

Legal Risk Management in Electronic Commerce

- Managing the risk of cross-border law enforcement

Jan Trzaskowski

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Ex Tuto Publishing
October 2005

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1st edition, October 2005

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Written in OpenOffice.org

Cover by MERE.INFO
Published by Ex Tuto Publishing
Printed in Denmark by Frederiksberg Bogtrykkeri A/S

ISBN 87-991018-0-7

Ex Tuto Publishing (Ex Tuto ApS)
Ved Amagerport 4
2300 Copenhagen S
Denmark
www.extuto.com

Preface

This doctoral thesis was submitted to the Faculty of Business Economics at Copenhagen Business School in partial fulfilment of the degree of Doctor of Philosophy (PhD).

Research for it was carried out at the Law Department of Copenhagen Business School under the supervision of Professor Ruth Nielsen, dr.jur., to whom I am indebted for rewarding comments and discussions. I owe a great deal to Professor Niels Bjørn-Andersen (CBS Department of Informatics), Professor Henrik Lando (CBS Department of Industrial Economics & Strategy), Professor Dr. Peter Mankowski (University of Hamburg), and Professor Jan Kabel (University of Amsterdam), who have all been helpful and inspiring in the process of shaping my project.

I wish to express my gratitude to the forthcoming and knowledgeable people at the Institute for Information Law at the University of Amsterdam, where I carried out a substantial amount of research as guest researcher. I am grateful for financial aid from Copenhagen Business School, Inge von Müllens Fond, and FSRs Studie- & Understøttelsesfond that enabled me to do research abroad.

I would like to thank my family, friends, and colleagues for helping me through the sometimes peculiar experience of writing a PhD thesis. In particular, I would like to express my thanks to my parents and my brother for their unfailing support, to Kim van Kaam and her family for all our positive experiences, to Professor Jan Kabel and Professor Bernt Hugenholtz for inviting me to the University of Amsterdam, to Professor Oren Bracha and his wife Tammi for their kind hospitality during my visit to the University of Texas at Austin, to Elvira Caneda Cabrera and Rosanne van der Waal for being my favourite librarians at the University of Amsterdam, and to Professor Erik Werlauff (Aalborg University) for encouraging me to pursue my interest in the legal aspects of technology back in 1996-97. Finally, I want to thank you, the reader, for taking an interest in my work. Your comments are most welcome.

Hyperlinks and other references were last updated on 1 June 2005. Material, including case law, added after that date was not taken into consideration.

Copenhagen, June 2005
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1. Introduction

The purpose of this chapter is to provide an introduction to the subject matter of this thesis, its hypotheses, the applied methodology and delimitation.

This thesis deals with cross-border law enforcement which, in this thesis, is defined as the enforcement of the legislation of one state on a natural or legal person established in another state. From a state perspective, the question is to what extent it can enforce its legislation on persons who are residing in other states. This thesis deals with cross-border law enforcement from a business perspective (legal risk management). From such perspective, the interest in cross-border law enforcement can be formulated as to what extent the law of foreign states can be enforced on a business and what the business can do to mitigate or eliminate such risk of cross-border law enforcement.

The focus in this thesis is on electronic commerce carried out on the Internet. The Internet is a world-wide computer network which allows people around the world to communicate easily at a low cost. Commercial transactions may be carried out on the Internet in the form of electronic commerce. The amount of commercial presence on the Internet is growing and entails different activities such as business and product presentations, sale of goods and services and delivery of 'digital goods' (for example music, film and software). Electronic commerce is interesting since it allows easy cross-border transactions between a business and its actual and potential customers, without a need for the business to engage in an establishment in the state of the customer.

The Internet has made it substantially easier for businesses to reach a global marketplace, but commercial activities which influence different markets are not unlikely to become subject to the legal regime of those states. In the absence of globally accepted standards for geographical delimitation of content on the Internet,¹ the infringement of foreign law is a risk which businesses inevitable will run when carrying out e-commerce on the Internet. 'The prospect that a website owner might be haled into a courtroom in a far-off jurisdiction is much more than a mere academic exercise, it is a real possibility'.² Compliance with national laws is rarely sufficient to limit a business's exposure to legal risks.³ Complying with

1 See for example Vasiljeva, Ksenija, 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online, European Law Journal, Volume 10 (January 2004), Issue 1, p. 123 at page 133f.

2 Geist, Michael A., Is there a There There? Toward Greater Certainty for Internet Jurisdiction, Berkeley Technology Journal, No. 16, 2002, p. 1345, p. 1.

3 Geist, Michael A., Is there a There There? Toward Greater Certainty for Internet Jurisdiction, Berkeley Technology Journal, No. 16, 2002, p. 1345, p. 3.

law on a global basis is, if possible at all, expensive. Some people have suggested that the Internet should be recognised as a virtual world not regulated in a traditional, legal sense.

*'Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather'.*⁴

It is obvious that activities on the Internet influence people, societies and markets in a very tangible way. The Internet is solely a medium which facilitates communication between individuals, but with an enormous potential.⁵

States are sovereign, and are to that extent not obliged to accept illegal activities affecting the state, just because they are carried out on the Internet.⁶ States may take various actions to regulate the Internet.⁷ The enforcement of legislation is often cumbersome, if possible at all, and may only be carried out to the extent that it does not violate the sovereignty of other states. This thesis deals with the possibilities in cross-border law enforcement and the effect of certain risk mitigation measures.⁸ The main purpose is to provide research which supplies guidance on how businesses can deal with the risk of being met with legal requirements deriving from a state other than that in which the business is established.

*A US study suggests that the risk of getting hauled into court is the biggest fear of companies operating online and that companies, particularly those situated in North America, seek to influence jurisdictional outcomes by using both technological and legal approaches to mitigate risk. The most common approaches were to either eliminate or reduce business activity in higher risk jurisdictions or to target specific jurisdictions that are perceived to be lower risk alternatives. The most commonly used approaches were technical access blocking (50 percent), user registration requirements self-identification, and password protection (40 percent). The most popular approaches to identify users were through user registration or self-identification.*⁹

This thesis concerns in particular the discussion on zoning the Internet¹⁰ which

4 Barlow, John Perry, A Declaration of the Independence of Cyberspace, 1996.

5 See for example Haines, Avril D., The Impact of the Internet on the judgments Project: Thoughts for the Future, Hague Conference, Permanent Bureau, Preliminary document 17, February 2002, p. 5.

6 'A nation's right to control events within its territory and to protect its citizens permits it to regulate the local effects of extraterritorial acts'. Goldsmith, Jack L., Against Cyberanarchy, 65 University of Chicago Law Review, Fall, 1998, p. 1199 at IV-A.

7 See for example Ramberg, Christina, Internet Marketplaces, the Law of Auctions and Exchanges Online, Oxford University Press, 2002, paragraph 2.05 with references.

8 Geographical delimitation of content on the Internet and the choice of forum and applicable law.

9 Global Internet Jurisdiction, The ABA/ICC Survey, American Bar Association, Sub-Committee Chair: Professor Michael Geist, April 2004, pp. 2-3 and 14-15.

10 See Lessig, Lawrence and Resnick, Paul, Zoning Speech on the Internet, Michigan Law Review, November 1999, p. 395. See Spang-Hanssen, Henrik, Cyberspace & International Law on Jurisdiction,

is related to the questions of maintaining geographical borders in a medium which does not automatically recognise such borders. The idea is that the content of the Internet may, mainly through technological means, be reserved for certain geographically delimited areas. It has been recognised that there is a legal trend encouraging the use of reliable risk-management strategies, in order to re-create 'noticeable' national borders in cyberspace.¹¹

1.1. Quality

The famous book 'Zen and the Art of Motorcycle Maintenance'¹² tells a story about an academic's (Phaedrus) search for quality as an objectively definable concept. Phaedrus seems to discover that quality is subjective, but not always unharmonised among people. This is a PhD thesis which is submitted in order to achieve the PhD degree from Copenhagen Business School. The quality requirements are thus settled by Danish law.

A Danish PhD thesis must, in conjunction with the public defence, show that the candidate is capable of carrying out a scientific project by applying scientific methods within the branch of knowledge and the thesis must constitute a contribution to research in accordance with international standards for PhD degrees within the branch of knowledge.¹³ This definition is thus the yardstick for measuring the 'quality' of this thesis. The branch of knowledge in question is law and the methodology applied is described below in this chapter.

The project is carried under a 2½ year scholarship ('kandidatstipendiat') which includes certain teaching obligations and course requirements, leaving 1½ year for researching and writing the thesis.

1.2. Purpose

The main purpose of this thesis is to provide an examination of to what extent the law of a foreign state can be enforced on a business which is carrying out electronic commerce on the Internet (World Wide Web), and how a business may mitigate or eliminate the risk of those requirements being enforced. The discussion consists of two parts:

1. *Part I - Cross-Border Law Enforcement (chapters 2 to 4):
Examine possibilities in cross-border law enforcement with focus on enforcement carried out by both public and private entities. The examination comprises both*

DJØF Publishing, 2004, p. 313ff. for an overview of this discussion.

11 Kohl, Uta, The Rule of Law, Jurisdiction and the Internet, International Journal of Law and Information Technology, vol. 12, no. 3, p. 367-376 at p. 371f.

12 Pirsig, Robert M., Zen and the Art of Motorcycle Maintenance: 25th Anniversary Edition, Vintage books, 1999.

13 See section 3(1) of the Danish Order Concerning the PhD Education and the PhD Degree ('bekendtgørelse 114 (8 March 2002) om ph.d.-uddannelsen og ph.d.-graden').

enforcement through the judiciary and enforcement carried out by alternative means.

2. *Part II - Legal Risk Management (chapter 5):*

Examine possibilities in risk mitigation through geographical delimitation and choice of forum and applicable law, with a view to determining the effect in relation to mitigating or eliminating the risk of cross-border law enforcement as dealt with in Part I.

1.2.1. Hypotheses

It requires knowledge of a field of research to formulate hypotheses, and hypotheses are likely to be refined in step with the knowledge acquired through research. Writing hypotheses in the context of a thesis is normally a self-referencing process - a strange loop.¹⁴ The hypotheses presented here are part of the entire research and serve mainly to define the research-theme, and to provide a structure for reaching conclusions through verifying or falsifying the hypotheses. These conclusions may be scrutinised by readers in general and the opponent to the thesis in particular. Similar conclusions to the hypotheses should be reached by other researchers based on the same methodology and delimitations.

The thesis seeks on the basis of the methodology and delimitation described below to discuss and to the extent possible verify or falsify the following hypotheses:

First Hypothesis:

'Activities on the Internet are subject to geographical borders, and it is possible to identify factors that are relevant in assessing where activities on a website are directed.'

Second Hypothesis:

'Private parties are better able to carry out traditional cross-border law enforcement than public authorities.'

Third Hypothesis:

'The freedom to provide goods and services in combination with the 2000 E-Commerce Directive restricts the possibilities of cross-border law enforcement (both public and private law enforcement as well as traditional and alternative law enforcement).'

Fourth Hypothesis:

'Law enforcers established outside the Internal Market have limited access to traditional cross-border law enforcement against the Business, whereas alternative cross-border law enforcement can be applied.'

Fifth Hypothesis:

'Businesses can mitigate the risks of cross-border law enforcement by applying geographical delimitation and by entering into agreements on forum and applicable law.'

Sixth Hypothesis:

'The laws of the Internal Market limit the Business's possibilities in applying geographical delimitation.'

1.3. Methodology

As mentioned above, a PhD thesis is to be based on scientific methods within the branch of knowledge. Legal methodology can be discussed at length and opinions varies from the non-existence hereof over it being undefinable, yet easy identifiable to firm explanations and strict rules. Science is concerned with empirically observable facts and events.¹⁵ The observable facts dealt with in this thesis are the various sources of law, which comprise inter alia statutory law, case law, preparatory works, and general legal principles. The examination in this thesis is mainly focused on statutory law, preparatory works and case law which altogether to some extent may reflect general legal principles. Legal science will in this context be the systematic investigation of sources of law in order to reach conclusions that can be used to predict the outcome of a trial and/or describe the relevant factors of importance for a judge's decision.

The quality of available (or observed) sources of law is decisive for the validity of the predictions. The better sources of law, the better predictions. The sources of law are mainly identified, but not examined, through literature studies and structured examinations of legal databases. The systematic investigation of sources of law is intended to simulate judges' way of thinking - a thinking process which concerns the distribution of importance to facts and sources of law. This is a way of thinking that lawyers are trained in and which is reflected in judgments. This is not the only possible understanding of law, but the understanding on which this research is carried out. It should be mentioned that different courts may attach different degrees of importance to the various sources of law.

The thesis maintains a broad scope which also includes discussions on technology. The broad scope entails that the thesis to some extent relies on the findings of other researchers, including existing literature. This means that many of the covered areas can be researched further. The broader scope means, however, that conclusions can be reached at a higher level of abstraction.

This thesis deals with international law in a broad sense,¹⁶ including also EU

15 Freeman, M. D. A., *Lloyd's Introduction to Jurisprudence*, seventh edition, Sweet & Maxwell, 2001, p. 13.

16 See in general Shaw, Malcolm N., *International Law*, Fifth Edition, Cambridge University Press, 2003, p.

and Community law. Sources of international law¹⁷ are mainly limited to generally accepted legal principles and international agreements, including in particular those establishing the European Union and the Internal Market. National law is, as a starting point, only dealt with to the extent it reflects international law. National law is, however, used to identify factors connecting Internet activities to particular jurisdictions. It should be noted that there is an interaction between national and international law, and a razor-sharp distinction between the concepts is not necessary in this context. A similar approach to 'international law' is seen in other works.¹⁸ The approach resembles what has been denoted an international technical and comparative approach.¹⁹

Case law is mainly based on decisions entered by the European Court of Justice and the European Court on Human Rights, but as mentioned immediately above, national case law is also examined to some extent, but only in an explorative manner. A number of the situations dealt with require the involvement of national courts, but it is not the intention to discuss national law in details, and under all circumstances only in a general manner. The case law is selected mainly on the basis of its authority and its relevance to distance activities, including both Internet activities and other activities carried out over a distance through other media such as for example television.

Inspiration for the interpretation of the acts examined is also found in preparatory work and other documents elaborated by well-respected legal writers and international organisations, including in particular the European Commission and the Hague Conference. The value as a source of law may, in principle, be limited, but those documents serve to provide an understanding of the intentions behind the acts. In particular in international criminal law, the amount of traditional sources of law is limited. For practical reasons, this thesis is build mainly on sources written in English and Danish.

Scientific research is often based on a number of premisses which are not corresponding completely with the world around us. In fact all observations done by human beings are limited by the sensors, processing power and intellectual capacity of human beings. Research is about compressing information to an operational level of abstraction.²⁰ The construction of law concerns the evaluation

48ff.

17 See in general on sources of international law, Shaw, Malcolm N., *International Law*, Fifth Edition, Cambridge University Press, 2003, p. 65ff.

18 See for example International Law Association, *Transnational Enforcement of Environmental Law*, Second Report, Berlin Conference (2004), Dr Christophe Bernasconi and Dr Gerrit Betlem (Rapporteurs), p. 2. Where it is stated that 'it is not feasible to provide a comprehensive analysis of numerous domestic laws. More detailed discussion is limited to regionally harmonised private international law of the European Community, as that encompasses 25 jurisdictions in one go, and to some individual domestic jurisdictions where the law can be deemed to be representative of wider trends or contains innovative approaches'.

19 See Spang-Hanssen, Henrik, *Cyberspace & International Law on Jurisdiction*, DJØF Publishing, 2004, p. 198f.

20 See in general Nørretranders, Tor, *The User Illusion*, Penguin Books, 1999.

of both facts and sources of law. As somewhat uncommon in legal research, an imaginary test set-up is created to provide a set of 'facts', upon which the law is applied. This approach is inspired by other areas of science, where experiments are carried to verify or falsify hypotheses. The idea is to maintain the focus of a standardised business ('the Business'). This approach has proven helpful in defining the scope of the thesis, since a number of discussions are excluded by defining the test set-up. Through this approach, it has been possible to maintain a rather broad scope, dealing in particular with private and public international law as well as the laws of the Internal Market and more technical issues. The test set-up is thus part of the general delimitation.

It has been important to examine and discuss the law from a business's point of view rather than providing a general presentation of the law on its own premisses. The approach is not that different from what is applied in the practice of the law, but instead of maintaining the focus of one client, this thesis intends to reach conclusions which are relevant for a number of businesses. This is in good harmony with the fact that this thesis is written and submitted for evaluation at a business school, and the need for providing research which may be utilised by businesses. The applied methodology leans against an economical 'realism', but the economical part is left to be pursued in later work.

1.4. Delimitation and Definitions

This thesis deals with a broad variety of legal areas, and it is difficult to provide a general overview of all delimitations carried out. In general, it can be said that the thesis is confined to the areas actually dealt with in the thesis. The main topics dealt with are the free movement of goods and services in the Internal Market, freedom of expression, public international law, private international and procedural law, geographical delimitation / targeted online activities and discrimination based on domicile/nationality in the Internal Market. These areas of law are confined to issues relevant to cross-border law enforcement within the provided test set-up. The analysis of the Internal Market is confined to the free movement of goods and services, which means that the free movement of persons, capital and the freedom of establishment is not examined.

The focus of this thesis is confined to electronic commerce, which in this context is defined as commerce carried out on an electronic network. This thesis focuses on activities carried out on the World Wide Web through the Internet. Even though the Internet and the World Wide Web are distinct entities, they are, for the sake of simplicity and unless otherwise stated, referred to collectively as 'the Internet'.²¹

21 See for a similar approach *Yahoo! Inc v. La Ligue Contre le Racisme et l'Antisemitisme et al*, United States Court for the Northern District of California, San Jose Division, 169 F. Supp. 2d 1181; 2001 U.S. Dist. LEXIS 18378; 30 Media L. Rep. 1001 (7 November 2001), footnote 1. 'Generally speaking, the Internet is a decentralized networking system that links computers and computer networks around the

Law enforcement concerns a variety of activities with a view to compelling observance of legal norms. By 'enforcement' is understood imposing sanctions on the infringer of a norm. 'Law enforcement' is the enforcement of 'legal norms', whereby is meant norms that can, at least in principle, be enforced through the judiciary. Law enforcement that is carried out through the judiciary is labelled 'traditional law enforcement', whereas enforcement of law carried out in other ways is labelled 'alternative law enforcement'. Alternative law enforcement can for example be carried out through the market (reputation) or by technical means. Law enforcement may be carried out by both public and private entities and is in this thesis denoted 'public law enforcement' and 'private law enforcement' respectively. Private entities are entities not exercising public powers.²² Cross-border law enforcement is in this thesis understood as imposing sanctions under the law of one state upon an infringer established in another state.

Traditional cross-border law enforcement normally requires cooperation by the state in which the business is established. Traditional law enforcement may be carried out 1) if the state, in which the business is established, recognises a foreign judgment, where foreign law is applied or 2) if the state in which the business is established applies foreign law. In more severe crimes which are not dealt with in this thesis, traditional cross-border law enforcement may also be carried out by means of extradition of the offender.

