International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?

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The Internet has no territorial boundaries.
Not only is there perhaps 'no there there', the 'there' is everywhere where there is Internet access.

1. Introduction

The original purpose of the Internet was merely to have a fast and free exchange of information. Consequently, for a long time, the commercial use of the Internet was limited to small, specialised enterprises. However, the currently increasing commercial use of the Internet is leading to an increasing number of contracts being entered into via the electronic highway, not only between enterprises themselves (b2b business) but also between enterprises and consumers (b2c business). Over the last few years, this evolution has led lawyers to pay close attention to the legal aspects of this new medium. In this context, one should also consider questions of...
private international law, since the intrinsic non-geographical nature of the Internet touches the territorial frontiers, which private international law is in essence based on.

In this article, an examination is undertaken of the international jurisdiction in the European Union (‘EU’) over consumer contracts entered into via the Internet.\(^3\) This topic has recently been in the legal spotlight due to the entry into force on 1 March 2002 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 (‘the Regulation’).\(^4\) The Regulation replaces the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (‘the Convention’) on the basis of Art. 65 of the Rome Treaty establishing the European Community\(^5\) in all EU Member States apart from Denmark, and introduces some modifications in the field of consumer protection.\(^6\) Since the use of the Internet in the United States of America (‘US’) started earlier and is more advanced than in Europe, we first provide a brief summary of the e-consumer contracts jurisdiction regime currently in force in the US. Further, we examine how this regime is dealt with in the Brussels Convention on the one hand and in the Regulation on the other hand; in both cases, the explanation of the theoretical discussions as regards the conditions is illustrated with a concrete example case. In conclusion, we take a quick glance at the regime that is currently being drafted in the Hague Conference on Private International Law.

2. Brief summary of the regime under US law

2.1 General principles

Over the past number of years, US case law as regards e-consumer contracts jurisdiction has grown significantly.\(^7\) The trend that has emerged in this case law is called ‘long arm’ personal jurisdiction, i.e. the readiness of the US courts to claim jurisdiction over websites, irrespective of whether the website, its holder or the business behind it is located in the US or not.\(^8\) US

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\(^1\) This article does not deal with the discussion about the applicable law and the choice of law as regards e-consumer contracts.


\(^4\) Pursuant to the Protocol on the position of Denmark (EC Official Journal 10 November 1997, C 340/101), this Regulation is not applicable in Denmark. On the basis of Art. 3.1 of the Protocol on the position of the United Kingdom and Ireland (EC Official Journal 10 November 1997, C 340/99), these two Member States have used their right to take part in the adoption and application of the Regulation.

\(^5\) For more information, see F. Lawrence Street and M.P. Grant, Law of the Internet (Lexis® Law Publishing: Charlottesville, Virginia 2000) 269-288 and 298-361.

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The law distinguishes between two types of personal jurisdiction, i.e. general and specific personal jurisdiction, depending on the nature of the defendant’s contacts with the forum state in a given case. The first refers to the authority of a court to hear any cause of action, regardless of whether the cause of action arose from the activities of the defendant within the forum state; the latter refers to the situation in which the cause of action arises directly from the defendant’s contacts with the forum state.\(^9\)

The starting point in analysing personal jurisdiction in federal cases is the ‘Long Arm’ Statute in effect in the state in which the court is located, for the court has to examine whether exercising jurisdiction over the defendant is allowed under the forum state’s laws. If the answer is affirmative, then the court must examine whether exercising that jurisdiction falls within the limits of the due process principle set forth in the Fourteenth Amendment of the American Constitution; this principle consequently clearly constitutes a constitutional restriction on exercising personal jurisdiction.

The Federal Supreme Court has ruled that, in case of general personal jurisdiction, this principle means that jurisdiction over a non-resident defendant of the forum state may be exercised only if the defendant has had substantial or continuous and systematic contacts with the forum state.\(^11\) However, in case of specific jurisdiction, mere minimum contacts are sufficient for a court to declare itself competent. But, as a compensation for this lower degree of required intensity of the defendant’s contacts with the forum state, two additional conditions have to be fulfilled cumulatively. First, the defendant must have performed an act or consummated a transaction within the forum, thereby purposefully availing himself of the benefits of the forum. In this context, the Federal Supreme Court has ruled that the mere placing of a product into the ‘stream of commerce’, without doing any more, is not an act which is purposefully directed to the US that permits the assertion of personal jurisdiction consistent with the due process principle; there must be additional, intentional conduct directed to the forum state.\(^12\) Second, the plaintiff must establish that the exercise of jurisdiction before the court is reasonable, thereby taking into account, amongst other things, the burden on the defendant in defending in the

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\(^12\) World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
2.2 Application to the Internet

In order to examine whether or not the minimum contacts and purposeful availment conditions are fulfilled in the field of jurisdiction over websites, US courts have grouped websites into three categories along a 'sliding scale'.

The first category are the so-called 'active' websites, i.e. websites that are used both to transmit the product or services purchased (e.g. downloading computer software) and to obtain payment (e.g. by transmission of the purchaser’s credit card number or banking information). A website holder-defendant’s use of such a website to obtain and maintain contact with the forum state always fulfils the two aforementioned conditions.

