because it does not cover any extra-EU situations.[21] EU consumer directives

17 A. Espiniella Menéndez, 'Contratos de consumo en el tráfico comercial UE – terceros estados', *Anuario Español de Derecho Internacional Privado* 2014, p. 277, 298, 299.

18 Añoveros Terradas 2006, p. 394 (*supra* n. 14).

19 Belohlávek 2011, p. 707-711 (*supra* n. 15); J. Carrascosa González, *Ley aplicable a los contratos internacionales: el Reglamento Roma I*, Madrid: Colex 2009, p. 151, 152.

20 Regarding scope rules, see *infra* section 3.

21 Art. 3(4) Rome I was intended to coordinate EU PIL and the application of EU mandatory law (such as the provisions of EU consumer directives). However, using a different connecting factor than the 'scope rules' of those directives, while not eliminating those 'scope rules', means that such an aim is not fulfilled. Consumer Credit Directive 2008/48/EC (*OJ* 2008, L 133/66) was enacted after the Rome I Regulation and still contained a scope rule (Art. 22(4)). While that rule refers to a 'close link' with the Member States, Art. 3(4) Rome I would only ensure its application when all the relevant elements are located within the Member States. See F.J. Garcimartín Alférez, 'The Rome I Regulation: much ado about nothing?', *The European*

do not contain mandatory provisions that either apply to intra-EU or extra-EU situations. The mandatory provisions of EU consumer directives apply provided the situation falls within its scope of application, which can occur even if not all the relevant elements are within the EU. The conclusion is that Article 3(4) Rome I and the EU consumer directives are not entirely compatible.

2.3 Article 9 Rome I as a possible mechanism for protection under EU consumer law

It has sometimes been assumed that, when Article 6 Rome I fails to ensure the application of EU consumer directives because of the aforementioned 'gaps', the Member State in question can ensure the application of EU consumer protection deriving from EU directives as overriding mandatory rules through Article 9 Rome I.[22] Some authors have defended that 'scope rules' in some EU consumer directives (see *infra* section 3) determine the overriding mandatory character of the provisions contained in the respective directives.[23] This would mean that the provisions of the directive would be applicable according to Article 9 Rome I, which ensures the applicability of overriding mandatory rules irrespective of the law applicable to the contract. However, overriding mandatory rules are an exception to the normal operation of conflict of laws.[24] Firstly, it is questioned whether the rules on EU consumer directives fall within the

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Legal Forum 2008, p. 61, p. 65; H. Aguilar Grieder, 'Desafíos y tendencias en el actual derecho Europeo de contratos', *Cuadernos de Derecho Transnacional* 2012, p. 23, p. 34, 35.

22 Espiniella Menéndez 2014, p. 299 (*supra* n. 17); F. Pocar, 'La protection de la partie faible en droit international privé', *Collected Courses of the Hague Academy of International Law* 1984, p. 339. However, on most occasions that is not the case; see: J. Kuipers, *EU Law and Private International Law: The Interrelationship in Contractual Obligations*, Leiden: Martinus Nijhoff Publishers 2012, p. 200; H. Aguilar Grieder, 'La voluntad de conciliación con las directivas comunitarias protectoras en la propuesta del Reglamento Roma I', in: J.L. Calvo Caravaca and E. Castellanos Ruiz, *La Unión Europea ante el derecho de la globalización*, Madrid: Colex 2006, p. 53; J. Carrascosa González, 'La autonomía de la voluntad conflictual y la mano invisible en la contratación internacional', *Diario la ley* 2012, p. 7847; H.L.E. Verhagen, 'The Tension between Party Autonomy and European Union Law: Some Observations on Ingmar GB Ltd v Eaton Leonard Technologies Inc.', *The International and Comparative Law Quarterly* 2002, p. 135, p. 136.

23 Plender and Wilderspin 2015, p. 377-379 (*supra* n. 15); M. Fallon and S. Francq, 'Towards Internationally Mandatory Directives for Consumer Contracts?', in: *Private Law in International Arena. Liber Amicorum K. Siehr*, The Hague: Asser Instituut 2000, p. 156, 157; A. Bonomi, 'Article 9: Overriding Mandatory Provisions', in: U. Magnus and P. Mankowski, *European Commentaries on Private International Law*, Cologne: Verlag Dr. Otto Schmidt 2016, p. 616; S. Sánchez Lorenzo, 'La unificación del derecho contractual Europeo vista desde el derecho internacional privado', in: *Derecho patrimonial europeo*, Navarra: Thomson Aranzadi 2003, p. 374, 375.