Alternative law enforcement is enforcement by other means than those imposed by the judiciary. This could for example be by blocking a website, whereby the citizens of a state are denied access to certain content.²³ Also enforcement through unfavourable commenting may be quite efficient in terms of imposing sanctions on a business. It falls outside the scope to evaluate the effects ('value') of law enforcement, since the thesis only focuses on the possibilities herein, including legal barriers to law enforcement which may be derived from the law of the Internal Market. The analysis concerning alternative law enforcement is confined to its compatibility with the laws of the Internal Market. It is assumed that alternative law enforcement can be carried out without cooperation of the state in which the business is established. As regards the effectiveness of such enforcement, the consequences for the business and the possibilities of managing such risks require discussion of economic and technical issues which are not dealt with in this thesis.

Cross-border litigation is normally both expensive and cumbersome. This may deter an aggrieved party from suing another party even if the outcome of a case

world. The World Wide Web is a publishing forum consisting of millions of individual websites that contain a wide variety of content'. See 5.2.1.1 for a technical introduction to the Internet and World Wide Web.

22 See in general 4.2.1.1.

23 See for example Dornseif, Maximilian, Government Mandated Blocking of Foreign Web Content, *md.hudora.de* and Ramberg, Christina, *Internet Marketplaces, the Law of Auctions and Exchanges Online*, Oxford University Press, 2002, paragraph 2.05.

would clearly benefit the aggrieved party.²⁴ This is especially the case where the subject matter is of insignificant value like in most consumer purchases on the Internet. This is only one obstacle to cross-border law enforcement which also counts problems relating to serving documents, discovery, investigation, legal aid, risk of procedure (cost-benefit) etc.²⁵ These factors are not dealt with in this thesis, which only focuses on the possibility, in principle, of imposing sanctions or restrictions.

The subject matter has for practical reasons been delimited to the enforcement of requirements in connection with commercial communications and practices (unfair competition law).²⁶ This includes enforcement of this body of law through contractual relations.²⁷ Even though unfair competition law may be severely sanctioned, the analysis deals only with fines, injunctions, damages and contractual liability or consequences. This means that for example custodial penalties, disqualification, confiscation, extradition, community service etc. are not dealt with. The thesis takes the viewpoint of a profit-optimising business which is concerned with the sanctions deriving directly from the types of enforcement described above. The analysis does not deal with the magnitude of sanctions. Only the possibilities in cross-border law enforcement are examined. It is not the intention to elaborate on material law, it is just assumed that the law of a foreign state is infringed.

*Unfair competition law can be defined by its objective to prevent the competition which takes place on a particular market from degenerating and becoming harmful or even abusive. The rules against unfair competition are intended to protect the qualitative aspect of competition, and are thereby to be distinguished from rules on restrictions of competition (antitrust laws) which are concerned with the structure of the market and intended to protect the quantitative aspect of competition.*²⁸

Antitrust laws seek to preserve freedom of competition by combating barriers to trade and the abuse of economic power, whereas the law of unfair competition seeks to ensure fair competition by requiring all participants to play the game according to the same rules. The distinction between an act of unfair competition and a restriction of competition is not always easy to make, and the line of demarcation is not the same in

24 See for example Cooter, Robert and Ulen, Thomas, *Law & Economics*, Third Edition, Addison-Wesley, 2000, p. 336.

25 See in general Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 609ff. and Bellia, Patricia L, Berman, Paul Schiff and Post, Davis G., *Cyberlaw – Problems of Policy and Jurisprudence in the Information Age*, Thomson West, 2003, p. 168ff with references.

26 See in general Kabel, Jan, *Swings on the Horizontal, The Search for Consistency in European Advertising Law*, IRIS 2003-8.

27 The distinction between private and public law is becoming increasingly blurred, and in particular consumer protection is often enforced through private law remedies. See Hörnle, Julia, *The European Union Takes Initiative in the Field of E-Commerce*, JILT 2000 (3), p. 333 at p. 352. See also Schepel, Harm, *The Enforcement of EC Law in Contractual Relations: Case Studies in How Not to 'Constitutionalize' Private Law*, *European Review of Private Law*, 5-2000, p. 661, in particular p. 664f.

28 Note on Conflicts of Laws on the Question of Unfair Competition: Background and Updated, drawn up by the Permanent Bureau, Preliminary Document No 5, April 2000, p. 7 with references.

all legislation.²⁹ A coherent body of unfair competition law can be identified as provisions dealing with comparative advertising, confusion, parasitic behaviour, special offers, low prices, prohibiting disparagement of competitors and discriminatory sales conditions, including price discounting.³⁰ Unfair competition law may be formulated in a special law or specific provisions inserted into legislation of general scope or through general rules which provide for civil or penal sanctions.³¹

1.4.1. The Test Set-Up

The test set-up applied in this thesis involves a business ('the Business') which is established in a state which is member of the European Union. It is assumed that the Business has no establishment or goods in other states than the state in which it is established.³² The Business is carrying out electronic commerce on the Internet. The online activities consist of publishing marketing material and selling products (goods or services) to both businesses and consumers ('the User'). Since the thesis adopts the viewpoint of the Business, the use of the term 'foreign' (as in foreign courts and foreign law) refers to another state than the state in which the Business is established.

The Business is assumed to comply with the law of the state in which it is established. This means that it, in principle, is without interest if a foreign court applies the law of the state in which the business is established. In practice it may have consequences for the Business if a foreign court applies the law of the Business. It means that the Business will have to defend itself in a foreign court and the risk of misinterpretation of the law is larger, all else being equal. There is in the Internal Market a substantial harmonisation of substantive law, which means that there to some extent in practice are limited difference between the laws of Member States in certain areas. This includes in particular the 1984 Misleading Advertising Directive,³³ the 1997 Distance Selling Directive,³⁴ the 2000 E-Commerce Directive,³⁵ and the 2005 Directive on Unfair Commercial Practices.³⁶

29 Note on Conflicts of Laws on the Question of Unfair Competition: Background and Updated, drawn up by the Permanent Bureau, Preliminary Document No 5, April 2000, p. 7 with references.

30 Thunken, Alexander, Multi-State Advertising Over The Internet And The Private International Law Of Unfair Competition, *International and Comparative Law Quarterly*, October 2002, p. 3 with references.

31 Note on Conflicts of Laws on the Question of Unfair Competition: Background and Updated, drawn up by the Permanent Bureau, Preliminary Document. No 5, April 2000, p. 15.

32 If the Business would have valuables in other states, the risk of being sued there would in most cases be greater, since a judgment can be enforced by seizing the valuables there. See also Geist, Michael A., *Is there a There There? Toward Greater Certainty for Internet Jurisdiction*, *Berkeley Technology Journal*, No. 16, 2002, p. 1345 at II.

33 Directive 84/450 (10 September 1984) concerning misleading and comparative advertising.

34 Directive 97/7 (20 May 1997) on the protection of consumers in respect of distance contracts.

35 Directive 2000/31 (8 June 2000) on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

36 Directive 2005/29 (11 May 2005) concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

It falls outside the scope of this thesis to present and discuss this harmonised body of substantive law.

Due to the international nature of the Internet, the Business is facing the risk of being met with legal requirements under the law of a foreign state. These legal requirements may be enforced by either 1) a public authority, 2) a private party without a contractual relationship with the Business and 3) a private party with a contractual relation with the Business. A number of imaginary experiments within the described test set-up is assumed. The experiments assume that a law enforcer seeks to impose a sanction on the Business. The observations made will be whether the law enforcer can expect to succeed in sanctioning the business or not. In a number of situations it will be clear whether law enforcement is possible, but in other situations knowledge of national law is required.

The project deals with two categories of enforcement, i.e. 1) traditional law enforcement carried out through the judiciary and 2) alternative law enforcement carried by other means. It is assumed that only one enforcement action is carried out at the time. This entails that the thesis does not deal with questions concerning competing competence in the same dispute.³⁷ What is interesting in this context is the legal competence of various courts and in particular the access to have judgments recognised and enforced.

In the first round of experiments the Business will not apply any risk mitigation and the outcome will provide information of the possibilities in law enforcement.³⁸ In the second round of experiments the Business applies various methods of risk mitigation as further described in chapter 5. I.e. 1) geographical delimitation and 2) choice of forum and applicable law. The outcome will be used to evaluate the effect of such risk mitigation.

1.5. What is New?

A PhD thesis must constitute a research contribution according to international standards for PhD degrees within the branch of knowledge. One key contribution lies in the applied methodological approach. Legal risk management, as a proactive approach to law, is subject to discussions³⁹ and this thesis is not only a contribution to research within the subject matter covered, but it is also an example of how research can be carried out in order to contribute to proactive law and legal risk management.⁴⁰ The methodology applied in this thesis is based on a

37 Litis pendens (private law) or ne bis in idem (criminal law).

38 See in general on various ways of enforcing legislation across borders in Trzaskowski, Jan, Cross-Border Law Enforcement in the Information Society, Julebøgen 2003, DJØF Publishing, 2003.

39 See for example www.proactivelaw.org.

40 See for example the preface to Dahl, Børge and Nielsen, Ruth (editors), New Directions in Business Law Research, GadJura, Denmark, 1996 and Østergaard, Kim, Metode på cand.merc.jur. studiet, Julebøgen 2003, Jurist- og Økonomiforbundets forlag, 2004, p. 269. See also www.proactivelaw.org on 'the Nordic School of Proactive Law'.

traditional approach to law and legal research. The adopted approach differs from what is normally seen in legal research,⁴¹ since it takes a particular point of view. In this situation the viewpoint of a profit-maximising business. This approach has made it possible to reach conclusions which are easily integrated into practice, but the approach has also allowed to deal with a relatively broad body of law because the test set-up excludes a number of legal discussions within the different areas of law.

The thesis also deals with questions on the interaction between law and technology.⁴² This interaction is in this thesis dealt with in connection with the idea of zoning the Internet, which has been discussed at some length, but mainly from a US perspective and mainly in the context of US law. The focus in these discussions has mainly been concentrated on jurisdiction and choice of law, whereas this thesis focuses on the enforcement of law across borders - an approach which unavoidably comprises questions on both jurisdiction and choice of law as elements. The focus is on the actual burden on the Business (enforceable sanctions) rather than a hypothetical burden including unenforceable sanctions.

The Internet is a relatively young medium and the application of law on this medium is despite a great deal of attention still a young branch of law, if a branch at all. International law, which is the legal core of this thesis has a longer history. This thesis works across both private and public law enforcement, since the Business may not from an economical point of view care whether a punishment falls under public or private law. Public and private law enforcement is often dealt with separately. The identification and structuring of the issues dealt with in this thesis provides a framework in which further research in legal aspects of international e-commerce can be fitted. It is also discovered through the research, where a need for harmonisation or clarification may be found. This is in particular true for areas where the Business will have to consider foreign, national law.

The thesis contains discussions including the most recent case law which, in itself, provides something new. The most important conclusions are made on a higher level of abstraction, but the thesis includes a number of discussions covering more detailed questions, and providing legal research at a lower level of abstraction. It is not always, in this context, a goal in itself to provide clear answers to the discussed question. The establishment of possible outcomes and the points of uncertainty may be more valuable than a single, vaguely founded, answer.

41 Most commonly legal research is carried out in the abstract.

42 See in general about 'code' as law in Lessig, Lawrence, *Code and Other Laws of Cyberspace*, Basic Books, 1999.

1.6. Outline of the Thesis

Below is a presentation of the outline of the thesis.

Chapter 1 - Introduction

This is the introductory chapter which provides the background and purpose of the project along with the hypotheses to be examined and the applied methodology and delimitation.

Chapter 2 - The Internal Market

In this chapter, the legal background of the Internal Market is introduced along with the principles of free movement of goods and services, in order to determine its influence on measures taken by both public and private law enforcers. The country of origin principle of the 2000 E-Commerce Directive is also introduced and its consequences for the Internal Market are discussed. The concept of freedom of expression is examined in order to establish to which extent the Business can rely on that freedom to avoid sanctions.

Chapter 3 - Public Law Enforcement

This chapter focuses on public entities' access to carry out traditional cross-border law enforcement. This chapter deals with enforcement under administrative and criminal law ('public law') and will examine enforcement arrangements and the limitations inherent in international and Community law.

Chapter 4 - Private Law Enforcement

This chapter explains the possibilities in traditional cross-border law enforcement within private international and procedural law. It is also discussed how Community law, including in particular the country of origin principle, may hinder private law enforcement.

Chapter 5 - Risk Mitigation

This chapter comprises an introduction to the technology behind the Internet. Based on the technology and case law, it will be discussed if it is possible to consider the Internet as a zonable medium. It will be examined, based on case law from various jurisdictions, which factors are relevant when considering where a website is directed. The possibilities in delimiting the impact of a website on the markets of foreign states are discussed. The chapter also deals with to what extent Community law may limit the Business's access to discriminate on the basis of nationality or place of residence.

Chapter 6 - Conclusions

Overall conclusions, where the outcome of the analysis will be discussed in order to establish whether the hypotheses can be verified or falsified.

2. The Internal Market

The purpose of this chapter is to introduce the fundamental legal framework of the Internal Market, including, in particular, the principles of free movement of goods and services. These freedoms will to some extent restrict the states of the Internal Market ('Member States') from carrying out cross-border law enforcement against businesses established in another Member State. The country of origin principle of the 2000 E-Commerce Directive plays an important role in this discussion. There will be a discussion on the relationship between the country of origin principle and the mentioned freedoms.

The freedom of expression is also examined, since a restriction imposed on the Business may interfere with this freedom. The focus is on the 'commercial freedom of speech'. Human rights are part of the European Union legislation, but the 1950 Convention on Human Rights has also been ratified by a number of states which are not part of the European Union and may thus have a bearing on the possibilities for those states to impose sanctions.

This chapter serves as a reference for a number of topics discussed later in this thesis. This is true for discussions on public law enforcement, private law enforcement and geographical delimitation.

The primary international legal person is the state which comprises the state's territory and the government and population within its borders.¹ Assuming that international law exists, sovereignty of states can be expressed in terms of law, providing that a state has 1) exclusive jurisdiction over a territory and its permanent population, 2) a duty of non-intervention in the exclusive jurisdiction of other states and 3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.²

States are as a starting point sovereign to prescribe, adjudicate and enforce within their own territory.³ Jurisdiction is a central feature of sovereignty.⁴ The member states of the Internal Market ('Member States') have, however, agreed to limit their competence to restrict access to their markets by businesses established

1 Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 105.

2 Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 288.

3 See in general Cassese, Antonio, *International Law*, Second Edition, Oxford University Press, 2005, p. 46ff and Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 287ff. See also on jurisdiction in international law Akehurst, Michael, *Jurisdiction in International Law*, *The British Year Book of International Law 1972-73*, University Press, Oxford, p. 145.

4 Shaw, Malcolm N., *International Law*, Fifth Edition, Cambridge University Press, 2003, p. 572.

in other Member States. The sovereignty of states provides a state with legislative competence over its territory, and states are not obliged to consent to treaties and tribunals. Most states have for economical and/or political reasons acceded to international agreements.

A common market, the Internal Market, is established through the Treaty Establishing the European Community ('the EC Treaty'). A fundamental principle is that the treaty, according to article 12, prohibits any discrimination on grounds of nationality.⁵ The EC Treaty furthermore establishes the concept of free movement of inter alia goods and services. It is in this context important to establish both what constitutes a restriction and to what extent such restrictions may be justified. In this part of the project, the 2000 E-Commerce Directive will also be examined in the light of these freedoms.

This chapter deals mainly with restrictions imposed on the Business by other states of the Internal Market. The Business may invoke these freedoms if an action against it is taken in another Member State. The aim is to define the Business's freedom to provide goods and services in other states. The Business cannot rely on the freedoms of the Internal Market against restrictions imposed from a state which is not a member of the Internal Market. But as demonstrated later in this thesis, traditional law enforcement requires cooperation with the state in which the Business is established, which is less likely to take place if actions are taken from a state which is not a Member State. The fundamental principles of the Internal Market as constructed by the European Court of Justice and the Court of the European Free Trade Association (the EFTA court), have proven to influence a broad variety of legal disciplines.

For this thesis the main treaties to be examined are those constituting the Internal Market, including legislation derived from those treaties. Treaties on private international law are being dealt with in chapter 4. The agreements entered under the World Trade Organisation may also be relevant to transnational trade and barriers hereto, but this area is excluded from the scope of this thesis. Human rights are a fundamental part of the Internal Market and the freedom of expression is discussed in order to establish how this fundamental right may be invoked by the Business against restrictions imposed from another Member State. The principles of human rights as acknowledged in the Internal Market may also serve as (public policy) objections towards cross-border law enforcement deriving from outside the Internal Market.

5 Article 12 of the EC Treaty provides that within the scope of application of the treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. See Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 387 with references.

2.1. The European Union

The European Union⁶ was established by the Treaty of the European Union⁷ (TEU) signed in Maastricht in 1992.⁸ The European Union is founded on the European Communities and its task is to organise relations between the Member States and between their peoples in a consistent and solidary manner.⁹ TEU¹⁰ and the EC Treaty,¹¹ both amended by the 1997 Amsterdam Treaty¹² and the 2000 Treaty of Nice,¹³ constitutes the primary sources of European Union law.

There is an ongoing work on a European Constitution.¹⁴ The draft treaty establishing the constitution (EU Constitution) was adopted on 18 June 2004 and signed on 29 October 2004 by the 25 EU Member States and the three candidate states (Bulgaria, Romania and Turkey). The EU Constitution must, however, be adopted (ratified) by each of the signatory countries in accordance with their own constitutional procedures. When, and if, the EU Constitution is ratified by all the signatory States, the Treaty can enter into force and become effective, in principle, according to the Treaty, on 1 November 2006.¹⁵ The future for the constitution is highly uncertain, but if it is finally ratified, it will not substantially alter the conclusions in this thesis.

The European Union consists of the following 25 states: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and United Kingdom.

The TEU and the EC Treaty have both elements of traditional international agreements and elements of a supranational nature. The latter means that decisions may derive their binding effect from powers given through treaties and not because every decision is agreed upon. The European Union law consists of three pillars which are the European Community (EC Treaty) and two intergovernmental pillars (TEU) consisting of 1) Common Foreign and Security Policy and 2) Police and Judicial Cooperation in Criminal Matters.

6 www.europa.eu.int.

7 Treaty on European Union (Maastricht, 1992), Official Journal C 191 of 29 July 1992.

8 For an introduction to the establishment and function of the European Union see for example Craig, Paul and Búrca, Gráinne de, EU Law, third edition, Oxford University Press, 2003, p. 3 ff. and Hartley, T. C., European Community Law, fifth edition, Oxford University Press, 2003, p. 3 ff.

9 TEU, article 1.

10 Treaty on European Union - (consolidated text), Official Journal C 325 of 24 December 2002.

11 Treaty establishing the European Community (consolidated text), Official Journal C 325 of 24 December 2002.

12 Treaty of Amsterdam, Official Journal C 340 of 10 November 1997.

13 Treaty of Nice, Official Journal C 80 of 10 March 2001.

14 See Treaty establishing a Constitution for Europe, Official Journal C 310 of 16 December 2004. See also http://europa.eu.int/constitution/index_en.htm.

15 See http://europa.eu.int/futurum/referendum_en.htm.

Because of the extensive cooperation between the members of the European Union, these states have to a large extent limited their sovereignty in favour of mutual rights and obligations in the European Union. The primary areas of interest for this thesis are the law deriving from the first pillar (title I on free movement of goods, title III concerning inter alia free movement services and the right of establishment and title IV dealing inter alia with judicial cooperation in civil matters) and the third pillar (title VI on police and judicial cooperation in criminal matters).