The second category are the so-called 'passive' websites, i.e. websites that do 'little more than make information available to those who are interested in it' (e.g. by posting information about the website holder’s or sponsor’s products). Holding such a website is not sufficient to justify the exercise of personal jurisdiction, even when holding a passive website is coupled with posting of messages to 'listservs' containing addressees within the forum state and to newsgroups accessible within the forum state, minimum contacts do not exist without proof of more traditional contacts with the forum.

The third (in-between) category are the so-called 'interactive' websites, i.e. websites whereby the product or services being sold cannot be directly transmitted via the Internet (e.g. a paper book or an automobile), but whereby the website itself allows for the exchange of information between the visitor to the website and the host computer. In such cases, the exercise of information is determined by examining both the degree of interactivity and the commercial nature of the exchange of information. It must be pointed out that there is some dissension in US case law as regards the
application of this criteria to concrete cases; some judges require a high degree of interactivity, others do not.

In conclusion, US courts do not have jurisdiction over a website merely because it is accessible in the US or in a US state, otherwise all website holders would be subject to their jurisdiction.

3 The regime under the Convention

3.1 General principles
Before 1 March 2002, the international consumer contracts jurisdiction regime in the EU was laid down in Arts. 13–15 of the Convention. These provisions contain a special protection regime vis-à-vis Arts. 2 and 5 of the Convention. This protection regime aims at avoiding that consumers, as the economically weaker and legally less experienced party, have to bring proceedings against the other party in the State in which that other party is domiciled. To that end, Art. 14 of the Convention prescribes that a consumer may bring proceedings against the other party to the contract either in the courts of the state in which that party is domiciled or in the courts of the state in which he is himself domiciled, it being understood that the chosen state has to be a contracting state to the Convention. In addition, Art. 15 of the Convention limits the possibility to depart from Art. 14 by an agreement.

However, not all consumer contracts fall within the scope of the special protection regime of Art. 14, because its field of application is limited to three situations: (1) a contract for the sale of goods on instalment credit terms, (2) a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods, and (3) any other contract for the supply of goods or services. However, in the latter case, two additional conditions must be fulfilled: (a) before the conclusion of the contract, the other party has addressed a specific invitation to the consumer or advertised in the state in which the consumer is domiciled, and (b) the consumer has taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled. These two

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21 G. King, loc. cit. 16.
22 For a discussion, see B.W.F. Depoorter, loc. cit. 394–396; R.L. Hoegle and C.P. Boam, loc. cit. 34–37; F.A. Koch, loc. cit. 125–129; B.B. Sookman, loc. cit. 75–82.
25 This article does not discuss case law and legal doctrine as regards the term "consumer"; when analysing the example case, we suppose that all conditions in respect of this term are fulfilled.
26 This issue is not further discussed.
additional conditions aim at assuring sufficient ties between the case and the jurisdiction of the state in which the consumer is domiciled.\textsuperscript{27}

3.2 Case study example

In this article, the explanation of the theoretical discussions as regards the E-Consumer contracts regime under the Convention as well as under the Regulation will be illustrated with the following example case. A boy aged twenty-two, whose is domiciled in Belgium, is on holiday in Australia. He is of Russian nationality, his mother tongue is Swedish and he speaks fluently English and French. Being a real bookworm, he has bought a book via the Internet two weeks before his departure for Australia. He has bought the book on the website of a seller that is domiciled in Sweden and the domain name of the website is www.stockholmbokhandel.se. The text on the website is in Swedish only and the prices are indicated in Swedish crowns only. After having selected the book, he has typed in his credit card number and his address and clicked on the ‘OK’-button with the mouse. According to the general terms and conditions on the website, the book will be delivered within five days. However, on the day of his departure, the book was still not delivered. Some days after his arrival in Australia, local culture and nature can no longer hold his attention. Since he has not yet received the book he had ordered, he decides to buy via the Internet a computer game via his laptop in his hotel in Australia. He buys the game on the website of a seller that is domiciled in France and the domain name of the website is www.commerce-europe.com. The text on the website is in French and English and the prices are indicated in euro. After having selected the game, he types in his credit card number and clicks on the ‘OK’-button with the mouse; the game is downloaded on the hard disk of his laptop directly. However, the game does not function properly. Back home, he writes some letters to both sellers, but there is no reaction at all. Finally, he decides to sue both sellers.

3.3 Application to the Internet

3.3.1 The legal status of digital products

Due to their intangible nature, legal doctrine asks the question whether or not digital products (e.g. computer software) can be considered as ‘goods’ in the sense of Art. 13 of the Convention (and at the same time Art. 1 of the United Nations Convention for the International Sale of Goods of 11 April 1980 (‘CISG’)\textsuperscript{28} and Art. 5 of the EC Convention on the Law Applicable to

\textsuperscript{27} H. van Houtte, ‘Uitsluitende bevoegdheidsgronden’ in H. van Houtte and M. Pertegás Sender (eds.),\textit{ Europese IPRoverdragen} (Acco: Leuven 1997) (41) 68.