24 The Rome I Regulation defines overriding mandatory provisions in Art. 9(1) Rome I as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation'. According to Art. 9(2) Rome I, overriding mandatory rules of the forum shall apply regardless of the law that is otherwise applicable, and, according to Art. 9(3) Rome I, the forum can give effect to the overriding mandatory rules of the country where the contractual obligations have to be or have been performed.

definition of Article 9(1) Rome I; secondly, it is argued that the existence of a scope rule does not determine the overriding mandatory character of the provisions of the directive.

It is necessary to distinguish between overriding mandatory rules and mandatory rules (or 'provisions that cannot be derogated from by agreement'). Where overriding mandatory provisions are aimed at protecting the public interests of the Member State in question, provisions that cannot be derogated from by agreement are aimed at protecting private interests, specifically the interests of weaker parties.[25] While all overriding mandatory rules fall within the category of mandatory rules, not all mandatory rules can be considered as overriding mandatory rules. Regarding the inclusion of certain provisions protecting consumers or other weaker contracting parties within the definition of Article 9 Rome I, neither doctrine nor the courts of the Member States share a common approach.[26] For example, German authors and courts follow a very restrictive interpretation of overriding mandatory rules. There is a strict distinction between *Eingriffsnormen*, or ordo-political rules (which pursue objectives of public interest, such as the protection of competition), and *Parteischutzvorschriften* (which pursue equilibrium between the parties to a contract, such as consumers' and employees' protection provisions). Only the former types of rules fall under the category of overriding mandatory rules.[27] Thus, a provision can serve either the individual interests of a weaker party or public interests, these objectives being mutually exclusive.[28] On the other hand, French doctrine and courts consider that the provisions protecting specific individual groups can also have an essential relevance for the political, social and economic organisation of a country, and therefore may fall under the category of overriding mandatory rules. While French doctrine and courts also distinguish between *lois de police de direction* (comparable to the *Eingriffsnormen*) and *lois de police de protec-*

25 I. Guardans Cambó, *Contrato internacional y derecho imperativo extranjero*, Pamplona: Aranzadi 1992, p. 314-316; Garcimartín Alférez 2008, p. 65 (*supra* n. 21); M. Gardeñes Santiago, 'Derecho imperativo y contrato internacional de trabajo', *Revista de Ministerio de Empleo y Seguridad Social* 2017, p. 163, p. 167.

26 A. Bonomi, 'Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts', in: P. Sarcevic, A. Bonomi and P. Volken (eds), *Yearbook of Private International Law*, Vol. 10, Munich: Sellier, European Law Publishers and Swiss Institute of Comparative Law 2008, p. 292.

27 Bonomi 2016, p. 622 (*supra* n. 23), referring to Mankowski, *RIW-Kommentar* 1996, p. 8 et seq., and Martiny, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, Vol. 10, 6th edn., Munich: Verlag C.H. Beck, 2015, para. 13. The Federal Labour Court (*Bundesarbeitsgericht*) refused to apply some German rules protecting employees against abusive dismissal based on this restrictive interpretation of Art. 7 Rome Convention (more precisely of Art. 34(2) EGBGB implementing Art. 7 Rome Convention) (*Bundesarbeitsgericht*, 29 October 1992, *IPRax* 1994, p. 123). Also, the German Federal Supreme Court (*Bundesgerichtshof*) in a decision on 13 December 2005 (*Bundesgerichtshof*, 13 December 2005 – XI ZR 82/05, *IPRax* 2006, p. 272) stated that the provisions concerning the protection of a contractually weaker party do not fall within the category of overriding mandatory provisions of Art. 34(2) EGBGB, even if they also promote, indirectly, public interests. See also Bonomi 2008 (*supra* n. 26); Garcimartín Alférez 2008, p. 77 (*supra* n. 21).

28 Those supporting this view highlight that the reference to public interests under Art. 9 should not be ignored and leads to a restrictive interpretation of the provision, which would only refer to ordo-political rules and which exclude those rules aimed at the protection of weaker parties; Art. 9 Rome I is not a provision that is destined to protect consumers, employees, commercial agents or other weaker parties: Garcimartín Alférez 2008, p. 77 (*supra* n. 21); C. von Bar and P. Mankowski, *Internationales Privatrecht Band 1: Allgemeine Lehren*, 2nd edn, Munich: CH Beck 2003, p. 267; J. Kropholer, *Internationales Privatrecht*, 5th edn., Tübingen: Mohr Siebeck 2006, p. 493–496.