It should be noted that Denmark has a reservation concerning the judicial cooperation in civil matters, which means that none of the provisions of title IV of the TEU apply to Denmark.¹⁶ The UK has a similar reservation, but with a possibility to participate on a case by case basis.

2.2. The European Economic Area

The European Free Trade Association (EFTA)¹⁷ consists of Norway, Iceland, Switzerland and Liechtenstein. A number of Member States¹⁸ have left the association in favour of the European Union. The association is based on the 1960 Convention establishing the European Free Trade Association¹⁹ as amended by the 2001 Vaduz Convention.²⁰ This convention comprises inter alia rules on free movement of goods and services similar to those found in the EC Treaty.

Three of the EFTA states (Norway, Iceland and Liechtenstein) have in 1992 entered an agreement with the European Community and the member states of that time, establishing the European Economic Area (The EEA Agreement).²¹ The EEA Agreement includes the three non EU states in the Internal Market, without providing full membership of the EU. These three states have the right to be consulted by the Commission during the formulation of community legislation, but they have no say in the decision making. The EFTA Court²² interpret the EEA Agreement with regard to the EFTA states which have adhered to the agreement.

The EEA Agreement comprises four freedoms (freedom of movement of goods, freedom of movement of persons, of services and of capital) and some horizontal provisions

16 See Declaration (No. 53) by Denmark on article 42 (ex Article K.14) of the Treaty on European Union and Decision of the Heads of State or Government, meeting within the European Council at Edinburgh on 12 December 1992, concerning certain problems raised by Denmark on the Treaty on European Union, Conclusions of the Presidency, Part B, OJ C 348, 31.12.1992, p. 1. See also protocol to the Amsterdam Treaty on the position of Denmark, article 2.

17 www.efta.int.

18 Austria, Denmark, Portugal, Sweden, United Kingdom, Ireland and Finland.

19 Signed at Stockholm on 4 January 1960 (taking effect on 3 May 1960).

20 Vaduz, 21 June 2001.

21 Agreement on the European Economic Area, May 1992 as amended by the Adjusting Protocol and subsequently by the EEA Enlargement Agreement (OJ L 130, 29 April 2004, p. 3 and EEA Supplement No 23, 29 April 2004, p. 1). The EEA Agreement entered into force on 1 January 1994.

22 www.eftacourt.lu

relevant to these four freedoms (social policy, consumer protection, environment, company law and statistics). All new legislation under the EC Treaty within these areas is integrated into national legislation of the EEA EFTA States. The application of the Agreement is carried out through a joint committee whose main function is to take decisions extending Community Regulations and Directives to the EEA EFTA States. The EEA Agreement deals also as a main feature with conditions of competition and it allows for cooperation between the Community and the EEA EFTA States in a range of the Community's activities.

Switzerland is located in the middle of the EU, but is not part of neither the European Union nor the EEA. The Swiss people has so far rejected participation in both. Switzerland has, however, a number of agreements with the European Union, including the 1972 Free Trade Agreement,²³ which prohibits customs duties and quantity-related or equivalent restrictions (only) on industrial goods, excluding agricultural products. The special conditions concerning EU, the Internal Market and Switzerland are not further elaborated on in this thesis.²⁴ Other arrangements between EU and other states are also not elaborated on.

The term 'Internal Market' as used in this thesis covers both EU and EEA States, but the discussion will only be based on the EC Treaty. 'Member States' denotes states within the Internal Market.

2.3. Free Movement of Goods²⁵

Title I of the third part ('Community Policies') of the EC Treaty contains provisions on the free movement of goods. This part is divided into 'the Customs Union' and 'Prohibition of Quantitative Restrictions Between Member States'. Only the latter is subject to further examination in this thesis. It should be noted that article 25 of the EC Treaty provides that customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States.²⁶

Articles 28 and 29 of the EC Treaty provide that quantitative restrictions and all measures having equivalent effect shall be prohibited between Member States concerning both imports (article 28) and exports (article 29). According to article 30, these provisions do not preclude restrictions on grounds of 1) public morality, public policy or public security, 2) the protection of health and life of humans, animals or plants, 3) the protection of national treasures possessing artistic, historic or archaeological value or 4) the protection of industrial and commercial property. Such restrictions may, however, not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The provisions in articles 28 to 30 of the EC Treaty are directly applicable. This

23 Official Journal L/300 (31 December 1972), pp. 189 to 280.

24 Further information and official documents can be found at www.europa.admin.ch/e.

25 See in general Oliver, Peter, *Free Movement of Goods in the European Union*, Fourth Edition, Sweet and Maxwell, 2003.

26 See Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 583ff.

means that where provisions of national law are incompatible with these articles, the national courts and administrations are obliged to guarantee the full impact of Community law by removing, on their own initiative, the conflicting provisions of national law. The national court must if necessary refuse of its own motion to apply any conflicting provision of national legislation.²⁷ The question of direct applicability is further dealt with below.²⁸

2.3.1. Restrictions

The ban in article 28 of the EC Treaty concerns quantitative restrictions which comprises quotas and total bans on the import of goods into a Member State²⁹ and all measures having equivalent effect. 'Goods', as referred to in article 28 of the EC Treaty, are products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.³⁰ In the absence of harmonisation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging),³¹ constitute measures of equivalent effect prohibited by article 28.

In the *Dassonville* case³² the European Court of Justice established that 'all trading rules, enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having effect equivalent to quantitative restrictions'. It is clear from the *Dassonville* case that the court applies a broad concept of restrictions which is based on the effect rather than the intention. Leaving aside rules having merely hypothetical effect on intra-Community trade, it has been consistently held that article 28 of the EC Treaty does not make a distinction between measures which can be described as measures having equivalent effect to a quantitative restriction according to the magnitude of the effects they have on trade within the Community.³³ 'Measures' does not necessarily concern legally binding rules, but may also comprise practices and policies,³⁴ if the practice or policy show a certain

27 Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition, (2003/C 265/02), p. 9 with references.

28 See 2.8.1. and 5.2.2.

29 Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 86.

30 Commission of the European Communities v. Italian Republic. Case 7/68 (10 December 1968), p. 428.

31 Criminal proceedings against Bernard Keck and Daniel Mithouard. Joined cases 267/91 and 268/91 (24 November 1993), paragraph 15.

32 *Dassonville*, Case 8/74 (11 July 1974), paragraph 5.

33 See *Schutzverband gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher GmbH*, Case 126/91 (18 May 1993). Paragraph 21.

34 Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 87f.

degree of consistency and generality.³⁵

In the *Buy Irish Case*,³⁶ it was established that the implementation of a programme defined by the government of a Member State to encourage the purchase of domestic products was to be regarded as a measure having an effect equivalent to quantitative restrictions. The programme comprised inter alia a national advertising campaign and the introduction of a 'Guaranteed Irish' symbol. Even though the campaign had no significant success, the judgment was based on the mere fact that the activities formed part of a government programme which was designed to achieve the substitution of domestic products for imported products and was liable to affect the volume of trade between Member States.

This case also showed that the term 'enacted by Member States' also covers situations where the role of the government is restricted to moral support and financial assistance.³⁷ Below there is a discussion on how the freedoms apply to private entities' activities.³⁸

2.3.1.1. *Certain Selling Arrangements*

Legislation which restricts or prohibits certain forms of advertising and certain means of sales promotion may, although it does not directly affect imports, restrict the volume of sales because it affects marketing opportunities for the imported products. Such rules may compel a producer either to adopt advertising or sales promotion schemes which differ from one Member State to another or to discontinue a scheme which he considers to be particularly effective. Such legislation may constitute an obstacle to imports even if the legislation in question applies to domestic products and imported products without distinction.³⁹ This appears to be in accord with the *Dassonville* ruling, which also comprises measures which are 'indirectly capable of hindering intra-Community trade'.

In the *Keck and Mithouard* case,⁴⁰ two persons were being prosecuted for reselling products in an unaltered state at prices lower than their actual purchase price ('resale at a loss') which was contrary to French law. The European Court of Justice admitted that the legislation in question could restrict the volume of sales and hence the volume of sales of products from other Member States, in so far as it deprives traders of a method of sales promotion. But the court questioned whether

35 See *Commission of the European Communities v. French Republic*, Case 21/84 (9 May 1985), paragraph 13. See also *Commission of the European Communities v. Kingdom of Denmark*, Case 192/01 (23 September 2003), paragraphs 40 and 41.

36 *Commission of the European Communities v. Ireland*, Case 249/81 (24 November 1982).

37 *Commission of the European Communities v. Ireland*, Case 249/81 (24 November 1982), paragraph 17.

38 See 2.8.

39 *Criminal proceedings against Oosthoek's Uitgeversmaatschappij BV*. Case 286/81 (15 December 1982), paragraph 15. The case concerned a national prohibition on the use of free gifts as sales promotion which, however, was found to be justified on the grounds of consumer protection.

40 *Criminal proceedings against Bernard Keck and Daniel Mithouard*, Joined cases 267/91 and 268/91 (24 November 1993). See especially paragraphs 15 to 17.

such a possibility was sufficient to characterise the legislation in question as a measure having equivalent effect to a quantitative restriction on imports within the meaning of article 28.⁴¹ It was noted by the court that the prohibition was not designed to regulate trade in goods between Member States.⁴² Due to an increasing tendency to invoke article 28 as a means of challenging any rules whose effect is to limit their commercial freedom, the court wanted to re-examine and clarify its case law on this matter.⁴³

The court established, contrary to what had previously been decided, that national provisions restricting or prohibiting certain selling arrangements are not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the Dassonville judgment mentioned above, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of article 28 of the EC Treaty.⁴⁴

Consequently article 28 could not be invoked by the defendants in the main proceedings to avoid prosecution, since a general prohibition on resale at a loss was not found to be a restriction within the meaning of article 28. One of the characteristics of rules concerning 'selling arrangements' (or 'market circumstances') is that they apply indistinctly to all operators without a purpose of protectionism. Another defining character is that it imposes restrictions on the retailer rather than the importer.⁴⁵

In *Leclerc-Siplec*,⁴⁶ it was established that a ban on televised advertising in the distribution sector did affect the marketing of products from other Member States and that of domestic products in the same manner. The ban was thus considered a selling arrangement falling outside the scope of article 28. Since it prohibited a particular form of promotion (televised advertising) of a particular method of

41 Criminal proceedings against Bernard Keck and Daniel Mithouard, Joined cases 267/91 and 268/91 (24 November 1993), paragraph 13.

42 Criminal proceedings against Bernard Keck and Daniel Mithouard, Joined cases 267/91 and 268/91 (24 November 1993), paragraph 12.

43 Criminal proceedings against Bernard Keck and Daniel Mithouard, Joined cases 267/91 and 268/91 (24 November 1993), paragraphs 14 and 15.

44 Criminal proceedings against Bernard Keck and Daniel Mithouard, Joined cases 267/91 and 268/91 (24 November 1993), paragraph 16 and 17.

45 See in general on selling arrangements in Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 128ff. with references.

46 *Société d'Importation Edouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA*, Case 412/93 (9 February 1995).

marketing products (distribution),⁴⁷ it was emphasised that the prohibition did not prevent distributors from using other forms of advertising.⁴⁸ On the other hand, it was established in the *Canal Satélite Digital* case that the need in certain cases to adapt the products in question to the rules in force in the Member State in which they are marketed prevents the requirements from being treated as selling arrangements.⁴⁹

In the case *Familiapress v. Heinrich Bauer Verlag*,⁵⁰ which concerned an Austrian ban on games of chance in connection with publications, the European Court of Justice found, even though the relevant national legislation was directed against a method of sales promotion, that the ban would bear on the actual content of the products, in so far as the competitions in question form an integral part of the magazine in which they appear. As a result, the national legislation in question as applied to the facts of the case was not concerned with a selling arrangement as defined by the judgment in *Keck and Mithouard*.⁵¹ The ban was found to hinder the free movement of goods which, however, could be justified, provided that that prohibition would be proportionate to maintenance of press diversity and that objective could not be achieved by less restrictive means.⁵² The court found that such a national prohibition must not hinder the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned the opportunity to win a prize.⁵³

The *De Agostini* case⁵⁴ concerned a Swedish ban on misleading advertising and advertising directed towards children. The European Court of Justice examined in accordance with the *Keck* ruling whether the ban 1) applied to all traders operating within the national territory and 2) affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. The first requirement was found to be met, whereas on the second requirement, the court would not exclude that an outright ban of a type of promotion might have a greater impact on products from other Member States.⁵⁵ The court noted that the

47 Paragraph 22.

48 Paragraphs 19 and 23.

49 *Canal Satélite Digital SL v. Administración General del Estado and Distribuidora de Televisión Digital SA (DTS)*, Case 390/99 (22 January 2002), paragraph 30.

50 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case 368/95 (26 June 1997).

51 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case 368/95 (26 June 1997), paragraph 11.

52 This assumes, *inter alia*, that the newspapers offering the chance of winning a prize in games, puzzles or competitions are in competition with small newspaper publishers who are deemed to be unable to offer comparable prizes and the prospect of winning is liable to bring about a shift in demand.

53 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case 368/95 (26 June 1997), paragraph 34.

54 *Konsumentombudsmannen v. De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, Joined Cases 34/95, 35/95 and 36/95 (9 July 1997).

55 *Konsumentombudsmannen v. De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB*, Joined Cases 34/95, 35/95 and 36/95 (9 July 1997), paragraphs 40 to 42.

efficacy of the various types of promotion is a question of fact to be determined by the referring court. The court emphasised, however, that it was mentioned by the defendant in the main proceedings (De Agostini) that television advertising was the only effective form of promotion enabling it to penetrate the Swedish market since it had no other advertising methods for reaching children and their parents.⁵⁶ The court concluded that an outright ban on advertising aimed at children less than 12 years of age and of misleading advertising, as provided for by the Swedish legislation, was not covered by article 28 of the EC Treaty, unless it is shown that the ban does not affect in the same way, in fact and in law, the marketing of national products and of products from other Member States.⁵⁷

TK-Heimdienst⁵⁸ concerned an Austrian legislation under which bakers, butchers and grocers could make sales on rounds in a given administrative district, such as an Austrian Verwaltungsbezirk, only if they also traded from a permanent establishment in that administrative district or an adjacent municipality, where they would offer the same goods for sale as they did on rounds. The court concluded that the legislation concerned a selling arrangement, but established that the legislation did not affect in the same manner the marketing of domestic products and that of products from other Member States and consequently that the application of the legislation in fact impeded access to the market of the Member State of importation for products from other Member States more than it impeded access for domestic products.⁵⁹

Similarly in the Gourmet International case,⁶⁰ the European Court of Justice established that a Swedish prohibition on advertising in reality, except for a few insignificant exceptions, prohibited producers and importers from directing any advertising messages at consumers. The state was thus liable to impede access to the market by products from other Member States more than it impeded access by domestic products, with which consumers are instantly more familiar. The prohibition was consequently found to be a restriction within the meaning of article 28.⁶¹

In the DocMorris case,⁶² concerning a German prohibition on mail order sales of

56 Konsumentombudsmannen v. De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB, Joined Cases 34/95, 35/95 and 36/95 (9 July 1997), paragraph 43.

57 Konsumentombudsmannen v. De Agostini (Svenska) Förlag AB and TV-Shop i Sverige AB, Joined Cases 34/95, 35/95 and 36/95 (9 July 1997), paragraph 44.

58 Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH. Case 254/98 (13 January 2000).

59 Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH. Case 254/98 (13 January 2000), paragraphs 24, 25 and 29.

60 Konsumentombudsmannen v. Gourmet International Products AB, Case 405/98 (8 March 2001).

61 Konsumentombudsmannen v. Gourmet International Products AB, Case 405/98 (8 March 2001), paragraphs 20, 21 and 25.

62 Deutscher Apothekerverband eV and 0800 DocMorris NV, Jacques Waterval, Case 322/01 (11 December 2003). See also Lang, Richard, Case C-322/01, Deutscher Apothekerverband eV v. 0800 DocMorris NV and Jacques Waterval, judgment of the Full Court of 11 December 2003, Court of Justice Common Market Law Review 42 (2005), p. 189–204.

medicines, the Commission, amongst others, argued that the prohibition was merely a selling arrangement, fulfilling the requirements set out above, emphasising that:

1. the prohibition did not concern the production or composition of particular products, but solely the ways in which they were marketed and
2. that the prohibition applied in the same way, both in law and in fact, to the marketing of domestic products and those from other Member States.⁶³

It was admitted that the fact that the sale of medicinal products by mail order is precluded makes it more difficult for foreign pharmacies to gain access to the German market because they in fact are obliged to open their own pharmacy in Germany.⁶⁴ The court noted that the emergence of the Internet as a method of cross-border sale means that the scope and, by the same token, the effect of the prohibition must be looked at on a broader scale than just argued.⁶⁵

The court found that the prohibition did not affect the sale of domestic medicines in the same way as it affected the sale of those coming from other Member States since the prohibition was more of an obstacle to pharmacies outside Germany than to those within it. The court argued that even though the pharmacies in Germany cannot use mail order sale, they are still able to sell the products in their dispensaries. For pharmacies not established in Germany, the Internet provides a more significant way to gain direct access to the German market and the prohibition thus has a greater impact on those pharmacies.⁶⁶ This argumentation seem to be in line with the reasoning in *De Agostini*, where the court accepted the relevance of the argument that a prohibition on television advertising deprived a trader of the only effective form of promotion which would have enabled it to penetrate a national market.⁶⁷

Selling arrangements may even if they impose the same burden in law and in fact to national and foreign operators be considered a restriction within the meaning of article 28 of the EC Treaty if the selling arrangement has serious implications for inter-state trade. This could for example be a complete ban as

63 Deutscher Apothekerverband eV and 0800 DocMorris NV, Jacques Waterval, Case 322/01 (11 December 2003), paragraphs 56 to 59 with references.

64 Deutscher Apothekerverband eV and 0800 DocMorris NV, Jacques Waterval, Case 322/01 (11 December 2003), paragraph 59. See also paragraph 61, where the defendants in the main proceedings argued that the prohibition, in conjunction with rules of professional conduct, makes it virtually impossible for pharmacies established in other Member States to gain access to the German market of end consumers of medicinal products.

65 Deutscher Apothekerverband eV and 0800 DocMorris NV, Jacques Waterval, Case 322/01 (11 December 2003), paragraphs 73.

66 Deutscher Apothekerverband eV and 0800 DocMorris NV, Jacques Waterval, Case 322/01 (11 December 2003), paragraph 74.

67 See Deutscher Apothekerverband eV and 0800 DocMorris NV, Jacques Waterval, Case 322/01 (11 December 2003), paragraph 72 with reference to *De Agostini*, paragraph 43.

discussed below under free movement of services and the Schindler case.⁶⁸ In the light of the DocMorris ruling, it may be difficult to imagine a selling arrangement which bans Internet sale and which is not to be considered more of an obstacle to foreign operators. It is clear from the DocMorris ruling that restrictions on the access to use the Internet is likely to have unequal consequences for domestic and foreign businesses respectively and thus does not qualify to be considered a selling arrangement within the Keck ruling.⁶⁹ Rules on selling arrangements are to be considered on the basis of factors such as the range of goods affected, the nature of the restriction, whether the impact is direct or indirect and the extent to which other selling arrangements are available.⁷⁰

The case of *Herbert Karner v. Troostwijk*⁷¹ concerned an Austrian prohibition on advertising indicating that goods come from an insolvent estate when they no longer constitute part of that estate. The court found such a provision to be a selling arrangements as defined in the Keck ruling.⁷² Both Keck-requirements were found to be satisfied. The court noted that contrary to the national provisions which gave rise to *De Agostini* and *Gourmet International*, this provision did not lay down a total prohibition on all forms of advertising in a Member State for a product which is lawfully sold there. Although such a prohibition is, in principle, likely to limit the total volume of sales in that Member State and consequently also to reduce the volume of sales of goods from other Member States, the court found it not to affect the marketing of products originating from other Member States more than it affected the marketing of products from the Member State in question.⁷³ Consequently the national provision was not caught by the prohibition in article 28 of the EC Treaty.