\textsuperscript{28} UN Treaty Series vol. 1489, 3.
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Contractual Obligations of 19 June 1980). The term ‘goods’ is not defined in any of these three conventions, the question is not dealt with in their preparatory documents and the European Court of Justice has not yet had the opportunity to issue a ruling thereon.

After having examined all possible interpretations, most authors eventually are of the opinion that digital products – despite their intangible nature – can be considered as ‘goods’ in the sense of the three aforementioned conventions. They base their opinion on the following grounds. First, they consider that it cannot be deducted from the conventions that the contracting parties wished to exclude digital products, all the more since they do not exclude immaterial goods in principle. Second, they think that an extensive interpretation of the term ‘goods’ is legitimated by the argument that the three conventions, as all other written laws, have to be interpreted in accordance with changing economic and technical circumstances, if one does not want them to become antiquated and lose value. Third, in their opinion, a principal qualification of digital products as ‘goods’ would correspond to the frequent use of the electronic highway by enterprises. Fourth, as regards the CISG, this qualification would also fit in the CISG’s objective mentioned in its preamble, i.e. promoting the development of international trade through uniform rules. Fifth, they think that the consumer’s need for the special protection regime in buying digital products does not significantly differ from this need in buying ‘traditional’ goods. In their opinion, the functional and economical finality of both types of transactions are essentially the same; the medium through which goods are delivered, would merely be of marginal significance for the consumers’ wishes and expectations and the legal status of the goods. Sixth, the consequence of not considering digital products as goods would be that a consumer of these products would never be entitled to rely on the special

31 In their opinion, the exclusion of electricity from the field of application of the Hague Sale Conventions is not indicative for immaterial goods in general, since this exclusion is based on the fact that not all jurisdictions of the Contracting Parties qualify contracts for the supply of energy as sale contracts. See K. Boele-Woelki, ‘Conflictenrechtelijke aspecten van Internetkoopovereenkomsten’ in F.W. Grosh-eide and K. Boele-Woelki (eds.), Europese Privaatrecht. Opstellen over Internationale Transacties en Intellectuele Eigendom (Koninklijke Vermande: Lelystad 1997) (139) 154.
34 Ibid.
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protection regime, which would not comply with the basic objective thereof (see supra).36

Should digital products not be considered as goods, then some authors argue that their delivery has to be qualified as a supply of a ‘service’, so that they do fall within the field of application of Art. 13 of the Convention. They thereby refer to the case law of the European Court of Justice in light of the four freedoms in EU law, according to which each commercial activity has to be qualified as either a good or a service.37

As regards the analysis of the example case, this point of view implies that the computer game falls within the field of application of Art. 13 of the Convention.

3.3.2 The first condition: Before the conclusion of the contract, the other party has addressed a specific invitation to the consumer or advertised in the state in which the consumer is domiciled

As already mentioned above, not all consumer contracts fall within the field of application of Art. 13 of the Convention. If the contract concerned is neither a contract for the sale of goods on instalment credit terms nor a contract for a loan payable by instalment or for any other form of credit, made to finance the sale of goods,38 then the first condition for the contract to fall within the field of application of Art. 13 of the Convention is that, before the conclusion of the contract, the other party has addressed a specific invitation to the consumer or advertised in the state in which the consumer is domiciled. This condition aims at protecting ‘passive’ consumers against ‘aggressive’ traders that approach consumers in their easy chair. Consequently, ‘active’ consumers, i.e. consumers who come into contact with the trader on their own initiative, are excluded from the special protection regime. The rationale of this condition is that an active consumer could reasonably have expected to have to bring the other party to a foreign court in case of a dispute if that other party is domiciled in another state.

Legal doctrine is divided into three groups as to whether or not, and if so, to what extent, the distinction between ‘active’ and ‘passive’ consumers can or has to be applied on consumer contracts entered into via the Internet.39 An additional difficulty is that neither the Convention nor its preparatory documents define the terms ‘specific invitation’ and ‘advertisement’.

38 These situations are not further discussed, since they do not lead to specific questions with regard to the Internet.
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A first group of authors is of the opinion that holding a commercial website always complies with the first condition, even if that website is accessible everywhere in the world. According to this point of view, a consumer is thus always ‘passive’, or, as said authors formulate, the distinction between ‘active’ and ‘passive’ consumers, at least as regards E-Consumer contracts, has to be abolished. These authors choose for a maximum consumer protection; they deem the protection regime too important for the Internet to be exempted from private international consumer protection law and point out that the current conditions in respect of the coming about of a contract date from the pre-Internet era. One author adds thereto that there is in fact no contact between the consumer and the website of the other party until that other party, by making a website, has first actively created the possibility for the consumer to come into contact with its website. He compares with advertisements in a magazine that first has to be bought by the consumer in a shop. Another author is of the opinion that traders that use the Internet do not have to be treated differently from ‘traditional’ traders, and that depriving the E-Consumer from the protection regime would imply an arbitrary preference for a certain way of trading, which would run counter to the free market and fair competition in the EU.

A second group of authors is of the opinion that holding a commercial website never complies with the first condition, and thus that a consumer is always ‘active’ and is never entitled to rely on the special protection regime.