tion (equivalent to the *Parteischutzvorschriften*), it is generally agreed in France that both can be classified as overriding mandatory rules.[29] These two countries represent the two extremes in the position, and in the middle we find countries such as Belgium, Italy or Spain, with an approach that is similar to the French view, or the Netherlands with a more restrictive approach that is closer to the German view.[30]

Following the ECJ position in its decision in the *Ingmar GB Ltd* v. *Eaton Leonard* case,[31] it can be interpreted that Article 9 Rome I can include those provisions that, although they protect a consumer or another weaker party, mainly serve to protect higher interests which are so essential that their priority over the law chosen by the parties is justified, whereby those higher interests may include significant EU interests. In the *Ingmar* decision, the ECJ held that the provisions in question (which originated in the Commercial Agents Directive and were aimed at the protection of the rights of the commercial agent) were mainly aimed at ensuring the freedom of establishment and undistorted competition on the internal market, and were therefore to be considered as essential for the EU. According to this reasoning, many authors

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29 For example: B. Dominique and H.M. Watt, *Droit international privé – Partie générale*, Paris: Presses Universitaires de France 2007, p. 558-562; P. Mayer and V. Heuzé, *Droit international privé*, 8th edn, Paris: Librairie générale de droit et jurisprudence 2004, p. 89. In the case of *Aginitis* (*Cour de Cassation*, 30 November 2007, 06-14006) the French Supreme Court (*Cour de Cassation*) held that the French law provisions at stake, under which a subcontractor can seek direct redress against the master of the works in the case of a default by the main contractor, were *lois de police*, in both the sense of Art. 3(1) French Civil Code, and Arts. 3 and 7 Rome Convention.

30 In the Netherlands, rules protecting socially or economically weaker parties can generally be considered as overriding mandatory rules as long as they are partially intended to protect common higher interests, although there is not complete agreement on this (Kuipers 2012 p. 154 (*supra* n. 22), referring also to other authors, such as: L. Strikwerda and S.J. Schaafsma, *Inleiding tot het Nederlandse internationaal privaatrecht*, Deventer: Wolters Kluwer 2005, p. 72; R.I.V.F. Bertrams and S.A. Kruisinga, *Overeenkomsten in het internationaal privaatrecht en het Weens Koopverdrag*, Deventer: Wolters Kluwer 2007, p. 58. However, with a contrasting opinion: H.L.J. Roelvink, 'Artikel 6:2 BW en het Nederlandse IPR', in: *Opstellen van J. Rijn van Alkemade*, Deventer: Kluwer 1993, p. 224). In the *Nuon Personeelsbeheer* decision (*Hoge Raad* 24 February 2012, LJN BU8512, *NIPR* 2012, 194), the applicability of Art. 6 *Buitengewoon Besluit Arbeidsverhoudingen* (BBA) [Extraordinary Decree on Labour Relations] regarding unfair dismissal depends on the extent to which the interests of the Dutch labour market are involved in the employment contract. The *Hoge Raad* added that the importance of the Dutch labour market must largely be equated with the interests of the individual employee against unjustified dismissal. Similarly, as in the previous *Sorensen/Aramco* decision (*Hoge Raad* 23 October 1987, *NJ* 1988/842, *NIPR* 1988, 150), the involvement of the Dutch labour market justified the consideration of the Dutch provision as an overriding mandatory rule, rather than the protection of the individual employee. K.C. Henckel, *Cross-Border Transfers of Undertakings*, Groningen: University of Groningen, 2016, p. 286; Verhagen 2002, p. 144 (*supra* n. 22).

On the other hand, in Belgium the idea that provisions aimed primarily at protecting the individual interests of weaker parties can qualify as overriding mandatory provisions in the sense that an abuse of weaker parties could be regarded as a threat to civil society, although they do not serve a specifically state interest, is particularly strong. Belgian provisions on the protection of the commercial agent and distributors are traditionally regarded as overriding mandatory rules (see, for example, the position of Belgium in the *Unamar* case: C-184/12 *United Antwerp Maritime Agencies* (*Unamar*) *NV* v. *Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, *NIPR* 2013, 349).