The advertisement giving rise to the case was posted in both a sales catalogue and on a website. Even though misleading advertising is harmonised in the EU, the relevant directive contains a right for Member States to adopt provisions with a view to ensuring more extensive consumer protection.⁷⁴ Such power must, however, be exercised in accordance with the fundamental freedoms of the EC Treaty.⁷⁵ Because the dissemination of advertising was found to be a secondary element in relation to the sale of the goods in question the activity was only

68 See 2.4.

69 See Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 142f.

70 Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 658.

71 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Case 71/02 (25 March 2004). See also Stuyck, Jules, Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Judgment of the Fifth Chamber of 25 March 2004, *Court of Justice Common Market Law Review* 41 (2004), p. 1683–1700.

72 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Case 71/02 (25 March 2004), paragraph 39.

73 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Case 71/02 (25 March 2004), paragraph 42.

74 Directive 84/450 (10 September 1984) concerning misleading and comparative advertising, article 7.

75 Paragraphs 33a and 34 with references.

examined under article 28 of the EC Treaty and not in the context of the free movement of services. This issue was dealt with by the Advocate General and is dealt with below in this thesis.⁷⁶

The Advocate General noted that the advertisement was published on the Internet which enabled potential buyers in other Member States to access the advertisement and to acquire goods at the auction. The Advocate General found that if the activity would not be a selling arrangement, and such advertisement was prohibited under the national provisions in question, trade between Member States would be hindered at least indirectly and potentially as such advertising becomes impossible.⁷⁷ It was found by the Advocate General that a total prohibition on advertisements stating that the goods advertised come from an insolvency estate goes beyond what is necessary in the interests of consumer protection and fair trading, and cannot therefore be justified by article 30 EC or overriding reasons in the general interest as dealt with immediately below.⁷⁸

2.3.2. Justifiable Restrictions

Even though a measure is considered to be a quantitative restrictions or a measure having equivalent effect within the meaning of article 28, such measure may be justified either under article 30 of the EC Treaty or by the concept of mandatory requirements as developed through case law and explained below. Quantitative restrictions can only be justified under article 30, whereas measures having equivalent effect may also be justified by mandatory requirements if the measure is applied indistinctly.⁷⁹ Distinctly applicable measures treat imported goods less favourable than domestic goods (different burden in law and in fact) and indistinctly applicable measures appear not to do so, but do in fact disadvantage imported goods by requiring them to satisfy additional requirements such as repackaging (same burden in law, different burden in fact).⁸⁰

2.3.2.1. Article 30

Restriction may be justified by virtue of article 30 of the EC Treaty which provides that articles 28 and 29 of the EC Treaty shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of:

1. public morality, public policy or public security,

76 See 2.6.

77 Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH. Opinion of Mr Advocate General Alber delivered on 8 April 2003, Case 71/02, paragraph 43.

78 Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH. Opinion of Mr Advocate General Alber delivered on 8 April 2003, Case 71/02, paragraph 86.

79 See in general Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 63ff.

80 See Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 92ff. and 128 with reference to now expired directive 70/50 (22 December 1969) on the abolition of measures which have an effect equivalent to quantitative restrictions on imports.

2. the protection of health and life of humans, animals or plants,
3. the protection of national treasures possessing artistic, historic or archaeological value or
4. the protection of industrial and commercial property.

Such restrictions may not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. In order for a restriction to be exempt under article 30 the challenged rule must come within at least one of the listed categories and must pass a proportionality test. The burden of proof rests with the Member State seeking to rely on it.⁸¹ As mentioned above, article 30 can be relied on to justify both quantitative restrictions and measures having equivalent effect (both distinctly and indistinctly applicable restrictions).

Where Community directives provide for the harmonisation of the measures necessary to ensure the objectives in article 30, recourse to this article is no longer justified.⁸² The situation may become a bit more complicated, where an area is only partially harmonised or harmonised by means of directives comprising minimum clauses. It is for the European Court of Justice to ensure that national regulation pursuing the justification-objectives of article 30 does not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.⁸³

In a case launched by the EU Commission against Ireland⁸⁴ in connection with Irish legislation requiring imported souvenirs and jewellery to bear an indication of origin or the word 'foreign', the court established that such a restriction to the free movement of goods could not be justified under article 30 since neither the protection of consumers nor the fairness of commercial transactions is included amongst the exceptions set out in the article. A similar conclusion was reached in a case concerning fixed prices for books,⁸⁵ where the European Court of Justice emphasised a strict interpretation of article 30 which does not allow for article 30 to cover objectives not expressly enumerated therein. Both consumers' interests and the protection of creativity and cultural diversity was rejected as valid objectives. The court emphasised, in another case, that the exceptions which are

81 Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 626. See also *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v. Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville*, Case 231/83 (29 January 1985).

82 *Oberkreisdirektor des Kreises, Borken and Vertreter des öffentlichen Interesses beim Obverwaltungsgericht für das Land Nordrhein-Westfalen v. Handelsgesellschaft Moormann BV*. Case 190/87 (20 September 1988), paragraph 10 with references. See also Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 64f.

83 See Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 635f. with references.

84 *Commission of the European Communities v. Ireland*, Case 113/80 (17 June 1981).

85 *Association des Centres distributeurs Édouard Leclerc and others v. SARL 'Au blé vert' and others*, Case 229/83 (10 January 1985), paragraph 30.

listed in article 30 may not be extended to cases other than those which have been exhaustively laid down and that the articles notably refer (only) to matters of a non-economic nature.⁸⁶ If the national rules in question make it possible in addition to achieve objectives of an economic nature which the Member State may also seek to achieve, it does, however, not exclude the application of article 30.⁸⁷

The European Court of Justice has, despite the firm rejection of objectives not listed in article 30, allowed national measures to be justified on environmental grounds.⁸⁸ It is for the national authorities to demonstrate in each case that their rules are necessary to give effective protection to the interests referred to in article 30.⁸⁹ Below are some examples of situations in which article 30 was invoked.

2.3.2.1.1. Public Morality

*Henn and Darby*⁹⁰ concerned a prohibition in United Kingdom on the importation of pornographic articles, which was invoked in connection with the import of obscene films and magazines into United Kingdom. The UK ban was found to constitute a quantitative restriction. The European Court of Justice established that the first sentence of article 30 means that a Member State may, in principle, lawfully impose prohibitions on the import from any other Member State of articles which are of an indecent or obscene character as understood by its domestic laws. With reference to the absence of a lawful trade in the same goods, the court concluded that the ban did not constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to article 30.

In *Conegate*,⁹¹ it was concluded, in a similar context, that a Member State may not rely on grounds of public morality as defined by article 30 in order to prohibit the import of certain goods on the ground that they are indecent or obscene when its legislation contains no prohibition on the manufacture and marketing of the same goods on its territory. In order to rely on article 30, it should be possible, by taking into account all relevant legislation, to at least conclude that its purpose is, in substance, to prohibit the manufacture and marketing of those products.

86 See *Commission of the European Communities v. Italian Republic*, Case 95/81 (9 June 1982), paragraph 27.

87 *Campus Oil Limited and others v. Minister for Industry and Energy and others*. Case 72/83 (10 July 1984), paragraph 36.

88 See Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 634f. with references and Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 65.

89 *Criminal proceedings against Leendert van Bennekom*, Case 227/82 (30 November 1983), paragraph 40.

90 *Regina v. Maurice Donald Henn and John Frederick Ernest Darby*, Case 34/79 (14 December 1979). In particular paragraphs 17 and 22

91 *Conegate Limited v. HM Customs & Excise*, Case 121/85 (11 March 1986). In particular paragraphs 15 through 17.

2.3.2.1.2. Public Policy and Security

Public policy concerns include human rights, such as freedom of expression as further discussed below.⁹² The fact that national rules are categorised as public-order legislation does not mean that they are exempt from compliance with the provisions of the EC Treaty. The considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the EC Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest.⁹³ Whatever interpretation is to be given to the term 'public policy', it cannot be extended so as to include considerations of consumer protection.⁹⁴

The court has, in the context of public policy concerns within the area of freedom to provide services, established that it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States with regards to the precise way in which the fundamental right or legitimate interest in question is to be protected.⁹⁵

The European Court of Justice has found that a ban on the export of coins which are not legal tender,⁹⁶ with a view to preventing their being melted down or destroyed in another Member State is justified on grounds of public policy within the meaning of article 30, because it stems from the need to protect the right to mint coinage which is traditionally regarded as involving the fundamental interests of the state.⁹⁷ The UK stated that the restrictions were enacted in order 1) to ensure that there is no shortage of current coins for public use, 2) to ensure that any profit resulting from any increase in the value of metal content of the coin accrues to the state rather than to an individual and 3) to prevent the destruction of these United Kingdom coins which, if it occurred within its jurisdiction would be a criminal offence, from occurring outside its jurisdiction. The court noted that it is for the Member States to mint their own coinage and to protect it from destruction.⁹⁸

Cullet v. Centre Leclerc⁹⁹ concerned French provisions compelling retailers to

92 See 2.7.

93 Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL, Joined Cases 369/96 and 376/96 (23 November 1999), paragraph 31.

94 Th. Kohl KG v. Ringelhan & Rennett SA and Ringelhan Einrichtungen GmbH, Case 177/83 (6 November 1984), paragraph 19.

95 Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Case 36/02 (4 October 2004), paragraph 37. This case concerns article 49 of the EC Treaty.

96 Coins that are legal tender are not considered goods as defined in article 28, but are dealt with under articles 56 of the EC Treaty concerning the free movement of capital and payments.

97 See Regina v. Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss, Case 7/78 (23 November 1978), paragraph 34.

98 Regina v. Ernest George Thompson, Brian Albert Johnson and Colin Alex Norman Woodiwiss, Case 7/78 (23 November 1978), paragraph 32.

99 Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v. Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville, Case 231/83 (29 January 1985).

observe fixed retail selling prices which according to the European Court of Justice made it more difficult to distribute imported products on the market. The French government argued that destructive competition over the price of fuel could lead to the disappearance of a large number of service-stations and therefore to an inadequate supply network throughout the national territory. The French government referred to the threat to public order and security represented by the violent reactions which would have to be anticipated on the part of retailers affected by unrestricted competition. The European Court of Justice found that the French government failed to show that it would be unable, using the means at its disposal, to deal with the consequences which an amendment of the rules in question would have upon public order and security.

Campus Oil¹⁰⁰ concerned Irish rules requiring importers of petroleum products to purchase a certain proportion of their requirements from a state-owned company which operated a refinery in Ireland. The price was determined by the competent minister taking into account the costs incurred by the refining company. The state's decision to acquire the refinery was the need to guarantee, by keeping refining capacity in operation in Ireland, the provision of supplies of petroleum products in Ireland. The purchase requirement was found by the European Court of Justice to constitute a measure having equivalent effect to a quantitative restriction on imports within the meaning of article 28 of the EC Treaty.¹⁰¹ In determining the possible justification under article 30, the court applied a three-step test:¹⁰² 1) whether the rules are justified in the light of the community rules on the matter, 2) whether article 30 (public policy and public security in this case) covers the Irish rules and 3) whether the rules enable the fulfilment of a justifiable objective under article 30 in compliance with the principle of proportionality.

The three-step test as applied in the Campus Oil Case:

1. *The court noted that recourse to article 30 is not justified if Community rules provide for the necessary measures to ensure protection of the interests set out in that article. Despite Community measures and measures taken within the context of the International Energy Agency,¹⁰³ the court found that there would still be real danger in the event of a crisis and that Ireland thus could rely on article 30 to justify appropriate national, complementary measures.*
2. *On the scope of the public policy and public security exceptions, the court noted that the purpose of article 30 of the EC Treaty is not to reserve certain matters to the exclusive jurisdiction of the Member States, but it merely allows national legislation to derogate from the principle of the free movement of goods to the extent to which*

100 Campus Oil Limited and others v. Minister for Industry and Energy and others, Case 72/83 (10 July 1984).

101 Campus Oil Limited and others v. Minister for Industry and Energy and others, Case 72/83 (10 July 1984), paragraph 20.

102 Campus Oil Limited and others v. Minister for Industry and Energy and others, Case 72/83 (10 July 1984), paragraph 26.

103 IEA is an autonomous intergovernmental entity within OECD (www.iea.org).

this is and remains justified in order to achieve the objectives set out in the article.¹⁰⁴ The court did not find the concept of public policy to be relevant, but concluded that petroleum products are of fundamental importance for a country's existence and that an interruption of supplies could seriously affect the public security as protected by article 30 of the EC Treaty.

3. *On the question whether the measures are capable of ensuring supplies and the principle of proportionality, the court stated that measures adopted on the basis of article 30 can be justified only if they are such as to serve the interest which that article protects and if they do not restrict intra-community trade more than is absolutely necessary and no less restrictive measure is capable of achieving the same objective.¹⁰⁵ The court concluded that the presence of a refinery on the national territory can effectively contribute to improving the security of supply of petroleum products to a state which does not have crude oil resources of its own. The court emphasised that the quantities of petroleum products covered by the system must not exceed the minimum supply requirement justified within the interest of public security.*

2.3.2.1.3. Health and Life

Sandoz BV¹⁰⁶ concerned a Dutch authorisation requirement for adding vitamins to foodstuff. Criminal proceedings was brought against Sandoz BV for selling and delivering in the Netherlands, without authorisation, vitamin-added foodstuff which was lawfully marketed in other Member States. Authorisation was rejected by the Dutch state with reference to possible danger to the public health. The national rules was found to be a measure having an effect equivalent to quantitative restrictions within the meaning of article 28 of the EC Treaty. The court found, however, in view of the uncertainties inherent in the scientific assessment of the harmfulness of vitamins, that the authorisation requirement was justified under article 30 on grounds of the protection of human health.

The court noted that in so far as there are uncertainties at the present state of scientific research, it is for the Member States, in the absence of harmonisation, to decide what degree of protection of the health and life of humans they intend to assure, having regard, however, for the requirements of the free movement of goods within the community. Those principles also apply to substances such as vitamins which are not as a general rule harmful in themselves but may have special harmful effects solely if taken to excess as part of the general nutrition.¹⁰⁷

On the question of proportionality, the court noted that national rules providing for such a prohibition are justified only if authorisations to market are granted when they are compatible with the need to protect health. Member States must consequently, in order to observe the principle of proportionality, authorise marketing when the addition

104 See *Campus Oil Limited and others v. Minister for Industry and Energy and others*, Case 72/83 (10 July 1984), paragraph 32 with references.

105 *Campus Oil Limited and others v. Minister for Industry and Energy and others*, Case 72/83 (10 July 1984), paragraph 37 with references and paragraph 44.

106 *Criminal proceedings against Sandoz BV*. Case 174/82 (14 July 1983).

107 *Criminal proceedings against Sandoz BV*. Case 174/82 (14 July 1983), paragraph 16 with references and paragraph 17.

of vitamins to foodstuffs meets a real need, especially a technical or nutritional one.

In a case concerning a Danish prohibition on the marketing of foodstuffs to which nutrients have been added,¹⁰⁸ the court found that such a prohibition must be based on a detailed assessment of the risk alleged by the Member State.¹⁰⁹ A marketing prohibition is the most restrictive obstacle to trade and may only be adopted if the real risk alleged for public health appears sufficiently established on the basis of the latest scientific data available at the date of the adoption of such decision. In such a context, the object of the risk assessment to be carried out by the Member State is to appraise the degree of probability of harmful effects on human health from the addition of certain nutrients to foodstuffs and the seriousness of those potential effects.¹¹⁰

Because such an assessment of risk contains uncertainty, it was accepted that a Member State may, in accordance with the precautionary principle, take protective measures without having to wait until the reality and seriousness of those risks are fully demonstrated, but the risk assessment cannot be based on purely hypothetical considerations.¹¹¹ Such a risk assessment may also take into consideration the cumulative effect of the presence on the market of several sources, natural or artificial, of a particular nutrient and of the possible existence in the future of additional sources which can reasonably be foreseen.¹¹²

A proper application of the precautionary principle presupposes, in the first place, the identification of the potentially negative consequences for health of the proposed addition of nutrients, and, secondly, a comprehensive assessment of the risk to health.¹¹³ The criterion of the nutritional need of the population of a Member State can play a role in its detailed assessment of the risk which the addition of nutrients to foodstuffs may pose for public health, but the absence of such a need cannot, by itself, justify a total prohibition of the marketing of foodstuffs lawfully manufactured and/or marketed in other Member States.¹¹⁴

In the UHT Milk Case,¹¹⁵ the European Court of Justice established that the

108 Commission of the European Communities v. Kingdom of Denmark. Case 192/01 (23 September 2003). See also judgment of the EFTA Court of 5 April 2001 in Case E-3/00 EFTA Surveillance Authority v. Norway (EFTA Court Report 2000/01, p. 73).

109 Commission of the European Communities v. Kingdom of Denmark. Case 192/01 (23 September 2003), paragraph 47.

110 Commission of the European Communities v. Kingdom of Denmark. Case 192/01 (23 September 2003), paragraph 48.

111 Commission of the European Communities v. Kingdom of Denmark. Case 192/01 (23 September 2003), paragraph 49 with references.

112 Commission of the European Communities v. Kingdom of Denmark. Case 192/01 (23 September 2003), paragraph 50.

113 Commission of the European Communities v. Kingdom of Denmark. Case 192/01 (23 September 2003), paragraph 51.

114 Commission of the European Communities v. Kingdom of Denmark. Case 192/01 (23 September 2003), paragraph 54.

115 Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland, Case 124/81 (8 February 1983), paragraphs 27, 28 and 30.

concern to protect the health of humans by an import prohibition could be achieved by less restrictive means by requiring safeguards equivalent to those prescribed for domestic production of Ultra Heat Treated milk. The court attached importance to the fact that UHT milk can be kept for long periods at normal temperatures which obviate the need for control over the whole production cycle if the necessary precautions are taken at the time of the heat treatment. The court also noted that in the case in question, the conditions were satisfied for a presumption of accuracy in favour of the statements contained in certificates from the exporting state.

2.3.2.1.4. Industrial and Commercial Property

Industrial and commercial property (intellectual property) includes copyrights, trademarks, patents, designs and models. The area of intellectual property is excluded from the scope of this thesis, but is slightly touched upon in this context since this exemption constitutes an important derogation from article 28.¹¹⁶

It should be noted that rules on intellectual property have been substantially harmonised at community level, but without completely removing the problems entailed in the national nature of a number of rights. The determination of the conditions and procedures under which protection of intellectual property is granted is a matter for national rules in the absence of harmonised laws. It is the right of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject matter of his exclusive right.¹¹⁷ To prevent the application of the national legislation in such circumstances would therefore be tantamount to challenging the very existence of that right.¹¹⁸

A proprietor of an industrial or commercial property right protected by the law of a Member State cannot rely on that law to prevent the import of a product which is lawfully marketed in another Member State by the proprietor himself or with his consent (consumption). The court has further established that neither the copyright owner or his licensee, nor a copyright management society acting in the owner's or licensee's name, may rely on the exclusive exploitation right conferred by copyright to prevent or restrict the importation of sound recordings which have been lawfully marketed in another Member State by the owner himself or with his

116 See in general Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, page 155ff. (chapter 8).

117 *AB Volvo v. Erik Veng (UK) Ltd.*, Case 238/87 (5 October 1988), paragraphs 7 and 8.