First, as regards the aspect ‘addressing a specific invitation to the consumer or advertising’, they think that it is not the other party but rather the consumer who actively enters the national market of the state in which the consumer is domiciled, since the latter determinedly surfs to a website. In their opinion, finding goods on the Internet requires a certain level of experience and advertising requires more action than the mere holding of a website; they argue the latter by referring to the fact that the term ‘advertisement’ in Art. 13 of the Convention is coupled with the term

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'specific invitation', which, in their opinion, clearly implies an active step on the part of the consumer. To underpin their point of view, these authors also refer to the technical functioning of surfing on the Internet: If someone surfs to a website, then that person orders his browser to make contact with a Universal Resource Locator ('URL') and a website address on the Internet, and when the contact is made, then the host server of the URL dispatches the contents of the requested website; the browser thus pulls the information from the Internet and brings it to the surfer’s server, whereupon the information appears on the surfer’s screen.

Second, as regards the aspect ‘in the state in which the consumer is domiciled’, they are of the opinion that a website can never be sufficiently directed to a particular state, since a website is accessible everywhere in the world.

A third group of authors adhere to a ‘middle ground’ point of view and are of the opinion that the special protection regime can never be granted or denied a priori; they argue in favour of a case-by-case examination. Some of these authors illustrate the impossibility to qualify a consumer as ‘active’ or ‘passive’ a priori by referring to some types of subtle techniques that website holders use to attract consumers to their website, for instance by making use of ‘banners’, by which consumers are led to another website without having asked for it.

First, as regards the aspect ‘addressing a specific invitation to the consumer or advertising’, they think that the degree of ‘activity’ or ‘passivity’ of the website holder and that of the consumer correlated thereto have to be evaluated according to the degree of interactivity of the website. Consequently, in their opinion, ‘advertising’ requires a certain

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45 B.W.F. Depoorter, loc. cit. 398.


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degree of interactivity between the website and the consumer, so that merely putting commercial information on a website does not constitute an advertisement.48

Second, as regards the aspect ‘in the state in which the consumer is domiciled’, they are of the opinion that there have to be sufficient ties between the website and the state in which the consumer is domiciled. To their mind, a website must be deliberately targeted on at least that state.49 The degree of deliberately targeting can be evaluated by taking into account some indications such as the language of the domain name and the text on the website, the currency that is used, a reference to the fiscal regime the goods offered are subject to in a certain state, a reference in local media to the domain name of the website, etc.50

It is clear that this ‘middle ground’ point of view, as regards both aspects, is in keeping with the aforementioned US case law ((inter)activity and purposeful availment).

As regards the analysis of the example case, the three different point of views in legal doctrine outlined above have the following implications. If one adheres to the point of view of the first group, then both the purchase of the book and that of the computer game would fall within the field of application of the special protection regime. If the opinion of the second group is supported, then neither the purchase of the book nor that of the computer game would fall within the scope of the protection regime. If one shares the ‘middle ground’ point of view, then the analysis runs as follows.

The website of the Swedish seller as well as that of the French seller have an interactive nature, so that, as regards the aspect ‘addressing a specific invitation to the consumer or advertising’, the condition is fulfilled. However, as regards the aspect ‘in the state in which the consumer is domiciled’, it can be derived from the data on the website of the seller that is domiciled in Sweden, that that website is not deliberately targeted on the state in which the boy is domiciled, i.e. Belgium: the top level domain name is ‘se’ (which unarguably refers to the Swedish territory), the second level domain name is in Swedish and contains a reference to the city of Stockholm, the text on the website is in Swedish only and the prices are indicated in Swedish crowns only. Consequently, as regards the purchase of the book, the boy cannot rely on the special protection regime of Art. 14 of

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the Convention. At first sight, the website of the seller that is domiciled in France is not deliberately targeted on the Belgian territory either, but it nevertheless contains some indications that it is *inter alia* focussed on the Belgian territory: the top level domain name is ‘com’ (which does not a priori exclude a focus on the Belgian territory, since ‘com’ refers to the commercial nature of the website and sometimes websites of sellers that are domiciled in Belgium end with this suffix), the second level domain name is at the same time in French and in English (French is one of the three official languages in Belgium and most Belgians speak English), the text on the website too is in French as well as in English and the goods are priced in euro (the euro is now the official Belgian currency). Consequently, as regards the purchase of the computer game, the boy would possibly be entitled to rely on the special protection regime.

### 3.3.3 The second condition: The consumer has taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled

In order for the consumer to be entitled to rely on the special protection regime, he must have taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled. Some examples of ‘steps necessary for the conclusion of the contract’ are the typing in of a credit card number, clicking on ‘Enter’ or on ‘OK’ with the keyboard or the mouse.51 It is, however, not required that the conclusion of the contract takes place in the state in which the consumer is domiciled.52 Some authors point out that there could be problems in respect of evidence, since, in an Internet environment, it is very difficult and sometimes even impossible to find out where the consumer has taken the necessary steps;53 one of them, for instance, remarks that several types of technical operations on the Internet, such as caching, result in the impossibility to make sure about the exact geographical location of the surfer.54