31 Case C-381/98, *Ingmar GB Ltd* v. *Eaton Leonard Technologies Inc.* [2000] *ECR* I-9305, *NIPR* 2001, 29.

consider that a provision which only aims to protect a weaker party would not be considered as an overriding mandatory rule, but it definitely could be as long as its application proves crucial to promote a higher political, social or economic interest which justifies the priority of this provision in an international scenario.[32]

It is true that overriding mandatory rules are a matter of national law: each state decides which are overriding mandatory rules, since Article 9(2) Rome I merely states that the provisions of the Regulation do not restrict the application of the overriding mandatory provisions of the forum, and therefore it is the Member State of the forum which has to decide which national rules are overriding mandatory rules.[33] However, when the national rules are rules implementing the standards of the EU directives, a consistent interpretation towards the objectives of the directive must be followed. As a result, what is crucial for the EU should be determined by the EU.[34] Most of the scope rules contained in the EU consumer directives indicate that the provisions of the directive cannot be circumvented when a choice for the law of a non-Member State has been made and a close connection with the EU exists.[35] This means that the rules of these directives are not necessarily overriding mandatory rules that are applicable in any case, regardless of whether there is a choice of law, but are mandatory rules in the sense of Article 6(2) Rome I and Article 3(4) Rome I.[36] If one were to interpret the rules of the directives as overriding mandatory rules, party autonomy would be completely excluded, they would be applicable regardless of the law that is otherwise applicable, and it would not be relevant whether that applicable law resulted from the normal operation of the connecting factors or the choice of law by the parties.[37]

Therefore, the existence of a 'scope rule' does not mean that EU consumer protection rules have to be classified as overriding mandatory rules, since not all of them are crucial for safeguarding the public interests of the EU and are intended to be applicable regardless of the law that is otherwise applicable, but are rather generally intended not to be circumvented as a result of choosing the law of a third country.[38] Moreover, in order not to completely set aside

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32 For example, among others: Kuipers 2012 p. 200 (*supra* n. 22); Aguilar Grieder 2006 p. 53 (*supra* n. 22); Carrascosa González 2012 (*supra* n. 22); Verhagen 2002 p. 136 (*supra* n. 22).

33 For example, in the *Unamar* judgment (*supra* n. 30), the ECJ concluded that the Belgian courts had a discretion to qualify their national agency provisions that exceeded the protection provided by the Commercial Agents Directive as overriding mandatory rules of the *lex fori* in the sense of Art. 7 Rome Convention (now Art. 9 Rome I).

34 Kuipers 2012, p. 203, 204 (*supra* n. 22).

35 See *infra* section 3.

36 See Kuipers 2012, p. 223, 224 (*supra* n. 22).

37 The only exception is the Timeshare Directive (Directive 2008/122/EC, *OJ* 2009, L 33/10): while the scope rules of the other directives indicate that their rules cannot be avoided by a choice of a foreign law when a close link with the EU exists, Art. 12(2) Timeshare Directive states that the consumer cannot be deprived of the protection of the Directive *regardless of the law that is applicable* when the immovable property is located in the EU or the professional directs its activities towards the EU.

38 In this regard, Basedow also claimed that the characterisation of these rules from a traditional PIL point of view as overriding mandatory rules would not fit with the fact that a choice of law is required for their application. However, he reasoned that the importance for the forum of an overriding mandatory rule depends on both the content and the connection of the situation with the forum country, it being therefore possible that scope rules could have the character of overriding mandatory rules. J. Basedow, 'Conflicto

party autonomy and the system of the Rome I Regulation, this author would be in favour of a restrictive interpretation regarding whether the provisions of a EU consumer directive are aimed at protecting public interests, since, to some extent, all EU legislation is aimed at the proper functioning of the internal market. Most of the provisions of EU directives are mandatory provisions, since they aim at the protection of weaker parties, but most are not overriding mandatory provisions, since most of them are not essential for the protection of a public EU interest (e.g., fair competition in the internal market, ensuring freedom in the provision of services, etc.). Article 9 Rome I should not be considered as an alternative mechanism to ensure the application of the protection provided by EU consumer law. Article 9 Rome I can only ensure the application of provisions of certain EU consumer directives, i.e., those which are considered to be overriding mandatory rules as their application is essential for the achievement of a higher public interest.

3. International applicability of EU consumer directives: 'scope rules', Rome I Regulation and PIL methods

The provisions of a directive, in order to be applicable, need to be transposed into the national law of the Member States, and due to the minimum harmonisation technique, this transposition differs from one Member State to another. As a result, there is a minimum common EU standard of consumer protection versus non-Member State law, plus different Member State transpositions improving or equalling that EU standard. The international applicability of EU consumer directives has to be clarified to determine in which international situations a Member State would apply the protection of the directive or a non-Member State law.