118 *Consorzio italiano della componentistica di ricambio per autoveicoli and Maxicar v. Régie nationale des usines Renault*, Case 53/87 (5 October 1988), paragraph 11.

consent.¹¹⁹ It was established in *Metronome Musik v. Music Point Hokamp*¹²⁰ that the release into circulation of a sound recording cannot, by definition, render lawful other forms of exploitation of the protected work, such as rental or public performance which are of a different nature from sale or any other lawful form of distribution.

*Warner Brothers and Metronome v. Christiansen*¹²¹ concerned the compatibility with the free movement of goods of Danish copyright legislation restricting the hiring-out of video-cassettes, in a situation where a video-cassette was legally purchased in London and imported into Denmark with a view to hiring it out there. The European Court of Justice found the Danish legislation clearly justified on grounds of the protection of industrial and commercial property pursuant to article 30 of the EC Treaty. The court noted that it would be impossible to guarantee makers of films a remuneration which reflects a satisfactory share of the rental market if royalties could only be collected on the sales of video-cassettes. The court attached importance to the fact that the Danish legislation applied without distinction as to where the video-cassettes were produced. The court furthermore rejected that the marketing by a film-maker of a video-cassette containing one of his works, in a Member State which does not provide specific protection for the right to hire it out, should have repercussions on the right conferred on that same film-maker by the legislation of another Member State to restrain, in that State, the hiring-out of that video-cassette.

The *Laserdisken Case*¹²² concerned whether it is possible for the holder of an exclusive rental right to prohibit copies of a film from being offered for rental in a Member State when those copies were authorised for rental within another Member State. With reference to *Warner Brothers and Metronome v. Christiansen* the court concluded that the exclusive right to hire out various copies of the work contained in a video film can, by its very nature, be exploited by repeated and potentially unlimited transactions, each of which involves the right to remuneration. The specific right to authorise or prohibit rental would be rendered meaningless if it were held to be exhausted as soon as the object was first offered for rental.

In order to rely on the derogation in article 30 of the EC Treaty, concerning protection of industrial and commercial property, the industrial and commercial property must be used within the state invoking the derogation. It has been established that goods in transit do not involve use of the appearance of a protected design. The impediment to the free movement of goods caused by the a product's detention under customs control cannot be justified on grounds of the protection of industrial and commercial property. The manufacture and marketing of the product

119 Musik-Vertrieb membran GmbH et K-tel International v. GEMA - Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte, Joined Cases 55/80 and 57/80 (20 January 1981), paragraphs 10 and 15.

120 *Metronome Musik GmbH v. Music Point Hokamp GmbH*, Case 200/96 (28 April 1998), paragraph 18.

121 *Warner Brothers Inc and Metronome Video ApS v. Erik Viuff Christiansen*, case 158/86 (17 May 1988). See especially paragraphs 12, 15, 16, 18 and 19.

122 *Foreningen af danske Videogramdistributører, acting for Egmont Film A/S, Buena Vista Home Entertainment A/S, Scanbox Danmark A/S, Metronome Video A/S, Polygram Records A/S, Nordisk Film Video A/S, Irish Video A/S and Warner Home Video Inc v. Laserdisken*, Case 61/97 (22 September 1998), paragraph 18.

in question was lawful in the Member States where those operations took place and that transit does not form part of the specific subject matter of the design right in the Member State where transit takes place.¹²³

2.3.2.1.5. Arbitrary Discrimination and Proportionality

Measures must, in order to be justified under article 30, not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.¹²⁴ This provision is designed to prevent restrictions on trade based on the grounds mentioned in the first sentence of article 30 from being diverted from their proper purpose and used in such a way as either to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products.¹²⁵ The proportionality requirement entails that the restriction must pass both a test on suitability and one on necessity.¹²⁶ National rules or practices having, or likely to have, a restrictive effect on the import of products are compatible with the EC Treaty only to the extent that they are necessary for the effective protection of the aim pursued, and a national rule or practice cannot benefit from article 30 if the concerns may be protected just as effectively by measures which are less restrictive of intra-Community trade.¹²⁷

Measures adopted on the basis of article 30 can be justified only if they are such as to serve the interest which that article protects and if they do not restrict intra-community trade more than is absolutely necessary.¹²⁸ In *Aragonesa*,¹²⁹ the European court of Justice found a national restriction on the advertisement of alcohol to be in proper pursuance of public health concerns. On the proportionality test, the court emphasised that the national measure restricted freedom of trade only to a limited extent since it concerned only beverages having an alcoholic strength of more than 23 percent and that the measure did not prohibit all advertising of such beverages but merely prohibited it in specified places some of which (for example public highways and cinemas) are particularly frequented by motorists and young persons which are two categories of the population in regard

123 *Commission of the European Communities v. French Republic*, Case 23/99 (26 September 2000), paragraphs 43 and 45.

124 See in general Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 78ff.

125 *Regina v. Maurice Donald Henn and John Frederick Ernest Darby*, Case 34/79 (14 December 1979), paragraph 21. See also *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, Case 40/82 (31 January 1984).

126 Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 79f. with references.

127 *See Kemikalieinspektionen v. Toolex Alpha AB*, Case 473/98 (11 July 2000), paragraph 40 with references.

128 *See Campus Oil Limited and others v. Minister for Industry and Energy and others*, Case 72/83 (10 July 1984), paragraph 37 with references.

129 *Aragonesa de Publicidad Exterior SA and Publivia SAE v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, Joined Cases 1/90 and 176/90 (25 July 1991), paragraphs 17 and 18.

to which the campaign against alcoholism is of quite special importance.¹³⁰

2.3.2.2. Mandatory Requirements

As mentioned above, measures having equivalent effect to quantitative restrictions may be justified under the pursuance of mandatory requirements.¹³¹ The mandatory requirements can only be applied to justify restrictions which are applied indistinctly, which means that the measures must be applicable to domestic products and to imported products without distinction.¹³² Distinctly applied restrictions may only be justified under article 30. It has, however, been argued that the European Court of Justice in a number of cases has begun to depart from the distinction between distinctly and indistinctly applicable restrictions and thus applying the language of mandatory requirements in respect of what are essentially distinctly applicable measures.¹³³

In the *Cassis de Dijon* case,¹³⁴ it was established that it is up to the individual states to regulate areas which are not yet harmonised on a community level. The court, however, emphasised that obstacles to the free movement within the community resulting from disparities between the national laws relating to the marketing of products must be accepted in so far as those provisions are necessary in order to satisfy mandatory requirements in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. In the actual case the fixing of a minimum alcohol content for alcoholic beverages was not found to fulfil such mandatory requirements.¹³⁵ The list of mandatory requirement has continuously been enlarged through case law.

The following non exhaustive list of mandatory requirements seems to be recognised by the European Court of Justice: The effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, the defence of the consumer, protection of the environment, protection of working conditions, protection of cinema as a form of cultural expression, protection of national or regional socio-cultural

130 *Aragonesa de Publicidad Exterior SA and Publivia SAE v. Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña*, Joined Cases 1/90 and 176/90 (25 July 1991), paragraphs 17 and 18.

131 Also referred to as 'imperative requirements', or 'overriding requirements in the public interest'. See Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 108 with references.

132 *Commission of the European Communities v. Ireland*, Case 113/80 (17 June 1981), paragraph 11. See also above on the distinction between distinctly and indistinctly applicable restrictions.

133 Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 117f. with reference to Criminal proceedings against Ditlev Bluhme, Case 67/97 (3 December 1998). See for a similar opinion Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 668.

134 *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Case 120/78 (20 February 1979), paragraph 8.

135 See *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Case 120/78 (20 February 1979), paragraphs 13 and 14.

*characteristics, maintenance of press diversity, preventing the risk of seriously undermining the financial balance of the social security system and the protection of fundamental rights.*¹³⁶

In order to justify national rules with reference to mandatory requirements, the rule must be non-discriminatory, fall within an area that has not been sufficiently harmonised and pursue an overriding requirements of general public importance. According to the case law of the European Court of Justice, the risk of misleading consumers cannot override the requirements of the free movement of goods and so justify barriers to trade, unless that risk is sufficiently serious.¹³⁷

In *Yves Rocher*,¹³⁸ it was established that even though protection of consumers against misleading advertising is a legitimate objective, a prohibition on eye-catching price comparisons, regardless of whether the comparison is true or false, was not found to be proportionate to the aim pursued. The court noted that the prohibition in question went beyond the requirements of the objective pursued, in that it affected advertising which is not at all misleading and contained comparisons of prices actually charged which can be of considerable use, in that it enables the consumer to make his choice in full knowledge of the facts. The court noted that a comparative examination of the laws of the Member States showed that information and protection of the consumer can be ensured by measures which are less restrictive of intra-Community trade than those at issue in the main proceedings.¹³⁹

*A product lawfully produced and marketed in one Member State must, in principle, be admitted to the market of any other Member State. Technical and commercial rules may create barriers to trade only where those rules are necessary to satisfy mandatory requirements and to serve a purpose which is in the general interest and for which they are an essential guarantee. This purpose must be such as to take precedence over the requirements of the free movement of goods which constitutes one of the fundamental rules of the Community.*¹⁴⁰

The most commonly invoked mandatory requirements are public health and consumer protection.¹⁴¹ Public health concerns may also be covered by the derogation in article 30 with reference to the protection of health and life. The

136 Taken from Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 109 (see source for references to case law).

137 *F.lli Graffione SNC v. Ditta Fransa*, Case 313/94 (26 November 1996), paragraph 24 with references.

138 *Schutzverband gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher GmbH*, Case 126/91 (18 May 1993). Especially paragraphs 15 to 19.

139 See opinion of Mr Advocate General Darmon delivered on 15 September 1992. *Schutzverband gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher GmbH*. Prohibition of advertising using price comparisons, Case 126/91, paragraph 52.

140 Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in case 120/78 ('Cassis de Dijon'). Official Journal C256 (3 October 1980), p. 2f.

141 *Commission of the European Communities v. Ireland*, Case 113/80 (17 June 1981), paragraph 11.

protection of consumers seeks to strike a balance between the protection of the average consumer who is well-informed and reasonably observant and circumspect and the protection of the free movement of goods.¹⁴²

In an illustrative case, the European Court of Justice refused to accept a German prohibition of the use of 'Clinique' as trademark for cosmetic products. Germany argued that the name could mislead consumers to believe that it was a medicinal product. The court argued that those products are ordinarily marketed in other countries under the name 'Clinique' without apparently misleading the consumers there.¹⁴³

In another case, the court established that article 28 of the EC Treaty precluded a national measure prohibiting the import and marketing of a product, the quantity of which was increased during a short publicity campaign and the wrapping of which bore the marking '+ 10%'. The prohibition was based a) on the ground that the presentation could induce the consumer into thinking that the price of the goods offered was the same as that at which the goods had previously been sold in their old presentation and b) on the ground that the new presentation gave the impression to the consumer that the volume and weight of the product had been considerably increased. The court argued that a reasonably circumspect consumers may be deemed to know that there is not necessarily a link between the size of publicity markings relating to an increase in a product's quantity and the size of that increase.¹⁴⁴

It is clear from the mentioned cases that a mandatory requirement, as a starting point, may only be invoked in situations where a measure is necessary to protect the average consumer who is reasonably well informed and reasonably observant and circumspect. The court has acknowledged considerations concerning social, cultural or linguistic differences between Member States.¹⁴⁵ The court has also accepted to lower the requirements in situations where commercial activities are directed towards a category of people who are particularly vulnerable.¹⁴⁶ Generally, it can be said that the risk of misleading consumers cannot override the requirements of the free movement of goods and so justify barriers to trade, unless that risk is sufficiently serious having regard all the relevant factors, including the risk of error in relation to the group of consumers concerned.¹⁴⁷ The court tends,

142 See in general Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 110ff. with references and Green Paper on European Union Consumer Protection, COM(2001) 531 (2 October 2001), p. 3ff. on consumer protection in the Internal Market.

143 *Verband Sozialer Wettbewerb eV v. Clinique Laboratoires SNC et Estée Lauder Cosmetics GmbH*, Case 315/92 (2 February 1994), paragraph 21.

144 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH*, Case 470/93 (6 July 1995), paragraph 24 and 25.

145 *Estée Lauder Cosmetics GmbH & Co. OHG v. Lancaster Group GmbH*, Case 220/98 (13 January 2000), paragraphs 29 and 30.

146 See *R. Buet and Educational Business Services (EBS) v. Ministère public*, Case 382/87 (16 May 1989), paragraph 13.

147 *F.lli Graffione SNC v. Ditta Fransa*, Case 313/94 (26 November 1996), paragraphs 24 and 26.

however, to be rather sceptical of the claims for consumer protection, because it fears that such arguments are simply a disguise for protectionism.¹⁴⁸

A restriction must, in order to be justified as a mandatory requirement, be proportionate to the aim pursued and that objective might not be attained by less restrictive measures.¹⁴⁹ Labelling seems to be the European Court of Justice's preferred solution to many proportionality problems.¹⁵⁰ This may, however, give rise to problems in situations where such labels themselves must be adjusted in accordance with national requirements. The Court has not excluded the possibility that a Member State may require producers or vendors to alter the description of a foodstuff where a product offered for sale under a particular name is so different from the products generally understood as falling within that description, that it cannot be regarded as falling within the same category. Where the difference is of minor importance, appropriate labelling should be sufficient to provide the purchaser or consumer with the necessary information.¹⁵¹

A measure introduced by a Member State cannot be regarded as necessary to achieve the aim pursued if it essentially duplicates controls which have already been carried out in the context of other procedures, either in the same State or in another Member State. A product which is lawfully marketed in one Member State must in principle be able to be marketed in any other Member State without being subject to additional controls, save in the case of exceptions provided for or allowed by Community law.¹⁵²

There seem in practice to be only little, if any at all, difference between the requirements to be met in terms of justification of indistinctly applied (affect in the same way, in law and in fact, the marketing of domestic products and of those from other Member States) mandatory requirements and those to be met with reference to the exhaustive list of objectives mentioned in article 30 of the EC Treaty.¹⁵³ For example, in *De Agostini*,¹⁵⁴ the court did not distinguish between overriding requirements of general public importance (article 28) or the aims laid down in article 30 of the EC Treaty. For both purposes, the restriction had to be necessary for meeting the mandatory requirement or aim, be proportionate for that

148 Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 112.

149 See *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case 368/95 (26 June 1997), paragraphs 27 and 34.

150 Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 116.

151 *Criminal proceedings against Yannick Geffroy and Casino France SNC*, Case 366/98 (12 September 2000), paragraphs 22 and 23.

152 *Canal Satélite Digital SL v. Administración General del Estado, and Distribuidora de Televisión Digital SA (DTS)*, Case 390/99 (22 January 2002), paragraphs 36 to 38 with references.

153 Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 117f. with reference to *Criminal proceedings against Ditlev Bluhme*, Case 67/97 (3 December 1998). See for a similar opinion Craig, Paul and Búrca, Gráinne de, *EU Law*, Third Edition, Oxford University Press, 2003, p. 668.

154 *Konsumentombudsmannen (KO) and De Agostini (Svenska) Förlag AB*, Case 34/95 (9 July 1997, Joined with Cases 35/95 and 36/95), paragraph 47.

purpose and it must not be possible to meet the overriding requirements or aims by less restrictive measures.

2.4. Free Movement of Services

According to article 49 of the EC Treaty, restrictions to the freedom to provide services within the Community are prohibited in respect of nationals of Member States who are established in another Member State than the state of the person for whom the services are intended.¹⁵⁵ A person who provides a service may, in order to do so, temporarily pursue his activity, in the state where the service is provided, under the same conditions as are imposed by that state on its own nationals. Article 46(1) concerning measures on grounds of public policy, public security or public health applies also to free movement of service according to article 55.

A service within the meaning of the treaty is in article 50 defined as services that are normally provided for remuneration and which are not governed by the provisions relating to freedom of movement for goods, capital and persons. Services include in particular activities of an industrial or a commercial character, activities of craftsmen and activities of the professions.

That a service is 'normally provided for remuneration' does not mean that the service needs to be paid for by those for whom it is performed.¹⁵⁶ It has been established that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon between the provider and the recipient of the service. The remuneration requirement can be laid out as a question on whether the entity in question is seeking to engage in gainful (commercial) activity.¹⁵⁷ A service is any activity through which a provider participates in the economy, irrespective of his legal status or aims, or the field of action concerned.¹⁵⁸ Also harmful services and services which are questionable on moral grounds are services under the EC Treaty.¹⁵⁹ This does, however, not exclude that restrictions to such services can be legally justified by overriding public interest considerations as discussed below.

The freedom to provide services also covers offers and the like, where there is no prior existence of an identifiable recipient of the service. It has been established

155 See in general Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 330ff.

156 *Bond van Adverteerders and others v. The Netherlands State*, Case 352/85 (26 April 1988), paragraph 16. See also Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 806ff.

157 *Belgian State v. René Humbel and Marie-Thérèse Edel*, Case 263/86 (27 September 1988), paragraphs 17 to 19.

158 Proposal for a directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2 final/3 (5 March 2004), 2004/0001 (COD), p. 19.

159 *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, Case 275/92 (24 March 1994), paragraph 32 with references.

that article 49 also covers services which the provider offers by telephone to potential recipients established in other Member States and provides without moving from the Member State in which he is established.¹⁶⁰ The freedom similarly applies to services which a provider offers via the Internet, and so without moving, to recipients in other Member States.¹⁶¹ In *Bond van Adverteerders*¹⁶² the European Court of Justice established that the transmission of television programmes consists of two separate transfrontier services (relaying television programmes and broadcasting advertisements respectively). The distinction between when a restriction falls under article 28 and article 49 respectively is discussed below.¹⁶³

The provisions of the EC Treaty on freedom to provide services does not apply to activities whose relevant elements are confined within a single Member State.¹⁶⁴ However, a transaction cannot be regarded as a service provided only within a Member State, when the person in receipt of the services, before the termination of the contractual relations between the parties, has taken up residence in another Member State.¹⁶⁵ The European Court of Justice seems to go far to include activities which could arguable be considered wholly internal.¹⁶⁶ In *Gourmet International*,¹⁶⁷ concerning a Swedish prohibition on the advertising of alcoholic beverages, the court established that the prohibition on advertising had a particular effect on the cross-border supply of advertising space, given the international nature of the advertising market in the category of products to which the prohibition relates, and thereby constituted a restriction on the freedom to provide services as defined in article 49 of the EC Treaty.¹⁶⁸

The freedom to provide services involves not only the freedom of the provider to offer and supply services to recipients in a Member State other than that in which the supplier is located, but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member

160 *Alpine Investments BV v. Minister van Financiën*, Case 384/93 (10 May 1995), paragraphs 19 to 22.

161 *Piergiorgio Gambelli and Others*, Case 243/01 (6 November 2003), paragraph 54.

162 *Bond van Adverteerders and others v. The Netherlands State*, Case 352/85 (26 April 1988), paragraphs 14 and 15.

163 See 2.6.

164 *Procureur du Roi v. Marc J.V.C. Debaue and others*, Case 52/79 (18 March 1980), paragraph 9.