As regards the analysis of the example case, this condition implies that the purchase of the book – provided that all other conditions are fulfilled – falls within the field of application of the special protection regime, and that the purchase of the computer game does not. For, the steps necessary for buying the book have taken place in the state in which the boy is domiciled (Belgium), whereas the steps necessary for buying the computer game have taken place in Australia. Personally, we adhere to the opinion that, in the Internet era and taking account of the increasing mobility of

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52 H. van Houtte, *loc. cit.* 69.  
54 B.W.F. Depoorter, *loc. cit.* 403–484.
persons as well as communication techniques (e.g. laptops and multimedia mobile phones), this condition is unrealistic and outmoded.55

4 The regime under the Regulation

4.1 General principles

As already mentioned above, on 22 December 2000, the EU Council adopted the Regulation, which replaces the Convention in all EU Member States except for Denmark on 1 March 2002. Art. 15 of the Regulation maintains the Convention’s special consumer protection regime but introduces some modifications as regards its field of application.

The first two situations set forth in Art. 13 of the Convention, i.e. (1) a contract for the sale of goods on instalment credit terms, and (2) a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods, have been maintained in the Regulation (respectively Art. 15.1.a and 15.1.b). However, the third situation with its two additional conditions, i.e. ‘any other contract for the supply of goods, if (a) before the conclusion of the contract, the other party has addressed a specific invitation to the consumer or advertised in the state in which the consumer is domiciled, and (b) the consumer has taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled’, has been removed and replaced by another one. Under the Regulation, the third situation, set forth in Art. 15.1.c, is the following: ‘in all other cases, (a) the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and (b) the contract falls within the scope of such activities.’

4.2 Application on the Internet

4.2.1 The legal status of digital products

When reading Art. 15.1.c of the Regulation, one immediately notices that the words ‘contract for the supply of goods’ and ‘contract for the supply of services’ have been removed and replaced by the words ‘in all other cases’.

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Most likely, the EU legislator has wished to give an affirmative answer to the question in legal doctrine of whether or not digital products can be qualified as ‘goods’. 56

As regards the analysis of the example case, this modification implies that now not only the purchase of the book but also that of the computer game falls within the field of application of the special protection regime.

4.2.2 The new condition: The contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State

This new condition aims at putting an end to the discussion in legal doctrine and the legal uncertainty in practice with regard to the question of whether or not e-consumers have to be qualified as ‘active’ or ‘passive’ consumers and consequently whether or not they can rely on the special protection regime. For, the third situation of the protection regime’s field of application is no longer based on the distinction between ‘active’ and ‘passive’ consumers; one now only has to take account of the question of whether or not the other party directs his activities to, inter alia, the state in which the consumer is domiciled. 57

However, the Regulation does not define the term ‘directing to’. As regards the Internet environment, one can find the following guidelines in its preparatory documents.

In the comments on its initial Proposal for a Regulation, the European Commission said that ‘the concept of activities pursued in or directed towards a Member State is designed to make clear that point (3) applies to consumer contracts concluded via an interactive website accessible in the State of the consumer’s domicile’. 58 Consequently, in the Commission’s opinion, two conditions must be fulfilled for a website to ‘direct to’ the Member State in which the consumer is domiciled.

First, a website must have an interactive nature. Consequently, the mere passive distribution of commercial information via a website cannot be considered as ‘directing to’; consumers must at least have to possibility to enter into an agreement online. 59 It has to be noticed that with this

54 Some authors are of the opinion that it would have been better to state explicitly in the preparatory documents that digital goods fall within the field of application of the special protection regime: M. Foss and L. Bygrave, loc. cit. 136–137.

55 It has to be pointed out that Art. 15.1.c of the Regulation does not prescribe that the other party has to direct his website to the consumer as a person but to the state in which the consumer is domiciled.


It is not clear whether the Commission will, as in the US, distinguish between active, interactive and passive websites, or only between interactive and passive websites.

Second, a website must be accessible in the EU Member State in which the consumer is domiciled. Recital 13 of the Commission’s initial Proposal comments on this condition as follows: ‘electronic commerce in goods or services by a means accessible in another Member State constitutes an activity directed to that State.’ Consequently, in the Commission’s opinion, besides an examination of the degree of interactivity of the website, no evaluation has to made of the website’s degree of deliberately targeting to the state in which the consumer is domiciled, which implies that factors as the language(s), currency/currencies, etc. used on the website, do not have to be taken into account. Since any website is almost always accessible in all EU Member States, this second condition implies that any website holder who is domiciled in a EU Member State can be sued in any EU Member State, irrespective of whether or not he wished to do business in the Member State concerned.

The European Parliament considered this implication far too excessive and proposed an amendment according to which the website’s degree of deliberately targeting to the state in which the consumer is domiciled does have to be taken into account; consequently, the mere accessibility of the website in the state in which the consumer is domiciled, would not be sufficient. It proposed to amend the aforementioned Recital 13 as follows: ‘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.’ In addition, it proposed to amend Art. 15 by adding the following paragraph: ‘The expression ‘directing such activities’ shall be taken to mean that the trader must have purposefully directed his activity in a substantial way to that other Member State or to several countries including that Member State. In determining whether a trader has directed his activities in such a way, the courts shall have regard to all 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.’