The existence of the so-called scope rules in some EU consumer directives pointed to the need to clarify the international applicability of those instruments.[39] Scope rules are special rules introduced in various EU consumer directives defining the instruments' spatial scope of

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de leyes y armonización del derecho privado material en la UE', *Anuario Español de Derecho Internacional Privado* 2006, p. 141, p. 153. However, that being said, I still consider that not every directive on consumer protection can be classified as crucial for safeguarding the political, social or economic organisation of the EU, and the different drafting between Art. 12(2) Timeshare Directive and the rest of the scope rules, the former requiring the application of the rules *regardless of the law that is applicable*, evidences the different level of 'mandatoriness' that exists between the directives in question.

39 Before the introduction of 'scope rules', the first generation of consumer directives (e.g. the Doorstep Selling Directive 85/577/ECC, now replaced by the Consumer Rights Directive 2011/83/EU, or the Consumer Credit Directive 87/102/ECC, now replaced by Directive 2008/48/EC), were silent regarding their international scope and the conflict of laws issue. However, it soon became apparent that the conflict rule designed for consumer protection under the Rome Convention had been narrowly conceived and the protection provided by the consumer directives was easily circumvented because of the normal operation of the general conflict rules of the Rome Convention, hence the introduction of scope rules in the second generation of EU consumer directives or, regarding the Commercial Agents Directive, the ECJ decision in *Ingmar* v. *Eaton*. S. Leible, 'Article 6 Rome I and Conflict of Laws in EU Directives', *Journal of European Consumer and Market Law* 2015, p. 39; C.G.J. Morse, 'Consumer Contracts, Employment Contracts and the Rome Convention', *The International and Comparative Law Quarterly* 1992, p. 11.

application.[40] They were aimed at ensuring the application of the protection provided by the respective directive when the choice of a non-Member State law could lead to the non-application of the minimum standards of protection for the consumer, even though the situation was closely connected with the Community. For example, Article 6(2) Unfair Contract Terms Directive[41] reads: 'Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of law of a non-Member State as the law applicable to a contract if the latter has a closest connection with the territory of the Member States'. Similar rules, with a slightly different formulation, were provided in Article 12(2) Distance Selling Directive[42] (now repealed by the Consumer Rights Directive[43]), Article 7(2) Consumer Sales Directive[44] (amended but not repealed by the Consumer Rights Directive), Article 12(2) Distance Marketing of Consumer Financial Services Directive[45] (amended but not repealed by Payment Services Directive 2015/2366[46]), and Article 22(4) Consumer Credit Directive.[47] The provisions differed in their drafting, but followed the same method: they determined the scope of application of the respective directive, while remaining silent about the application of foreign law.[48] The objective of the correct functioning of the internal market served as a justification for the introduction of scope rules as a mechanism to originally supplement and fill in the gaps of the Rome Convention regarding the special needs of the EU consumer directives.[49] However, the introduction of scope rules in directives has caused various problems from the perspective of our EU conflict of laws system.[50] First, because they have to

40 M. Wilderspin, 'Article 6: Consumer Contracts', in: U. Magnus and P. Mankowski (eds.), *Rome I Regulation – Commentary*, Cologne: Verlag Dr Otto Schmidt 2016, p. 485; Kuipers 2012, p. 181 et seq. (*supra* n. 22).

41 Directive 93/13/EEC (*OJ* 1993, L 95/29) (Unfair Contract Terms Directive).

42 Directive 1997/7/EC (*OJ* 1997, L 144/19) (Distance Selling Directive).

43 Directive 2011/83/EU (*OJ* 2011, L 304/64) (Consumer Rights Directive).

44 Directive 1999/44/EC (*OJ* 1999, L 171/12) (Consumer Sales Directive).

45 Directive 2002/65/EC (*OJ* 2002, L 271/16) (Distance Marketing of Consumer Financial Services Directive).

46 Directive 2015/2366 (*OJ* 2015, L 337/ 35) (Payment Services Directive).

47 Directive 2008/48/EC (*OJ* 2008, L 133/66) (Consumer Credit Directive).

48 Art. 12(2) Timeshare Directive (Directive 2008/122/EC, *OJ* 2009, L 33/10) constitutes an exception. Also, instead of providing a flexible connection ('close connection'), it required a rigid connection with the territory, providing that: 'Where the applicable law is that of a third country, consumers shall not be deprived of the protection granted by this Directive, as implemented in the Member State of the forum if (1) any of the immovable properties concerned is situated within the territory of a Member State, or, (2) in the case of a contract not directly related to immovable property, the trader pursues commercial or professional activities in a Member State or, by any means, directs such activities to a Member State and the contract falls within the scope of such activities'.

49 F. De la Rosa, 'El sistema Europeo y Español de ley aplicable a los contratos de consumo transfronterizos: el modelo de dispersión normativa para el derecho privado de la integración', *Revista Agenda Internacional* 2007, p. 409, p. 415.