165 *Société Générale Alsacienne de Banque SA v. Walter Koestler*, Case 15/78 (24 October 1978), paragraph 3.

166 *Barnard, Catherine*, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 332.

167 *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)*, Case 405/98 (8 March 2001).

168 *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)*, Case 405/98 (8 March 2001), paragraph 39.

State without being hampered by restrictions.¹⁶⁹ In the *Alpine Investments* case,¹⁷⁰ it was established that a prohibition against telephoning potential clients in other Member States without their prior consent ('cold calling') may constitute a restriction on freedom to provide services since it deprives the operators concerned of a rapid and direct technique for marketing and contacting clients. The court held that the EC Treaty not only covers restrictions laid down by the state of destination but also those laid down by the state of origin.¹⁷¹ This thesis deals, however, only with the restriction imposed by foreign states, and not by the state in which the Business is established.

2.4.1. Restrictions

Article 49 of the EC Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services. In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment.¹⁷²

In the perspective of a single market and in order to permit the realisation of its objectives, the freedom to provide services precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State.¹⁷³ It should be noted that a prohibition concerning a specific marketing technique does not constitute a restriction on freedom to provide services within the meaning of article 49 solely by virtue of the fact that other Member States apply less strict rules to providers of similar services established in their territory.¹⁷⁴

The European Court of Justice seems to attach importance to the possibilities of utilising different effective media. In *Säger*,¹⁷⁵ the court noted that a restriction is

169 Piergiorgio Gambelli and Others, Case 243/01 (6 November 2003), paragraph 55 with reference to *Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna*, Case 294/97 (26 October 1999), paragraphs 33 and 34 and to *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, Joined Cases 286/82 and 26/83 (31 January 1984), paragraph 16.

170 *Alpine Investments BV v. Minister van Financiën*, Case 384/93 (10 May 1995).

171 The court noted that the Member State from which the unsolicited telephone call is made is best placed to regulate the canvassing of potential clients who are in another Member State, it cannot be complained that the former Member State does not leave that task to the Member State of the recipient.

172 *Manfred Säger v. Denneweyer & Co. Ltd.*, Case 76/90 (25 July 1991), paragraphs 12 and 13.

173 *Commission of the European Communities v. French Republic*, Case 381/93 (5 October 1994), paragraph 17.

174 See *Alpine Investments BV v. Minister van Financiën*, Case 384/93 (10 May 1995), paragraph 27 with references.

175 *Manfred Säger v. Denneweyer & Co. Ltd.*, Case 76/90 (25 July 1991).

all the less permissible where the service (monitoring and renewal service in connection with patents) is supplied without it being necessary for the person providing it to visit the territory of the Member State where it is provided.¹⁷⁶ Similarly in *Alpine Invest*, the court emphasised that the prohibition in question deprived the operators a rapid and direct technique for marketing and for contacting potential clients (cold calling) in other Member States.¹⁷⁷

In a case concerning a specific tax on satellite dishes, the court attached importance to the fact that a tax had the effect of a charge on the reception of television programmes transmitted by satellite which does not apply to the reception of programmes transmitted by cable, since the recipient does not have to pay a similar tax on that method of reception. The court noted that most television broadcasting programmes transmitted from those Member States could only be received by satellite dishes.¹⁷⁸ As mentioned above, in connection to the free movement of goods, the court has attached importance to the effectiveness of the Internet.¹⁷⁹ A similarly clear reference was not made in the *Gambelli* case which, however, refers to the consideration in *Alpine Invest*, as just mentioned.¹⁸⁰ It seems clear that the court also in this context is likely to recognise the importance of the Internet as medium, capable of supporting the realisation of the goals of the Internal Market which is also in line with the principles set out in the 2000 E-Commerce Directive dealt with below.¹⁸¹

2.4.2. Justifiable Restrictions

National rules which are not applicable to services without discrimination as regards their origin are compatible with Community law only if they can be brought within the scope of an express exemption, such as that contained in article 46 of the EC Treaty. It should be noted that, in line with the exemptions in article 30, economic aims cannot constitute grounds of public policy within the meaning of article 46.¹⁸²

National rules which are indistinctly applied, impose an additional burden on foreign service providers and in the absence of harmonisation such restrictions come within the scope of article 49, if the application of the national legislation to

176 *Manfred Säger v. Denemeyer & Co. Ltd.*, Case 76/90 (25 July 1991), paragraph 13.

177 *Alpine Investments BV v. Minister van Financiën*, Case 384/93 (10 May 1995), paragraph 28.

178 *François De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort*, Case 17/00 (29 November 2001), paragraphs 31 and 32.

179 *Deutscher Apothekerverband eV and 0800 DocMorris NV, Jacques Waterval*, Case 322/01 (11 December 2003), paragraph 74.

180 *Piergiorgio Gambelli and Others*, Case 243/01 (6 November 2003), paragraphs 53 and 54. See below under 2.4.2.

181 See 2.5.

182 *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, Case 288/89 (25 July 1991), paragraph 11 with reference to *Bond van Adverteerders and others v. The Netherlands State*, Case 352/85 (26 April 1988), paragraphs 32 and 34.

foreign persons providing services is not justified by overriding reasons relating to the public interest, or if the requirements embodied in that legislation are already satisfied by the rules imposed on those persons in the Member State in which they are established.¹⁸³

Article 49 does not preclude national rules which are applied without distinction as regards the origin, whether national or foreign, of those advertisements, the nationality of the person providing the service, or the place where he is established.¹⁸⁴ However as seen in *Alpine Investments* case,¹⁸⁵ non-discriminatory measures may constitute a restriction on freedom to provide services if it restrict access to markets. Such restrictions must be treated as indistinctly applied restrictions as mentioned above.

The freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the state of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established.¹⁸⁶ The application of national rules to providers of services established in other Member States must be appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it.¹⁸⁷

*The court has recognised the following overriding reasons relating to the public interest: professional rules intended to protect recipients of the service, protection of intellectual property, the protection of workers, consumer protection, the conservation of the national historic and artistic heritage, turning to account the archaeological, historical and artistic heritage of a country and the widest possible dissemination of knowledge of the artistic and cultural heritage of a country.*¹⁸⁸

The case, *Bond van Adverteerders*,¹⁸⁹ concerned the justification on grounds of public policy of a Dutch prohibition on relaying television programmes from other states if the (commercial) programmes contained advertising intended especially for the public in the Netherlands or they had Dutch subtitles. The court ruled that discriminatory regulation is compatible with Community law only if it can be brought within the scope of an express derogation which in this case would be the public policy derogation. The court did not find that the Dutch legislation was

183 *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, Case 288/89 (25 July 1991), paragraphs 12 and 13 with references.

184 *Procureur du Roi v. Marc J.V.C. Debaue and others*, Case 52/79 (18 March 1980), paragraph 16.

185 *Alpine Investments BV v. Minister van Financiën*, Case 384/93 (10 May 1995).

186 See *Manfred Säger v. Dennemeyer & Co. Ltd.* Case 76/90 (25 July 1991), paragraph 15 with references.

187 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL and Bernard Leloup, Serge Leloup and Sofrage SARL*, Joined Cases 369/96 and 376/96 (23 November 1999), paragraph 35 with references.

188 *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, Case 288/89 (25 July 1991), paragraph 14 with references.

189 *Bond van Adverteerders and others v. The Netherlands State*, Case 352/85 (26 April 1988).

justified on grounds of public policy. The court noted that economic aims, such as that of securing for a national public foundation all the revenue from advertising cannot constitute ground of public policy within the meaning of the EC Treaty. Also the aim of maintaining the non-commercial and pluralistic nature of broadcasting was refused because this objective could be achieved in less restrictive and non-discriminatory ways.

In the *Schindler*¹⁹⁰ case, concerning restrictions on lotteries, it was left to national authorities to determine what is required to protect players and, maintain order in society, as regards the manner in which lotteries are operated, the size of the stakes, and the allocation of the profits they yield. In those circumstances, it is for them to assess not only whether it is necessary to restrict the activities of lotteries but also whether they should be prohibited, provided that those restrictions are not discriminatory.¹⁹¹ In the case, *Familiapress v. Heinrich Bauer Verlag*,¹⁹² which concerned free movement of goods it was established, with reference to the *Schindler* case, that a ban on games of chance in connection with publications did not entail corresponding special features, since the *Schindler* case concerned exclusively large-scale lotteries in respect of which the discretion enjoyed by national authorities was justified because of the high risk of crime or fraud.¹⁹³

The *Piergiorgio Gambelli*¹⁹⁴ case dealt with an Italian ban prohibiting, on pain of criminal penalties, the organisation of, marketing of and participation in unlicensed gambling activities.¹⁹⁵ The case concerned criminal proceedings brought against a number of Italians for collaborating in Italy with a UK-based bookmaker (*Stanley International Betting Ltd*) in the activity of collecting bets.¹⁹⁶ Betting data was sent via the Internet and the Italian agencies were also assisting in the transfer of money.

The court noted that when a company, established in a Member State (such as *Stanley*), pursues the activity of collecting bets through the intermediary of an organisation of agencies established in another Member State (such as the defendants in the main proceedings), any restrictions on the activities of those

190 *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, Case 275/92 (24 March 1994).

191 *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, Case 275/92 (24 March 1994), paragraph 61.

192 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case 368/95 (26 June 1997).

193 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case 368/95 (26 June 1997), paragraph 22 and *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, Case 275/92 (24 March 1994), paragraphs 50, 51 and 60 of *Schindler*.

194 *Piergiorgio Gambelli and Others*, Case 243/01 (6 November 2003).

195 It should be noted that the 2000 E-Commerce Directive according to article 1(5)(d) does not deal with gambling activities.

196 The UK Company was carrying on business as a bookmaker under a licence granted pursuant to UK legislation and was subject to rigorous controls in relation to the legality of its activities. See *Piergiorgio Gambelli and Others*, Case 243/01 (6 November 2003), paragraph 12.

agencies constitute obstacles to the freedom of establishment.¹⁹⁷ The prohibition was also found to be a restriction on the free movement of services.¹⁹⁸ The Italian law prohibited individuals in Italy from participating in foreign online betting activities when the individual would be using his credit card to arrange payments. This prohibition, enforced by criminal penalties, on participating in betting games organised in Member States other than in the country where the bettor was established was found to constitute a restriction on the freedom to provide services.¹⁹⁹

The European Court of Justice left it to the national court to decide whether the restrictions if applied without discrimination was 1) justified by imperative requirements in the general interest, 2) was suitable for achieving the objective which they pursue and 3) did not go beyond what is necessary in order to attain it. The court emphasised that the risk of reduction of tax revenue does not constitute a matter of overriding general interest which may be relied on to justify a restriction on the freedom of establishment or the freedom to provide services.

It was also noted by the court that a restriction must reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorised games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted.²⁰⁰ The court admitted that moral and financially harmful consequences of gambling may serve to justify the preservation of public order. It was, however, emphasised that in so far as the authorities of a Member State encourage consumers to participate in gambling activities to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns.²⁰¹

2.4.3. The Relationship to the Right of Establishment

Article 43 of the EC Treaty prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State, including restrictions on the setting-up of agencies, branches or subsidiaries. The freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is effected. However, application of measures providing for special treatment for foreign nationals on grounds of public policy, public security or public health is exempt pursuant to article 46(1). This exception also applies to the free movement of

197 Piergiorgio Gambelli and Others, Case 243/01 (6 November 2003), paragraph 46.

198 Piergiorgio Gambelli and Others, Case 243/01 (6 November 2003), paragraphs 54, 58 and 59.

199 Piergiorgio Gambelli and Others, Case 243/01 (6 November 2003), paragraphs 56 and 57.

200 Piergiorgio Gambelli and Others, Case 243/01 (6 November 2003), paragraph 61 and 62 with references.

201 See Piergiorgio Gambelli and Others, Case 243/01 (6 November 2003), paragraphs 62, 63, 65 and 69 with references.

services which is dealt with above.

In the *Gephard*²⁰² case, it was established that the situation of a Community national who moves to another Member State of the Community in order there to pursue an economic activity is governed by the chapter of the EC Treaty on the free movement of workers, or the chapter on the right of establishment or the chapter on services, these being mutually exclusive. The concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his state of origin and to profit therefrom. In contrast, where the provider of services moves to another Member State, the provisions of the chapter on services envisage that he is to pursue his activity there on a temporary basis. The temporary nature of the activities in question has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. The fact that the provision of services is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) in so far as such infrastructure is necessary for the purposes of performing the services in question.

The relationship between the rights to provide service and those of establishments is a matter of in which way the services is to be provided. The scope of this thesis is cross-border activities without establishment in the enforcing state. The freedom to provide service must be the primary freedom for the Business to rely on. The European Court of Justice has, however, established that Member State cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state. The court has found that such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services.²⁰³

It was further in the *Knoors Case* noted that the liberties of the EC Treaty could not be fully realised if Member States can refuse to grant the benefit of freedom to provide services to those of their nationals who have taken advantage of the freedom of movement and establishment and who have acquired, by virtue of such facilities, the necessary trade qualifications in a Member State other than that whose nationality they possess.²⁰⁴ In the *Bouchoucha case*, the court found that in

202 Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, Case 55/94 (30 November 1995). See especially paragraphs 20 and 25 to 27.

203 Johannes Henricus Maria van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, Case 33/74 (3 December 1974), paragraph 13.

204 J. Knoors v. Secretary of State for Economic Affairs, Case 115/78 (7 February 1979), paragraphs 20 and 24.

the absence of Community legislation on the professional practice of the field in question (osteopathy) each Member State is free to regulate the exercise of that activity within its territory, without discriminating between its own nationals and those of the other Member States.²⁰⁵ It has been suggested that the reasoning in this case is based on an attempted 'abuse' situation, in which a Member State had a legitimate interest in preventing its own nationals from evading the provisions of national legislation by attempting to use article 43 to rely on a 'lesser' qualification obtained in another Member State.²⁰⁶

The provisions on freedom of establishment will not be further dealt with in this thesis.

2.4.4. Draft Directive on Services in the Internal Market

The Commission has proposed a directive on services in the Internal Market.²⁰⁷ The future for this directive is quite uncertain and it will only be mentioned here for good measure. The draft directive approach services in general in order to facilitate the freedom of establishment for service providers and the free movement of services. The directive applies to information society services whether these services are comprised by the 2000 E-Commerce Directive or not.²⁰⁸ The approach adopted in the directive is similar to the 2000 E-Commerce Directive, as dealt with below, which establish a country of origin principle with some derogations and harmonisation. The derogations are either general, or temporary or may be applied on a case-by-case basis. The directive lay on Member States to simplify procedures and requirements to the services and service providers and guarantee free movement of services. Member States will have to eliminate certain legislation and evaluate the justification and proportionality of a number of requirements.

The draft directive deals with services supplied by providers established in a Member State. 'Services' is defined in accordance with the European Court of Justice's case law on article 50 of the EC Treaty.²⁰⁹ Article 16 of the proposal

205 Criminal proceedings against Marc Gaston Bouchoucha, Case 61/89 (3 October 1990), paragraph 12.

206 Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 788f.

207 Proposal for a directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2 final/3 (5 March 2004), 2004/0001 (COD). See also Working document of the Luxembourg Presidency, containing clarifications to the Commission's proposal; Proposal for a Directive of the European Parliament and of the Council on services in the internal market, 2004/2001 (COD) (10 January 2005).

208 See article 2 for the delimitation of the directive's scope.

209 Article 4(1). According to page 19 of the proposal, the definition covers a very wide range of activities including, for example, management consultancy, certification and testing, maintenance, facilities management and security, advertising services, recruitment services, including the services of temporary employment agencies, services provided by commercial agents, legal or tax consultancy, property services, such as those provided by estate agencies, construction services, architectural services, distributive trades, organisation of trade fairs and exhibitions, car-hire, security services, tourist services, including travel agencies and tourist guides, audiovisual services, sports centres and amusement parks, leisure services, health services and personal domestic services, such as assistance for old people.

contains a country of origin principle similar to the one in the 2000 E-Commerce Directive, providing that Member States shall ensure that providers are subject only to the national provisions which fall within the coordinated field, of their state of origin. In article 4(1) number 9, the coordinated field is defined as 'any requirement applicable to access to service activities or to the exercise thereof'.

A number of general derogations are made to the scope which inter alia exclude intellectual property rights, the freedom of parties to choose the law applicable to their contract and contracts for the provision of services concluded by consumers to the extent that the provisions governing them are not completely harmonised at community level.²¹⁰ Some transitional derogations from the country of origin principle is given in article 18 which provides that inter alia gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions are excluded in a transitional period.

2.5. The 2000 E-Commerce Directive

The 2000 E-Commerce Directive²¹¹ is a cornerstone in the EU legislative framework which seeks to develop electronic commerce within the Community. The idea of the directive is presented in a 1997 communication from the Commission²¹² along with other initiatives concerning inter alia electronic signatures and electronic money institutions.²¹³ The purpose of the 2000 E-Commerce Directive is, according to article 1(1), to contribute to the proper functioning of the Internal Market by ensuring the free movement of 'information society services' between Member States. In order to achieve this objective the directive comprises a country of origin principle and an approximation of rules concerning:

1. the establishment of service providers,
2. commercial communications,
3. electronic contracts,
4. the liability of intermediaries,
5. codes of conduct,
6. out-of-court dispute settlements,
7. court actions and

210 2000 E-Commerce Directive, article 17.

211 EU Directive 2000/31 (8 June 2000) on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce). See also proposal for a European Parliament and Council directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 final, 18 November 1998, 98/0325 (COD). Adopted by the EU Parliament on 4 May 2000 (see A5-0106/2000).

212 A European Initiative in Electronic Commerce, COM(97) 157 (16 April 1997).

213 Directive 1999/93 (13 December 1999) on a Community framework for electronic signatures and Directive 2000/46 (18 September 2000) on the taking up, pursuit of and prudential supervision of the business of electronic money institutions respectively.

8. cooperation between Member States.

The focus in this context is on the country of origin principle and not on the substantive harmonisation. The idea of the country of origin principle is that businesses, as a starting point, only have to comply with the legislation in the country of establishment in connection with providing information society services.

2.5.1. Information Society Services

The 2000 E-Commerce Directive deals with so-called information society services as defined in article 1(2) of directive 98/34 as amended by directive 98/48.²¹⁴ 'Information society services' is defined as any service 1) normally provided for remuneration, 2) at a distance, 3) by electronic means and 4) at the individual request of a recipient of services. This definition is accompanied by an indicative list of services which are not covered by the definition.²¹⁵

The first requirement of 'normally provided for remuneration' is to be interpreted in accordance with the case law on the freedom movement of service,²¹⁶ which inter alia excludes activities carried out by a state without economic consideration in the context of its duties, in particular, in the social, cultural, educational and judicial fields.²¹⁷ Information society services are not solely restricted to services giving rise to online contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering online information or commercial communications, or those providing tools allowing for search, access and retrieval of data.²¹⁸ The use of electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service. The contractual relationship between an employee and his employer is also not an information society service.²¹⁹

'At a distance' means that the services is provided without the parties being simultaneously present and excludes services provided in the physical presence of the provider and the recipient, even if they involve the use of electronic devices.²²⁰

214 Directive 98/34 (22 June 1998) laying down a procedure for the provision of information in the field of technical standards and regulations. Directive 98/48 (20 July 1998) amending Directive 98/34 laying down a procedure for the provision of information in the field of technical standards and regulations.