However, in the comments on its Amended Proposal, the Commission explicitly rejected these proposed amendments: ‘Parliament proposes a new
paragraph to define the concept of activities directed towards one or more Member States, and takes as one of its assessment criteria for the existence of such an activity any attempt by an operator to confine its business to transactions with consumers domiciled in certain Member States. The Commission cannot accept this amendment, which runs counter to the philosophy of the provision. The definition is based on the essentially American concept of business activity as a general connecting factor determining jurisdiction, whereas that concept is quite foreign to the approach taken by the Regulation. Moreover the existence of a consumer dispute requiring court action presupposes a consumer contract. Yet the very existence of such a contract would seem to be a clear indication that the supplier of the goods or services has directed his activities towards the state where the consumer is domiciled. Lastly, this definition is not desirable as it would generate fresh fragmentation of the market within the European Community.\textsuperscript{64} In a joint EU Council and Commission statement on Articles 15 and 73 of the Regulation, the Commission’s point of view is supported by the Council: ‘[…] the language or currency which a website uses does not constitute a relevant factor.’\textsuperscript{65}

One notices that the Commission points out that the proposed amendments are in keeping with the American concept of business activity (minimum contacts, purposeful availment, etc.) as a general ground for determining whether or not assertion of jurisdiction is legitimated, and that this ground runs counter to the general ground set forth in the Regulation (i.e. the domicile of both the consumer and the trader).

Attention has to be paid to the Commission’s second argument for rejecting the proposed amendments, i.e. that the existence of a consumer contract seems to be a clear indication that the trader has directed his activities to the state in which the consumer is domiciled. In their aforementioned joint statement on Articles 15 and 73 of the Regulation, the Council and the Commission have stressed this again: ‘The Council and the Commission point out in this connection that for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer’s residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities. In this context, the Council and the Commission stress that the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. […]’\textsuperscript{66} This argument is most strange. One author has pointed out that, if the consumer contract is itself a clear indication to examine whether or not


\textsuperscript{65} Statement on Articles 15 and 73 of 14 December 2000, 1st Paragraph, 4th Alinea, \url{http://register.consilium.eu.int/pdf/en/00/st14/14139en0.pdf}.

\textsuperscript{66} \textit{Ibid.}, 1st Paragraph, 3rd and 4th Alinea.
commercial or professional activities are directed to a certain state, this condition is in fact unnecessary. Indeed, if ‘directing to’ is a necessary condition for the existence of a consumer contract in the sense of Art. 15 of the Regulation, then the existence of a consumer contract cannot be itself an indication that the ‘directing to’ condition is fulfilled; this is clearly a circular reasoning. This author consequently correctly argues that this cannot be intended, taking into account the existence and phrasing of the condition.67

Personally, we adhere to the opinion that the Commission’s point of view should not be supported.68 First, such interpretation would after all confuse the meaning of the term ‘directing to’ with that of the term ‘accessible in’; it is in the nature of the term ‘directing to’ that the person who ‘directs to something’ ‘concentrates on or specializes in’ that thing, whereas the term ‘accessibility’ does not include any notion of intended connection with something. Second, interpreting the term ‘directing to’ in the sense of the purposefully availment condition in US case law would be the ideal opportunity to streamline the regimes in the US and the EU. In our opinion, the Commission’s argument that the American concept of ‘business activity’ as a general ground for determining whether or not assertion of jurisdiction is legitimated, runs counter to the general ground set forth in the Regulation, i.e. the concept of ‘domicile’, cannot be supported; in the Regulation, the general ground is indeed the concept of ‘domicile’ (both the consumer and the other party must be domiciled in an EU Member State), but this does not inherently prevent using the concept of ‘business activity concentrated on’ as an additional ground for determining jurisdiction (besides the fact that both the consumer and the other party must be domiciled in an EU Member State, that other party must moreover concentrate his (e)business on the EU Member State in which the consumer is domiciled).

The foregoing has shown that the second ‘guideline’ for interpreting the term ‘directing to’ rather gives rise to controversies than elucidating this term. One now has to await an opportunity for the European Court of Justice to decide which interpretation has to be followed. However, since it is supported by the Council, it seems at first sight that the Commission’s point of view should be adhered to.

As regards the analysis of the example case, this condition and the Commission’s and Council’s interpretation thereof lead to the following. Since both the website of the Swedish seller and that of the French seller

have an *interactive* nature and indications concerning *deliberately targeting* do seemingly not have to be taken into account, the boy can rely on the special protection regime not only for the purchase on the website of the French seller but also – contrary to the analysis under the Convention’s regime – for the purchase on the website of the Swedish seller.

4.2.3 *The omission of the condition that the consumer must have taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled*

When reading Art. 15.1.c of the Regulation, one immediately notices that for the special protection regime to apply, it is no longer required that the consumer has taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled. The only thing that is required is that the contract falls within the scope of the commercial or professional activities of the other party. Consequently, the special protection regime can also apply when the steps necessary for the conclusion of the contract have been taken in a state (anywhere in the world) other than that in which the consumer is domiciled. The omission of the condition set forth in Art. 13 of the Convention shows a sense of reality and overcomes the flaw in the Convention that a consumer cannot rely on the special protection regime if the other party has urged the consumer to leave the state in which he is domiciled for the purpose of entering into the contract.  
As regards the analysis of the example case, this omission implies that not only the contract entered into at home in Belgium (the book) but also that entered into on holiday in Australia (the computer game) falls within the scope of the special protection regime.