50 See F. Ragno, 'The Law Applicable to Consumer Contracts Under the Rome I Regulation', in: F. Ferrari and S. Leible (eds.), *Rome I Regulation*, Munich: Sellier, European Law Publishers 2009, p. 188, 189; E. Jayme and C. Kohler, 'L'interaction des règles de conflit contenues dans le droit dérivé de la Communauté Européenne et des conventions de Bruxelles et de Rome', *Revue critique de droit international privé* 1995, p. 11. Even in the Commission's Green Paper regarding the conversion of the Rome Convention into the Rome I Regulation, it was commented that the proliferation of these rules was a source of concern, referring

be implemented into the national law of the Member States, the vagueness in their drafting has resulted in difficult and diverse implementation in the laws of the Member States, resulting in a parallel intra-EU conflict of laws system.[51] Second, there is uncertainty surrounding the specific nature and function of these rules, and regarding their interaction with the Rome I Regulation. Authors do not agree on whether these rules are special conflict rules, which on the basis of the Article 23 Rome I Regulation prevail over the normal conflict rules of the Rome I Regulation.[52] Moreover, they result in a disruption to the EU conflict of laws system based on the Rome I Regulation regarding contractual obligations, thereby affecting the existing unified system.[53] Unified conflict rules prevent forum shopping and enhance legal certainty within the EU. Legal certainty is damaged when rules somehow affecting conflict of laws are dispersed in different instruments. In this regard, as recital 40 Rome I states, 'a situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided'.[54]

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to problems such as the transposition of the state or the dispersion of conflict rules among different instruments (Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations, COM(2002) 654 final, p. 17, 18).

51 Each Member State can implement the rule as it wishes, which naturally leads to inconsistencies. For example, some national rules transposing scope rules impose the application of national consumer law with the objective of ensuring the application of the protection under the EU consumer directive in question, but they do this by unilaterally imposing the application of national law even when the law of another Member State (which also ensures the minimum protection under the Directive) is applicable (e.g. Art. 67*octiesdecies* Italian Consumer Code). Also, regarding the term 'close connection', different rules deriving from the different national implementations exist among the different Member States, especially when Member States implement the term through a rigid rule with specific conditions, which again leads to inconsistencies among the different implementations and does not help to achieve a coherent and harmonised conflict of laws system (e.g. Art. L231-1 French Consumer Code).

52 Art. 23 Rome I establishes that the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations, prevail over the rules of the Rome I Regulation. However, it is the subject of discussion whether 'scope rules' can be considered as conflict rules. S. Francq, 'The Scope of Secondary Community Law in the Light of the Methods of Private International Law – or the Other Way Around?', in: P. Sarcevic, P. Volken and A. Bonomi (eds.), *Yearbook of Private International Law*, Vol. 8, Munich: Sellier, European Law Publishers and Swiss Institute of Comparative Law 2006, p. 354; X.E. Kramer, 'The Interaction between Rome I and Mandatory EU Private Rules – EPIL and EPL: Communicating Vessels?', in: P. Stone and Y. Farah (eds.), *Research Handbook on EU Private International Law*, Cheltenham: Edward Elgar Publishing 2015, p. 9; U. Magnus and P. Mankowski, 'Joint Response to the Green Paper on the Conversion of the Rome Convention on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernisation (COM 2002) 654 Final', p. 6.

53 Magnus and Mankowski, p. 6 (*supra* n. 52).

54 The possibility of including a list of EU consumer directives in the Annex to the Rome I Regulation as instruments including specific conflict rules prevailing over the general conflict rules of the Rome I Regulation (see Art. 23 Rome I) was considered during the transformation of the Rome Convention into the Rome I Regulation. The Rome I Proposal (COM(2005) 650 final) included in its Annex I a list of instruments laying down conflict rules relating to contractual obligations and which should prevail over the conflict rules of Rome I (Art. 22 Rome I Proposal). Although this list did not include EU consumer directives, it was defended that if the list in the Annex was to be included in the final version of the Regulation, it should also