215 Annex V of directive 98/48 (20 July 1998) amending Directive 98/34 laying down a procedure for the provision of information in the field of technical standards and regulations.

216 See 2.4.

217 See recital 19 of directive 98/48 (20 July 1998) amending Directive 98/34 laying down a procedure for the provision of information in the field of technical standards and regulations.

218 Recital 18 of the 2000 E-Commerce Directive.

219 Recital 18 of the 2000 E-Commerce Directive.

220 Annex V of directive 98/34 as amended by directive 98/48.

As examples of services not provided at a distance, are mentioned the consultation of an electronic catalogue in a shop with the customer on site, plane ticket reservation at a travel agency in the physical presence of the customer by means of a network of computers and electronic games made available in a video-arcade where the customer is physically present.²²¹

'By electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.²²² The information society services includes economic activities which take place online, including, in particular, the selling of goods online, whereas activities such as the delivery of goods as such or the provision of services off-line are not covered.²²³ Off-line services such as for example distribution of CD-ROMs are not covered. The definition excludes services having material content even though provided via electronic devices such as automatic cash or ticket dispensing machines. Services which are not provided via electronic processing/inventory systems are excluded, such as voice telephony services, telefax or telex services, telephone/telefax consultation of for example doctors and lawyers and telephone/telefax direct marketing.²²⁴ Activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.²²⁵

That the service is to be provided at the 'individual request of a recipient of services' means that the service is to be provided through the transmission of data on individual request. Annex V excludes services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission) and mention a) television broadcasting services (including near-video on-demand services) covered by article 1(1)(a) of Directive 89/552,²²⁶ b) radio broadcasting services and c) televised teletext. Services which are transmitted point to point, such as real video-on-demand or the provision of commercial communications by electronic mail, are

221 Annex V of directive 98/34 as amended by directive 98/48.

222 Article 1(2) of directive 98/34 as amended by directive 98/48.

223 Recital 18 of the 2000 E-Commerce Directive.

224 Annex V of directive 98/34 as amended by directive 98/48.

225 Recital 18 of the 2000 E-Commerce Directive.

226 Directive 89/552 (3 October 1989) on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (1989 EU Television Without Frontier Directive). Point (a) of article 1 defines 'television broadcasting' as 'the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services'.

included in the scope of application.²²⁷

The definition of information society services is media-neutral and is thus not limited to certain known media. It is, however, obvious that services provided over the Internet is the main target of the directive.²²⁸ The directive includes services delivered via other media and services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service.²²⁹

*Article 2(1)(d) of the 2000 E-Commerce Directive provides that the 'recipient of the service' is any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible. The definition covers all types of usage of information society services, both by persons who provide information on open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons.*²³⁰

2.5.2. General Delimitation

Besides the delimitation which is entailed in the definition of information society services, the 2000 E-Commerce Directive comprises a general delimitation and certain exceptions which only concerns the country of origin principle ('the general exception' and 'specific exceptions'). The general delimitation is found in article 3 (5) and excludes 1) the field of taxation, 2) questions relating to information society services covered by the data protection directives,²³¹ 3) questions relating to agreements or practices governed by cartel law and 4) gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

The exclusion of gambling activities from the scope of application covers only games of chance, lotteries and betting transactions which involve wagering a stake with monetary value. It does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.²³² The fiscal aspects of electronic commerce are also generally excluded.²³³

227 Recital 18 of the 2000 E-Commerce Directive.

228 This is indeed obvious when considering the information requirement entailed in the substantive harmonisation.

229 See recital 18 of the 2000 E-Commerce Directive.

230 Recital 20 of the 2000 E-Commerce Directive.

231 Directive 95/46 (24 October 1995) on the protection of individuals with regard to the processing of personal data and on the free movement of such data and directive 02/58 (12 July 2002) concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

232 Recital 16 of the 2000 E-Commerce Directive.

233 The area is under review in the work that was launched by the Commission Communication 'Electronic commerce and indirect taxation'. See proposal for a European Parliament and Council directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 (18 November

The exclusion of questions relating to information society services covered by the data protection directives is introduced because these directives already establish a legal framework in the field of personal data and therefore, it is not necessary to cover this issue to ensure the smooth functioning of the Internal Market, in particular the free movement of personal data between Member States.²³⁴ The data protection directives are fully applicable to information society services which is also apparent from recent case law.²³⁵ The exclusion was introduced to avoid any interference between the directives.²³⁶

2.5.3. The Country of Origin Principle

The 2000 E-Commerce Directive comprises a country of origin principle which consists of two elements, i.e. 1) a principle of home country control and 2) a principle of mutual recognition.²³⁷ The country of origin principle applies only to services provided between Member States and not to services supplied by service providers established in a third country or services provided only to third countries.²³⁸ The country of origin principle can thus not be invoked by a business established outside the Internal Market or be invoked by a business established in the Internal Market against legal requirement imposed by states outside the Internal Market.

The country of origin principle is intended to support the Treaty's goal of free movement of services and is elaborated along the lines of a similar principle in the 1989 Television Without Frontier Directive.²³⁹ The interpretation of the country of origin principle in that directive is of value for the interpretation of the corresponding principle in the 2000 E-Commerce Directive.²⁴⁰ The relationship between the country of origin principles in the two directives was confirmed by the European Court of Justice (Advocate General).²⁴¹

Article 2 of the 1989 Television Without Frontier Directive provides that Member States shall ensure that all television broadcasts transmitted by broadcasters under its jurisdiction comply with the law applicable to broadcasts intended for the public in that

1998), 98/0325 (COD), p. 32.

234 2000 E-Commerce Directive recital 14.

235 Criminal proceedings against Bodil Lindqvist, Case 101/01 (6 November 2003).

236 See proposal for a European Parliament and Council directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 (18 November 1998), 98/0325 (COD), p. 32.

237 Article 3.

238 See recital 58 and article 3 respectively.

239 Directive 89/552.

240 See in general on broadcasting in the Internal Market, Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 355ff.

241 Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH, Opinion of Mr Advocate General Alber delivered on 8 April 2003, Case 71/02, paragraph 98 with reference to the ruling in *Konsumentombudsmannen against De Agostini (Svenska) Förlag AB*, Case 34/95 (9 July 1997, joined with cases 35/95 and 36/95, *Konsumentombudsmannen against TV-Shop i Sverige AB*).

*Member State. Other Member States shall ensure freedom of reception and may not restrict retransmission of television broadcasts from EU member states for reasons which fall within the fields coordinated by the directive. The receiving Member State (country of destination) may, exceptionally and under specific conditions provisionally suspend the retransmission of televised broadcasts.*²⁴²

In order to ensure an effective protection of public interest objectives, information society services should be supervised at the source of the activity.²⁴³ The principle of home country control is found in article 3(1) and provides that 'Member States shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field'. The objective of the home country control is to ensure effective law enforcement by the authorities which have effective access to law enforcement, i.e. the authorities in the state in which the service provider is established.²⁴⁴

The place at which a service provider is established is to be determined in conformity with the case law of the European Court of Justice, according to which, the concept of establishment involves the actual (effectively) pursuit of an economic activity through a fixed establishment for an indefinite period.²⁴⁵ It is emphasised that the presence and use of the technical means and technologies required to provide the service (for example servers) do not, in themselves, constitute an establishment of the provider.²⁴⁶ It will usually be straightforward to establish the place where a service provider pursues its economic activity. If the service provider has several places of establishment, the place of establishment is the place from which the service concerned is provided. If it is difficult to determine from which of several places of establishment a given service is provided, it should be determined where the provider has the centre of his activities relating to this particular service.²⁴⁷ In the test set-up of this thesis the place of establishment is clearly defined and thus easy to determine.

According to the principle of home country control, Member States must ensure compliance with national provisions, no matter where in the Internal Market the activity is directed. It is obvious that states are obliged to maintain a geographical

242 Member States may according to article 2(2) provisionally suspend retransmissions of television broadcasts if (all of) the following conditions are fulfilled: (a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22; (b) during the previous 12 months, the broadcaster has infringed the same provision on at least two prior occasions; (c) the Member State concerned has notified the broadcaster and the Commission in writing of the alleged infringements and of its intention to restrict retransmission should any such infringement occur again; (d) consultations with the transmitting State and the Commission have not produced an amicable settlement within 15 days of the notification provided for in point (c), and the alleged infringement persists.

243 Recital 22 of the 2000 E-Commerce Directive.

244 See in general chapter 3.

245 Article 2(1)(c).

246 Recital 19.

247 2000 E-Commerce Directive, recital 19.

scope of application for the concerned national legislation that covers the entire Internal Market. This means that also national criminal law applies to activities carried out in a foreign market, even if the activity is not illegal there.²⁴⁸ Any other conclusion would not correspond with the objective of providing protection for all citizens in the Internal Market and of improving mutual trust between Member States.²⁴⁹

Article 3(2) comprises the principle of mutual recognition and provides that 'Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State'. This principle is an obvious counterpart to the principle of home country control which provides that states should not intervene in areas covered by the principle of home country control, where the activity is supervised in the country of origin. The principle underlines the mutual confidence which is reflected in the country of origin principle.

2.5.3.1. *The General Exception*

Member States may under certain circumstances take measures to derogate from the principle of mutual recognition.²⁵⁰ The provision is intended for very specific cases, where for example a state seeks to protect fundamental societal interests, such as applying a law which would forbid the arrival of racist messages.²⁵¹ The derogation requires that intervention is necessary for one of the following reasons:

- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,
- the protection of public health,
- public security, including the safeguarding of national security and defence,
- the protection of consumers, including investors.

The measure must be taken against a given information society service which prejudices these objectives or which presents a serious and grave risk of prejudice to the objectives. This means that also preventive measures can be justified under article 3(4). The measure must be proportionate to the objective pursued. The principles in the exception must be understood in the light of existing case law,²⁵²

248 See in general 3.2.2 on dual criminality.

249 2000 E-Commerce Directive, recital 22.

250 2000 E-Commerce Directive article 3(4)

251 Proposal for a European Parliament and Council directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 (18 November 1998), 98/0325 (COD), 32f.

252 Communication from the Commission to the council, the European Parliament and the European Central Bank on application to financial services of article 3(4) to (6) of the electronic commerce directive. COM

which provides that national measures liable to hinder or make less attractive the exercise of a fundamental freedom guaranteed by the EC Treaty must 1) be applied in a non-discriminatory manner, 2) be justified by imperative requirements in the general interest, 3) be suitable for securing the attainment of the objective which they pursue and 4) not go beyond what is necessary in order to attain it.

Article 3(4) does not cover all the reasons identified by the European Court of Justice in the context of articles 28 and 49 of the EC Treaty as justifying a restriction on the ground of defending the general interest. In addition to public policy, public security and public health as found in article 46 of the EC Treaty, the general exemption identifies only the protection of consumers, including investors. The exhaustive nature of the list means that some of the mandatory requirements, recognised by the European Court of Justice in the context of the free movement of services, cannot provide justification for measures taken under article 3(4). The article covers measures taken on a case-by-case basis against a specific service provided by a given operator and can thus not justify general measures.²⁵³

A Member State wishing to restrict the free movement of an information society service must, before taking such measures, ask the Member State in which the service provider is established to take measures and wait an unspecified time until it is possible to establish that the state did not take such measures or that the measures were inadequate. The Commission and the Member State where the service provider is established must be informed of the intention to take measures under this general exception.²⁵⁴ This request and notification procedure is notably without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, and may furthermore be derogated from in the case of urgency.²⁵⁵

It is provided in article 1(3) that the directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services. This article must be understood as allowing Member States to keep a stricter regulation in accordance with a minimum-clause, insofar the enforcement hereof does not

(2003) 259, p. 2f.

253 Communication from the Commission to the council, the European Parliament and the European Central Bank on application to financial services of article 3(4) to (6) of the electronic commerce directive. COM (2003) 259, p. 5.

254 According to article 3(6) shall the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time and if necessary ask the EU Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question. This examination and the Commissions conclusion is without prejudice to the state's possibility of proceeding with the measures in question.

255 According to article 3(5) the measure in the case of urgency shall be communicated, along with indication of reasons for the urgency, in the shortest possible time to the Commission and to the EU member state, where the service provider is established.

constitute a restriction on the freedom to provide information society services. In recital 57 there is made a reference to the European Court of Justice's case law on circumvention, concerning Member States' right to take measures against a service provider that is established in another Member State, but directs all or most of his activity to the territory of the first Member State, if the choice of establishment is made with a view to evading the legislation that would have applied to the provider if he had been established on the territory of the first Member State.²⁵⁶

2.5.3.2. The Coordinated Field

Both the principle of home country control and the principle of mutual recognition refer to the coordinated field. The coordinated field is the substantive scope of the country of origin principle, i.e. which requirements should be controlled (solely) at the source. The coordinated field concerns requirements applicable to either information society service providers or the information society service itself. It is of no importance whether the rule is of a general nature or designed specifically for information society services or the providers hereof. The coordinated field concerns requirements concerning both the taking up of an activity as provider of information society services and the requirements concerning the pursuit of such activities.²⁵⁷ The directive provides in article 2(1)(h) that for example requirements concerning qualifications, authorisation or notification and requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider are included.

The coordinated field covers only requirements relating to online activities such as online information, online advertising, online shopping, online contracting,²⁵⁸ but it does not concern Member States' legal requirements relating to goods, such as safety standards, labelling obligations, or liability for goods, or Member States' requirements relating to the delivery or the transport of goods, including the distribution of medicinal products.²⁵⁹ The coordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods, such as works of art.²⁶⁰

The country of origin principle in the 2000 E-Commerce Directive differs from the corresponding principle in the 1989 Television Without Frontier Directive by including a definition of the coordinated field, whereas the latter directive only refers to 'fields coordinated by this directive'.

In the *De Agostini* case²⁶¹ the European Court of Justice elaborated on the scope

256 On circumvention ('abuse of rights') see Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 369 with references.

257 2000 E-Commerce Directive, article 2(h).

258 2000 E-Commerce Directive, recital 21.

259 2000 E-Commerce Directive, article 2(1)(h).

260 2000 E-Commerce Directive, recital 21.

261 *Konsumentombudsmannen against De Agostini* (Svenska) Förlag AB, Case 34/95 (9 July 1997, joined

of that country of origin principle. The case concerned the Swedish Consumer Ombudsman's intervention against a Swedish company's advertising in Sweden through a broadcaster (TV3) established in the United Kingdom. The Swedish Consumer Ombudsman intended to fine the Swedish company for breaching a Swedish ban on television advertisement designed to attract the attention of children under 12 years and misleading advertising respectively. The European Court of Justice established that the directive only partially coordinates television advertising and sponsorship and that the directive does not have the effect of excluding completely and automatically the application of rules other than those specifically concerning the broadcasting and distribution of programmes.²⁶²

The European Court of Justice established that the directive contains a set of provisions specifically devoted to the protection of minors in relation to television programmes and that the directive precludes the application of a domestic broadcasting law which provides that advertisements broadcast in commercial breaks on television must not be designed to attract the attention of children under 12 years of age.²⁶³ Conversely, it was found that the directive does not preclude a Member State from taking, pursuant to general legislation on misleading advertising, measures against an advertiser in relation to television advertising broadcast from another Member State, provided that those measures do not prevent the retransmission, as such, in its territory of television broadcasts coming from that other Member State.²⁶⁴ The latter area was not found to be coordinated/harmonised by the directive.

By introducing a broad definition of the coordinated field in the 2000 E-Commerce Directive, the uncertainty which gave rise to the De Agostini case, should be eliminated. The flip side is that the country of origin principle also applies to areas of law which are not harmonised, neither by the directive itself nor by other community legislation. The broad definition in the 2000 E-Commerce Directive is found to be justified by the need to ensure clarity as regards the scope.

2.5.3.3. *Specific Exceptions*

Article 3(3) refers to the annex of the directive which contains derogations concerning specific areas which cannot benefit from the country of origin principle because 1) it is impossible to apply the principle of mutual recognition as set out in the case law of the Court of Justice concerning the principles of freedom of

with cases 35/95 and 36/95, Konsumentombudsmannen against TV-Shop i Sverige AB).

262 Konsumentombudsmannen against De Agostini (Svenska) Förlag AB, Case 34/95 (9 July 1997, joined with cases 35/95 and 36/95, Konsumentombudsmannen against TV-Shop i Sverige AB), paragraphs 32 and 33.

263 Konsumentombudsmannen against De Agostini (Svenska) Förlag AB, Case 34/95 (9 July 1997, joined with cases 35/95 and 36/95, Konsumentombudsmannen against TV-Shop i Sverige AB), paragraphs 57 and 62.

264 Konsumentombudsmannen against De Agostini (Svenska) Förlag AB, Case 34/95 (9 July 1997, joined with cases 35/95 and 36/95, Konsumentombudsmannen against TV-Shop i Sverige AB), paragraph 38.

movement enshrined in the EC Treaty, 2) it is an area where mutual recognition cannot be achieved due to insufficient harmonisation or 3) there are provisions laid down by existing directives which are clearly incompatible with the country of origin principle because they explicitly require supervision in the country of destination.²⁶⁵

Annex to the 2000 E-Commerce Directive ('derogations from article 3'): As provided for in Article 3(3), Article 3(1) and (2) do not apply to:

- *copyright, neighbouring rights, rights referred to in Directive 87/54/EEC and Directive 96/9/EC as well as industrial property rights,*
- *the emission of electronic money by institutions in respect of which Member States have applied one of the derogations provided for in Article 8(1) of Directive 2000/46/EC,²⁶⁶*
- *Article 44(2) of Directive 85/611/EEC,²⁶⁷*
- *Article 30 and Title IV of Directive 92/49/EEC, Title IV of Directive 92/96/EEC, Articles 7 and 8 of Directive 88/357/EEC and Article 4 of Directive 90/619/EEC,²⁶⁸*
- *the freedom of the parties to choose the law applicable to their contract,*
- *contractual obligations concerning consumer contacts,*
- *formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated,²⁶⁹*
- *the permissibility of unsolicited commercial communications by electronic mail.*

The derogation on the choice of applicable law in contract is made to ensure that such choice can still be made despite the country of origin principle. The parties to a contract are normally free to choose which law shall govern a contract

265 Proposal for a European Parliament and Council directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 (18 November 1998), 98/0325 (COD), p. 32.

266 Article 8(1) of Directive 2000/46 (18 September 2000) on the taking up, pursuit of and prudential supervision of the business of electronic money institutions allow the competent authorities of an EU member state to under certain circumstances waive the application of some or all of the provisions of that directive and the application of Directive 2000/12 (20 March 2000) relating to the taking up and pursuit of the business of credit institutions. This article provides an exceptions to the already established system for providing banking services in the internal market (see for example Title III). This exception in the 2000 E-Commerce Directive is introduced to maintain this exception in the 2000 Directive on Electronic Money.

267 Article 44(2) of Directive 85/611 (20 December 1985) on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) is exempt from the country of origin principle in order to avoid a conflict between the country of origin principle and the country of destination principle in the mentioned directive. Article 44(2) gives that undertakings for collective investment in transferable securities (UCITS) may advertise its units in the EU member state in which they are marketed. It must comply with the provisions governing advertising in that State.

268 A number of articles concerning insurance are exempt from the scope of the country of origin principle. This exception is introduced to avoid conflict with the already established system for providing insurance services in the internal market.