4.2.4 *Opinions of business and consumers*

The new general rule as regards international E-Consumer contracts jurisdiction in the EU, as interpreted by the European Commission, is thus that a consumer, irrespective of his nationality, who is domiciled in a EU Member State and who uses, anywhere in the world, an interactive website which is (also) accessible in the Member State in which the consumer is domiciled and the holder of which is domiciled in a Member State, can bring proceedings against the website holder in the Member State in which he is himself domiciled.  
It is clear that the new regime, as interpreted by the European Commission, has ‘put the cat among the pigeons’ in business circles, since, henceforth, enterprises that are domiciled in a EU Member State can be sued in any EU Member State where their website is accessible, irrespective

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of whether or not they 'focussed' their on-line business on that Member State. A first reaction of the business community is that this regime will result in legal uncertainty and a lot of costs for enterprises, which will constitute an important barrier to the development of e-commerce (especially the e-commerce activities of small enterprises), result in higher prices for consumers and lead to enterprises refusing to enter into e-contracts with consumers from certain Member States, since website holders will be obliged to organise their website in such a way that consumers are asked via a technical functionality to indicate the Member State in which they are domiciled, and to make it clear to consumers that they do not wish to enter into a contract with consumers who are domiciled in certain Member States.70 A second argument put forward by business is that it is impossible for them to take account of and to engage legally skilled personnel who have knowledge of all different legal systems of all EU Member States, to draft different model contracts, etc.71 A third remark from business is that the country of destination principle set forth in the Regulation runs counter to the country of origin principle set forth in the EU E-Commerce Directive of 8 June 2000.72 Finally, a fourth comment from business is that a consumer does know that a website holder is not necessarily domiciled in the EU Member State in which he is himself domiciled, and thus that a consumer can reasonably expect to have to bring the website holder before a foreign court in case of a dispute if the website holder is domiciled in another Member State.73

A first reaction of consumers, on the other hand, is that lawsuits, both in the consumer's own Member State and abroad, are always very expensive for the consumer, and having to bring proceedings abroad is made all the more onerous by the consumer's unfamiliarity with the law, language and legal system. In their opinion, such discouraging factors may not result in a de facto denial of the fundamental right of access to justice; enterprises, on the other hand, as repeat players, do dispose of the necessary knowledge of languages and legal know-how to deal with proceedings abroad. Moreover, consumers are of the opinion that being sued abroad is included in the risk management of enterprises and that enterprises that wish to avoid being sued in certain Member States have to perform rechtsgeschäftlicher Selbst-

71 F. Sweerts, loc. cit. 263.
schutz, for instance by organising their website in such a way that it is impossible to enter into a contract with consumers from a certain Member State. A second argument of consumers is that for e-commerce to become a full-grown way of trading, consumers first have to have confidence in it and to be sure that they are not left to the arbitrariness of the website holders. In their opinion, broadening the scope of the special protection regime is consequently of high symbolic value. Third, they refute the aforementioned criticism as regards the inconsistency between the country of destination principle set forth in the Regulation and the country of origin principle set forth in the EU E-Commerce Directive by pointing out that this Directive does not deal with international jurisdiction but with the applicable law and that Recital 23 and Art. 1.4 of this Directive explicitly prescribe that ‘this Directive does not aim at establishing rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts’. A fourth remark of consumers is that the consumers’ need to be entitled to rely on the special protection regime in the field of e-consumer contracts equals that in the field of ‘traditional’ consumer contracts.

5. Towards a world-wide regime?

From 6 until 22 June 2001, the Hague Conference on private international law met in the first part of the nineteenth diplomatic session at the Peace Palace in the Hague to pursue negotiations towards a new convention on jurisdiction and foreign judgments in civil and commercial matters. The basis of these negotiations was a preliminary draft convention drawn up in October 1999. One of the important challenges of the Conference is to

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74 S. Dutson, ‘Transnational E-commerce’ (2000) Computer Law & Security Report (105) 107; M. Foss and L. Bygrave, loc. cit. 135; R.L. Hoegle and C.P. Boam, loc. cit. 49–50; P. Mankowski, loc. cit. 24–25; S. van der Hof, ‘De internationale on-line consumentenovereenkomst’ (2000) http://www.nvvir.nl/doc/H5.pdf, 9. Some authors are of the opinion that refusing to contract with consumers from certain Member States can only be realised by mentioning this explicitly on the website: I. Couwenberg and M. Pertegás Sender, ‘Recente ontwikkelingen in het Europees bevoegdheids- en executierecht’ in H. van Houtte and M. Pertegás Sender (eds.), Het nieuwe Europese IPR: van verdrag naar verordening (Intersentia: Antwerp 2001) (31) 42. Others doubt whether such a disclaimer is sufficient, since it can be formulated in a language that is not understood by certain consumer. They propose to oblige the consumer to type in his geographical address, so that the order can automatically be refused when that address is situated in a Member State on the ‘black list’. If a consumer has typed in a false address and has thus misled the seller, then he will not be entitled to rely on the special protection regime: M. Lubitz, loc. cit. 41; P. Stone, loc. cit. 9.