On the other hand, more recent directives such as the Consumer Rights Directive[55] or the Package Travel Directive[56] do not contain a scope rule and refer the conflict of laws issue to the Rome I Regulation.[57] The absence of a scope rule (as well as, in this case, the fact that the directives have a maximum harmonisation nature) avoids the result of different interpretations and implementations of such a rule into the national laws of the Member States which used to lead to inconsistencies and a forum-centred regulation by some Member States. Furthermore, the absence of scope rules and a reference to the Rome I Regulation to resolve any conflict of laws issue assist in the coherence of the conflict of laws system of the Rome I Regulation, which has been enacted in order to aim at the unification of conflict of laws for contractual obligations. Dispersed conflict or scope rules among other instruments prejudice this aim. Thus, although scope rules allow a case-by-case determination of the scope of the directive, allowing the application of consumer protection when determined by them and thus avoiding the 'gaps' of Article 6 Rome I, the absence of scope rules might overall be more beneficial for consumer protection.[58] This would avoid intra-EU problems and inconsistencies and enhance the coherence of the conflict of laws system and legal certainty. While some authors agree with this, this author included, this author also believes that there might be better solutions which can ensure consumer protection while ensuring, at the same time, a coherent system of conflict of laws in the EU.[59]

One of the principal characteristics of our modern PIL system is the openness to the application of a foreign law, rather than requiring courts to systematically apply the law of the forum in cross-border situations. In contrast to the unilateral approach, a multilateral approach requires a choice between the different state laws by connecting the legal relationship to the law of a country according to objective criteria. With this approach, equality between the forum law and foreign law is promoted, as well as predictability and respect for the expectations of the parties involved. This approach aims to achieve an uniformity of results and avoiding forum shopping.[60] However, there are several situations that justify the use of a unilateral approach.

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include the scope rules of the consumer directives (Max Planck Institute for Foreign Private and Private International Law, 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)', *RabelsZ* (71) 2007, p. 276, p. 339-344). This solution was rejected, since that would impose a continuous necessity for adaptation in order to include new consumer directives (Magnus and Mankowski, p. 8 (*supra* n. 52)). However, if directives were to keep including scope rules, and the legislator aimed for them to prevail over the general conflict rules of the Rome I Regulation, the inclusion of such a list would increase legal certainty and facilitate the task of the legal operator, and would constitute the only means to coordinate the existence of such rules with the Rome I Regulation and at the same time allow each directive to design its own international scope.

55 Directive 2011/83/EU (*OJ* 2011, L 304/64) (Consumer Rights Directive).

56 Directive (EU) 2015/2302 (*OJ* 2015, L 326/1) (Package Travel Directive).

57 See recitals 10 and 58 Consumer Rights Directive and recital 49 Package Travel Directive.

58 Especially considering that these scope rules refer to the same scope, with the exception of the Timeshare Directive.

59 On the view that scope rules are unnecessary and that the Rome I Regulation system should prevail: R. Piir and K. Sein, 'Law Applicable to Consumer Contracts. Interaction of the Rome I Regulation and EU-Directive-Based Rules on Conflict of Laws', *Juridica International* 2016, p. 63-70. On the other hand, arguing for a change since Art. 6 Rome I is not sufficient: Leible 2015 (*supra* n. 39).

60 Ten Wolde and Henckel 2012, p. 12-26 (*supra* n. 5).

First, the more the countries are interrelated, the more legal values they would share and, therefore, the more eager they would be to use neutral conflict rules, regardless of whether the law applicable is national law or a foreign law. However, in the opposite case, the more the countries do not share basic values or legal principles, the more the application of foreign law becomes difficult or undesirable.[61] Second, the applicability of foreign law varies depending on the area of law in question. Contract law is a mostly value-free area where the free will of the parties prevails and, as a result, the existence of common principles among the countries involved does not seem to be so relevant as compared to other fields of law, such as family law. However, when talking about rules with a mandatory character in the field of consumer law, a state will be more reluctant to apply foreign law, aiming to ensure these consumer protection values of the forum state when necessary. Thus, both a neutral multilateral approach and party autonomy are subject to limitations. So far, the Rome I Regulation reflects this approach.

However, the Rome I Regulation does not sufficiently take into account the specialties deriving from the existence of the EU and an internal market, both regarding the existence of EU legal values and EU mandatory law, and the interrelationship between Member States and non-Member States. The existence of the EU modifies the approach towards the legal values involved and the interrelationship between the countries. In addition to a national perspective concerning the application of foreign law, a EU perspective concerning the application of non-EU law has to be added. This means that there is a need for a differentiation between intra-EU situations and extra-EU situations. Member States, in the areas harmonised by the EU directives, share the same or similar legal values. In the area of EU consumer law, Member States share the same minimum level of consumer protection. Therefore, a multilateral approach can be promoted for an intra-EU scenario, since the minimum level of consumer protection is ensured regardless of the Member State law that is applicable. Still, since the majority of consumer directives are of a minimum harmonising nature and minor differences still exist between Member States, the neutral multilateral approach and party autonomy can be restricted to a certain extent if it is desired to take national interests into account. In an extra-EU scenario, when the application of the EU mandatory law deriving from the relevant directives is at stake, the use of a unilateral approach and a restriction of party autonomy can be justified. EU consumer law is an important area for the EU internal market, and the application of its mandatory rules needs to be ensured in certain situations to ensure a well-functioning market, both at an economic and a social level. A unilateral conflict rule would ensure the application of EU consumer directives in accordance with their scope, as opposed to the possible application of a non-Member State law with eventual different legal values (e.g., no consumer protection). The principal condition for the application of the protective conflict rule for consumers is when the professional directs its activities towards the country of the habitual residence of the consumer. At an EU level, therefore, it should be added that, in extra-EU cases, when

61 Ten Wolde compared this phenomenon to a sliding scale, where at one end of the scale the country would apply exclusively the forum law because the countries involved lacked a relationship between them, while at the opposite end of the scale the countries would be neutral regarding the application of forum law or foreign law, since the relationship between the societies is so close that the same or similar legal values are shared. M.H. ten Wolde, 'The Relativity of Legal Positions in Cross-Border Situations: The Foundations of Private Interregional Law, Private Intra-Community Law and Private International Law', in: *A Commitment to Private International Law – Essays in honour of Hans van Loon*, Cambridge: Intersentia 2013, p. 576.

the professional directs its activities towards the EU market, the minimum protection of the relevant EU consumer directives should be ensured. If the EU legislator considers that the EU consumer directives need to be protected in certain circumstances, a justified unilateral inroad could be included in the Rome I Regulation by adapting Article 6 Rome I to EU needs and the scope of the directives. An adaptation of the Rome I Regulation to EU needs, acknowledging the difference between intra-EU and extra-EU situations, would be sufficient to ensure the application of the EU consumer directives when this is required by their scope.

4. Conclusion

The achievement of the objectives and the international application of EU consumer directives relies on whether the Rome I Regulation is effectively coordinated with those objectives. Hence the importance of interaction and coordination between these instruments. In order to cover the described 'gaps' regarding the application of the EU consumer directives through the Rome I Regulation, certain changes can be introduced:

(1) Eliminating the various scope rules to be found in some EU consumer directives, and referring the conflict of laws question to the Rome I Regulation.
(2) Adapting Article 6 Rome I and Article 3(4) Rome I to the requirements of the EU legislator regarding the international application of the EU consumer directives. Instead of solving the application of EU consumer directives through scope rules contained in the directives themselves, a novelty could be incorporated within Article 6 Rome I. Article 6 Rome I could ensure that whenever a professional directs its activities towards a Member State, the application of the minimum requirements of EU consumer directives should be applicable, regardless of the Member State of the habitual residence of the consumer. In that way, whenever a professional directs its commercial activities towards the EU internal market, the EU consumer requirements are respected. In addition, Article 3(4) Rome I can be adapted so as to include the 'closest connection' connecting factor similar to scope rules, ensuring the application of EU mandatory rules deriving from directives protecting other consumers (e.g., active consumers) against the choice of a third country law, as required by scope rules. This modification is only necessary if the EU legislator considers that the international application of EU directives protecting weaker parties should be ensured when the situation is closely connected to the EU. Although this can be criticised as giving up some legal certainty of the PIL system, it is a better alternative than using Article 9 Rome I and the doctrine of overriding mandatory rules to ensure the application of these rules through a too extensive interpretation of public interests and overriding mandatory provisions.
(3) Article 9 Rome I includes a definition of overriding mandatory rules that should be respected and interpreted restrictively. Article 9 Rome I is an exception to all the other conflict rules of the Regulation when essential public interests of the Member State in question are at stake. The protection of weaker contracting parties is not a public interest as such, and Member States should not extend the interpretation of 'public interest' so as to justify the application of weaker party protection provisions or other provisions that they merely wish to apply. Provisions protecting consumers can only be applicable through Article 9 Rome I

when the main purpose of the application of the provision is to protect a public interest of the country or of the EU.

In conclusion, a difference between intra-EU and extra-EU situations regarding the application of EU consumer directives protecting and involving EU mandatory law should be made. A more EU-focused PIL method is necessary, but still respecting the current multilateral basis and party autonomy. In EU harmonised areas involving mandatory law (i.e., EU consumer law), a multilateral approach is promoted in intra-EU situations, where the same or similar rules are shared, while the introduction of a unilateral inroad is justified in extra-EU situations, where a non-EU law with very different legal standards is potentially applicable. The more harmonised an area of law is, as well as mandatory, such as EU consumer law, the more necessary and evident the differentiation should be.