76 See http://www.hcch.net/e/workprog/jdgm.html and http://www.hcch.net/e/workprog/e-comm.html.
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draw up a convention that sufficiently overcomes the legal problems in respect of the Internet.

The current draft convention pays a lot of attention to international E-Consumer contracts jurisdiction (see its Art. 7). However, at present, there are four different proposals and some variants thereof and there is no consensus in respect of any of them either that one or more should be omitted or that any one of them should be preferred. One notices that the first proposal is clearly less advantageous to E-Consumers than the regime under the Regulation, for it prescribes that a consumer cannot bring proceedings against the other party in the state in which he is himself domiciled if that other party demonstrates that it took reasonable steps to avoid concluding contracts with consumers habitually resident in the state in which the consumer is domiciled. It is also not clear whether or not the Conference will – as the European Commission – introduce the distinction between active, interactive and passive websites that originates from US case law.

One now has to await the second part of the diplomatic session. However, due to the current lack of consensus between the delegations, one can only guess at the final outcome of the Conference, if any.

6. Conclusion

This article has pointed out that the debate and case law in the US as regards international E-Consumer contracts jurisdiction has started earlier than in Europe. The current regime under US law is that a court first examines whether or not the ‘Long Arm’ Statute allows to exercise personal jurisdiction over a website and further, if so, whether or not exercising that personal jurisdiction falls within the limits of the due process principle set forth in the Fourteenth Amendment of the American Constitution. To the latter end, the court examines in case of general personal jurisdiction whether or not the website holder-defendant has had substantial or continuous and systematic contacts with the forum state, and in case of specific personal jurisdiction whether or not exercising jurisdiction is reasonable and the website holder-defendant fulfils the conditions of minimum contacts and purposeful availment. In this context, a distinction is made between active, interactive and passive websites, whereby the active website always, interactive websites sometimes and passive websites never fulfil the aforementioned conditions.

In the EU, international jurisdiction over E-Consumer contracts was governed by Art. 13 of the Convention until 1 March 2002 (this is still the

case in Denmark). Its first condition, i.e. that before the conclusion of the contract, the other party has addressed a specific invitation to the consumer or advertised in the state in which the consumer is domiciled, has lead to various point of views in legal doctrine, and its second condition, i.e. that the consumer has taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled, has been considered as unrealistic in the Internet era.

Since 1 March 2002, in all EU Member States (except for Denmark), this matter is governed by Art. 15 of the Regulation. The new regime gives an affirmative answer to the question of whether digital products can be considered as ‘goods’. It also introduces some modifications as regards the field of application of the special consumer protection regime set forth in the Convention.

First, it is no longer required that the consumer has taken the steps necessary for the conclusion of the contract in the state in which he is himself domiciled.

Second, the distinction between an ‘active’ and a ‘passive’ consumer has been omitted, since it is no longer necessary that before the conclusion of the contract, the other party has addressed a specific invitation to the consumer or advertised in the state in which the consumer is domiciled; the new requirement is that the consumer contract has been concluded with a person who pursues commercial activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State. However, it is not so clear how the new term ‘directing to’ has to be interpreted. The European Commission, the Council and the European Parliament agree that this term firstly implies that a website must have an interactive nature, which means that the website must at least give the consumer the opportunity to enter into an agreement on line; consequently, they introduce a terminology and concept that originates from US case law. The European Parliament is of the opinion that a website must secondly also be deliberately targeted on the EU Member State in which the consumer is domiciled, whereby factors such as the language(s) and currency/currencies used on the website have to be taken into account for evaluating the degree of ‘deliberately targeting’; it consequently adheres to the purposeful availment requirement of US case law and the ‘middle ground’ point of view in European legal doctrine. The Commission, however, is of the opinion that, if the website has an interactive nature, its mere accessibility in the EU Member State in which the consumer is domiciled is sufficient for asserting jurisdiction over the E-Contract; consequently, it does not support the purposeful availment requirement of US case law and the ‘middle ground’ point of view in European legal doctrine. It is clear that, due to this discord, the European Court of Justice will have a decisive role in settling this ‘dispute’. However, since the Commission is supported by the Council, it seems that the new regime has to be interpreted in
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accordance with the Commission’s point of view. This would mean that a consumer, irrespective of his nationality, who is domiciled in a EU Member State and who uses, anywhere in the world, an interactive website which is (also) accessible in the Member State in which he is himself domiciled and the holder of which is domiciled in a EU Member State, can bring proceedings against the website holder in the EU Member State in which he is himself domiciled.

Furthermore, one has to await the outcome of the second part of the diplomatic session of the Hague Conference for Private International Law. Taking into account the intrinsic border-crossing nature of the Internet, it is necessary to draw up a world-wide uniform international E-Consumer contracts jurisdiction regime. However, considering the current stay of play, it remains to be seen whether the Hague project will ever lead to a satisfactory result.