269 This exception concerns the formal validity of contracts creating or transferring rights in real estate where such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is situated. This exception is introduced to avoid conflict with the choice of law principle, which gives that the law of the place where the subject matter of rights in real estate is situated is to apply (*lex rei sitae*).

between them.²⁷⁰ This derogation along with the two following indicates that the country of origin principle may influence private international law even though article 1(4) provides that the directive does not establish additional rules on private international law. This discussion is pursued in the chapter on private law enforcement.²⁷¹

*Intellectual Property Rights are taken out of the scope of this thesis, but it is important to emphasise that a substantial part of the country of origin principle is carved out by the exception for copyright,²⁷² neighbouring rights, rights referred to in directive 87/54²⁷³ and directive 96/9²⁷⁴ as well as industrial property rights (collectively denoted 'intellectual property rights').²⁷⁵ This exception was introduced to maintain the choice of law principle, *lex protectionis*,²⁷⁶ for intellectual property rights.*

This principle is inter alia found in the Berne Convention for the Protection of Literary and Artistic Works (Paris, 1971) article 5 which provides that authors are to enjoy, in countries of the (Berne) Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals in respect of works for which they are protected under the Berne Convention. The enjoyment and the exercise of these rights shall according to article 5(2) be governed exclusively by the laws of the country where protection is claimed.

Below is a presentation and a discussion of the derogations of principal importance for this thesis.

2.5.3.3.1. Contractual Obligations in Consumer Contacts

Consumers in Europe are normally protected by mandatory legislation in the state where the consumer has his residence when the contract is entered via the Internet.²⁷⁷ This exception is introduced to maintain this protection.²⁷⁸ The

270 See 5.3.3.

271 See 4.1.3.1.

272 See the later directive 2001/29 (22 May 2001) on the harmonisation of certain aspects of copyright and related rights in the information society ('InfoSoc Directive').

273 Directive 87/54 (16 December 1986) on the legal protection of topographies of semiconductor products.

274 Directive 96/9 (11 March 1996) on the legal protection of databases.

275 The 2000 E-Commerce Directive fails to provide a definition of intellectual property rights. This exception is of great importance for the problem dealt with under this thesis, it falls outside the scope of this paper to provide a clear definition of this exception. The scope of copyright and related rights seem to be relatively well defined as well as the definitions in the explicitly mentioned directives. Industrial property rights may give rise to uncertainty especially on the borders of marketing law (unfair competition) and the use trade secrets. In the systematic applied at the World Intellectual Property Organisation (WIPO), industrial property is sub-divided into inventions (patents), trademarks, industrial designs and geographic indications.

276 See in general Eechoud, Mireille van, Conflict of Laws in Copyright and Related Rights. Alternatives to the Lex Protectionis, Information Law Series 12, Den Haag: Kluwer Law International 2003.

277 See 4.1.1.2 and 4.2.1.5.

278 2000 E-Commerce Directive, recital 55 gives that this directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to

directive does not provide a clear definition of what is meant by contractual obligations, but the obligations include information on the essential elements of the content of the contract, including consumer rights which have a determining influence on the decision to contract.²⁷⁹

Recital 56: 'As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights which have a determining influence on the decision to contract'.

Problems may arise when information provided on a website relates both to unfair competition and to obligations in consumer contracts. Misleading statements relating to a product may for example both constitute misleading advertisement (comprised by the country of origin principle) and at the same time form part of the assessment of conform performance under a consumer contract (exempt from the country of origin principle).

Article 2(1) of the 1999 Consumer Sales Directive²⁸⁰ provides that the seller must deliver goods to the consumer which are in conformity with the contract of sale which according to article 2(2)(a) inter alia requires that the consumer goods comply with the description given by the seller. The approximation of national legislation governing the sale of consumer goods is not to impinge on provisions and principles of national law relating to contractual and non-contractual liability.²⁸¹

Article 4 and 5 of the 1997 Distance Selling Directive²⁸² prescribe a number of information requirements (administrative provisions) which must be fulfilled in connection with distance contracts between consumers and suppliers. Some of this information (for example 'the main characteristics of the goods or services') may be relevant in connection with delivery in conformity with the contract, whereas the requirements in general may influence the right of withdrawal as provided for in article 6, and which also can be said to concern contractual obligations in consumer contracts.

This conflict may be approached either by determining the nature of the cause of action (contract or outside of a contract) or by the nature of the information in question as being information on the essential elements of the content of the contract. The former approach would mean that certain information should comply with the law of both the country of origin (if enforced outside of a contract) and the country of destination (if enforced in connection with a contract).

The situation can be illustrated by the Karl Heinz Henkel case,²⁸³ which

contractual obligations of the law of the Member State in which he has his habitual residence.

279 2000 E-Commerce Directive, recital 56.

280 Directive 99/44 (25 May 1999) on certain aspects of the sale of consumer goods and associated guarantees.

281 1999 Consumer Sales Directive, recital 6.

282 Directive 97/7 (20 May 1997) on the protection of consumers in respect of distance contracts.

283 Verein für Konsumenteninformation and Karl Heinz Henkel, Case 167/00 (1 October 2002).

concerned jurisdiction, where a preventive action by a consumer organisation in connection to the use of unfair contract terms in consumer contracts, was found to be an action relating to tort, delict or quasi-delict.²⁸⁴ The latter approach may be supported by recital 56, cited above, and would provide that information should comply only with the legislation of one jurisdiction. Based on recital 56 and difficulties entailed in the former approach, the latter approach seem to be more operable, but there is a need for a sharper refinement of 'contractual obligation in consumer contracts'. It cannot be excluded that the nature of the cause of action, in a particular case, would have a bearing in determining the nature of the information in question.

As provided in chapter 4,²⁸⁵ the Business will have to consider the legislation of the country of destination in connection to consumer contracts. It is therefore, in lack of any clearer definition of the exception, advisable to ensure compliance in both the country of origin and country of destination in connection with marketing material which may constitute information on the essential elements of the content of the contract.

The differences in the legal systems in the Internal Market are limited, but notably not eliminated, by existing harmonisation and will be further limited when pending initiatives concerning requirements to both consumer contracts and commercial communication and practices are adopted.²⁸⁶

2.6. Goods or Services

As demonstrated above, there is a difference in the European Court of Justice's approach to measures restricting free trade in the Internal Market, depending whether it is categorised as hindering the free movement of goods or services respectively.²⁸⁷ Even though the European Court of Justice applies different approaches, the difference in fact seem to be limited. There seem to be a similar approach to dealing with restrictions and possible justification hereof whether it is

284 Verein für Konsumenteninformation and Karl Heinz Henkel, Case 167/00 (1 October 2002).

285 See 4.1.1.2.

286 See especially directive 93/13 (5 April 1993) on unfair terms in consumer contracts, directive 97/7 (20 May 1997) on the protection of consumers in respect of distance contracts and directive 2002/65 (23 September 2002) concerning the distance marketing of consumer financial services and amending directive 90/619 and directives 97/7 and 98/27. Directive 87/102 (22 December 1986) on the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit and proposal for a directive on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, COM(2002) 443 (11 September 2002). See also Communication from the Commission on European Contract Law and the revision of the acquis, COM(2004) 651 (11 October 2004). Directive 84/450 (10 September 1984) concerning misleading and comparative advertising and directive 05/29 (11 May 2005) concerning unfair business-to-consumer commercial practices in the internal market and amending directive 84/450, directives 97/7, 98/27 and 2002/65 and regulation 2006/2004 ('Unfair Commercial Practices Directive').

287 See in general Stuyck, Jules, Case C-71/02, Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH, judgment of the Fifth Chamber of 25 March 2004, Court of Justice Common Market Law Review 41 (2004), p. 1683–1700, at p. 1690ff.

based on free movement of goods or services.²⁸⁸ The analysis applied by the court is, in principle and simplified, a weighing up the effect of and reasoning behind a restricting measure against the intentions behind the fundamental freedoms in the Internal Market (proportionality). Both freedoms comprise public policy (etc.) considerations which to a proportionate extent may justify both distinctly and indistinctly applied restrictions. Both freedoms also recognise a set of mandatory requirement which may, in a proportionate manner, be invoked to justify restrictive measures. There are even examples of situations where the European Court of Justice in dealing with one of the freedoms refers to case law concerning the other freedom.²⁸⁹ The main difference between the two freedoms seems to lie in the concept of certain selling arrangements, as elaborated under the free movement of goods.

As mentioned above, national provisions restricting or prohibiting certain selling arrangements may fall outside the scope of article 28 of the EC Treaty as long as those provisions apply to all relevant traders operating within the national territory, and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.²⁹⁰ In *Alpine Invest*,²⁹¹ concerning a ban on cold calling in the light of article 49 of the EC Treaty, the concept of certain selling arrangements was invoked. The European Court of Justice rejected that the prohibition in question was analogous to the above-mentioned selling arrangements, even though it was general and non-discriminatory and neither its object nor its effect was to put the national market at an advantage over providers of services from other Member States. The court maintained that the prohibition constituted a restriction on the freedom to provide cross-border services because it deprived the operators concerned of a rapid and direct technique for marketing and for contacting potential clients in other Member States.²⁹² This ruling is not a clear rejection of the possibility to apply the concept of certain selling arrangement within the area of free movement of services.²⁹³ On the other hand, the court could be much clearer if it intended to copy this concept into the area of services within the meaning of article 28 of the EC Treaty. However, certain selling arrangements may be caught by article 28 and all things being equal, it may be easier to justify a restriction under article 49 if it fulfil the

288 Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 659.

289 See for example *Schutzverband gegen unlauteren Wettbewerb v. TK-Heimdienst Sass GmbH*, Case 254/98 (13 January 2000), paragraph 29. See also Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 371 with reference to *Konsumentombudsmannen (KO) v. Gourmet International Products AB (GIP)*, Case 405/98 (8 March 2001), paragraph 21.

290 *Criminal proceedings against Bernard Keck and Daniel Mithouard*, Joined Cases 267/91 and 268/91 (24 November 1993), paragraphs 16 to 17.

291 *Alpine Investments BV v. Minister van Financiën*, Case 384/93 (10 May 1995).

292 *Alpine Investments BV v. Minister van Financiën*, Case 384/93 (10 May 1995), paragraphs 28 and 33 to 36.

293 It could be argued that it was considered a restriction because it concerned a total ban. See to that end *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Case 71/02 (25 March 2004), paragraphs 40 to 42 with reference to paragraph 37 of the *Keck and Mithouard* ruling presented above.

requirements established in the Keck ruling on certain selling arrangements.

It follows from article 50 of the EC Treaty that the provisions on services only apply in so far as the activity is not governed by the provisions relating to freedom of movement of goods. Where a national measure restricts both the free movement of goods and the freedom to provide services, the European Court of Justice will in principle examine it in relation to only one of those two fundamental freedoms where it is shown that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it.²⁹⁴

It may not always be obvious when to refer a restriction to either of the provisions, especially in cases concerning the distribution of advertising material, and decision must be made in the light of the specific circumstances of each particular case.²⁹⁵ In *Schindler*,²⁹⁶ the sending of advertisements application forms and possibly tickets was considered as only steps in the operation of a lottery (service) and could not be considered independently under article 28 of the EC Treaty. In *GB-INNO-BM*,²⁹⁷ advertisement (the distribution of flyers) was examined solely in the light of article 28 because consumers (in frontier areas) may travel freely to the territory of another Member State to shop (goods) under the same conditions as the local population, and that that freedom for consumers is compromised, if they are deprived of access to advertising available in the country where purchases are made.

In *Herbert Karner v. Troostwijk*,²⁹⁸ the court rejected to consider the marketing regulation in question in the light of article 49 because the dissemination of advertising was found to be a secondary element in relation to the sale of the goods in question. The advertisement giving rise to the case was posted in both a sales catalogue and on the Internet. The Advocate General pointed out that if advertising is seen as part of the general commercial process of selling goods, that rule must be examined exclusively from the point of view of the free movement of goods, whereas if advertising is seen as a separate activity, the question arises whether the prohibition in question is compatible with the provisions on the freedom to provide services.²⁹⁹ The Advocate General emphasised that decision must be made in the light of the specific circumstances of each particular case, and he attached importance to the fact that the advertisement was produced and published by the

294 *Canal Satélite Digital SL v. Administración General del Estado, and Distribuidora de Televisión Digital SA (DTS)*, Case 390/99 (22 January 2002), paragraph 31 with references.

295 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Opinion of Mr Advocate General Alber, Case 71/02 (8 April 2003), paragraph 92.

296 *Her Majesty's Customs and Excise v. Gerhart Schindler and Jörg Schindler*, Case 275/92 (24 March 1994), paragraphs 22 to 25.

297 *GB-INNO-BM v. Confédération du commerce luxembourgeois*, Case 362/88 (7 March 1990), paragraph 8.

298 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Case 71/02 (25 March 2004), paragraphs 46 and 47.

299 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Opinion of Mr Advocate General Alber, Case 71/02 (8 April 2003), paragraph 91.

seller himself and thus is part of the sale of the goods in question, whereas the activity would fall within the scope of article 49 of the EC Treaty if the advertisement was produced and published by a third party, for example by an independent advertising agency.³⁰⁰

Advocate General Alber elaborated in Karner v. Troostwijk on how the national court should assess advertisements on the Internet if it would establish that the advertisement in question was placed on the Internet by a third party, including for example a parent company with an independent legal personality.³⁰¹ In that case, the national prohibition on certain advertisement would have to be examined with a view also to determining its compatibility with the freedom to provide services. The Advocate General noted that the freedom to provide services could have been restricted if the third party would be established in another Member State and it could not provide the services in question for the Austrian company Troostwijk. If the third party would also be established in Austria, the freedom to provide services could have been restricted if the advertisement could not be distributed via the Internet to other Member States where such advertisements are in principle permitted.

In *Canal Satélite Digital*,³⁰² it was established that it in the field of telecommunications is difficult to determine generally whether it is free movement of goods or freedom to provide services which should take priority. In the case in question the court noted that the two aspects often are intimately linked and that the supply of hardware sometimes is more important than connected services and that it in other circumstances is the economic activities of providing know-how or other services which are dominant.³⁰³ The court found that the restriction in question should be examined simultaneously in the light of both articles 28 and 49 of the EC Treaty. The court examined, apparently without distinction between the freedoms, whether the national measure pursued an objective of public interest which complied with the principle of proportionality (that is to say whether it is appropriate for securing the attainment of that objective and does not go beyond what is necessary in order to attain it).³⁰⁴

In the situations dealt with in this thesis, the Business's activities may fall under article 28 and/or article 49 depending on the underlying activity and in particular the restriction in question. Restrictions concerning the goods or services sold by the Business will fall under the respective provisions. Advertisement (i.e. the Business's website) in connection to such sales would, as a starting point, follow

300 Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH, Opinion of Mr Advocate General Alber, Case 71/02 (8 April 2003), paragraph 93.

301 Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH, Opinion of Mr Advocate General Alber, Case 71/02 (8 April 2003), paragraphs 94 to 98.

302 Canal Satélite Digital SL v. Administración General del Estado, and Distribuidora de Televisión Digital SA (DTS), Case 390/99 (22 January 2002).

303 Canal Satélite Digital SL v. Administración General del Estado, and Distribuidora de Televisión Digital SA (DTS), Case 390/99 (22 January 2002), paragraph 32.

304 Canal Satélite Digital SL v. Administración General del Estado, and Distribuidora de Televisión Digital SA (DTS), Case 390/99 (22 January 2002), paragraph 33.

the nature of the product offered (goods or services), but the advertisement may also be treated as an independent service as suggested by Advocate General Alber in *Karner v. Troostwijk*.

2.6.1. Goods, Services and Information Society Services.

Information society services, as discussed above,³⁰⁵ are not characterised by the underlying product which is offered, but is determined by the definition, including in particular whether it is carried out online. Activities which take place off-line are not included in the definition, and it does not concern legal requirements relating to goods or the delivery hereof. Of particular interest for this thesis is that the Business's marketing on the website and possible online delivery of services is included in the definition. This will have consequences, in particular, for the treatment of certain selling arrangements as defined by the *Keck* ruling. In a situation where it, under the *Keck*-doctrine, is justified to impose national marketing rules on foreign operators' activities in that state, such marketing rules must not restrict the freedom to provide information society services within the meaning of article 3(2) of the 2000 E-Commerce Directive.

Even though a justified selling arrangement, by definition, is not a quantitative restriction or a measure having equivalent effect within the meaning of article 28 of the EC Treaty, it may none the less constitute a restriction within the meaning of the 2000 E-Commerce Directive. This is in particular true when the provision is construed in the light of article 3(1) and the overall goal of the directive which is to ensure that businesses only need to comply with the legislation of one Member State.³⁰⁶ Restrictions may, however, be justified under the limited scope of the exception in article 3(4) of the 2000 E-Commerce Directive.

In so far as restrictions do not fall under the coordinated field or do not concern information society services, the restrictions will have to be examined under the fundamental freedoms of the EC Treaty and not under the E-Commerce Directive.

2.7. Freedom of Expression (Human Rights)³⁰⁷

It is relevant to establish whether the Business can rely on the right of freedom of expression to challenge obstacles imposed by foreign states. It is provided in article 19 of the United Nations' Universal Declaration of Human Rights³⁰⁸ that everyone has the right to freedom of opinion and expression. This right includes the freedom to hold opinions without interference and to seek, receive and impart

305 See 2.5.1.

306 See for a similar reasoning, *Konsumentombudsmannen (KO) and De Agostini (Svenska) Förlag AB*, Case 34/95 (9 July 1997, Joined with Cases 35/95 and 36/95), paragraph 27.

307 See in general Ovey, Clare and White, Robin C.A., *Jacobs & White, The European Convention on Human Rights*, third edition, Oxford University Press, 2002, p. 276ff.

308 www.un.org/Overview/rights.html.

information and ideas through any media and regardless of frontiers. The primary source of human rights in Europe is the 1950 European Convention on Human Rights.³⁰⁹

*The 1950 Convention on Human Rights is ratified by Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, the former Yugoslav Republic of Macedonia, Turkey, Ukraine and United Kingdom. The conventions is signed without ratification by Monaco and Switzerland.*³¹⁰

The Convention is elaborated as a universal declaration by the Council of Europe in order to secure the universal and effective recognition and observance of human rights. These rights are, according to the preamble, the foundation of justice and peace in the world. To ensure the observance of the human rights, the contracting states have agreed to establish a permanent European Court of Human Rights.³¹¹ The analysis of human rights in this thesis is confined to the freedom of expression as provided in article 10 of the convention.

1950 European Convention on Human Rights, article 10 – Freedom of expression:

1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

The freedom of expression constitutes one of the essential foundations of a democratic society and it covers all forms of expressions through any medium regardless of content. As provided in article 10(2) of the 1950 European Convention on Human Rights, it is possible to justify restrictions to the freedom of expression which in a proportionate manner pursues a legitimate aim. The purpose of the convention and the European Court on Human Rights is to strike a proper balance between the competing interests of the applicant, other individuals and the public as a whole in the light the media's power in modern society in order to

309 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome (4 November 1950). <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

310 Source: <http://conventions.coe.int>.

311 www.echr.coe.int. See article 19 of the 1950 European Convention on Human Rights.

maintain an effective political democracy.³¹² In defining the borders of freedom of expression, the purpose of the expression in question is of central importance.

Given the overall purpose of the 1950 European Convention on Human Rights, securing justice and peace through an effective political democracy with respect of human rights, it is clear that those expressions which contribute to social and political debate, criticisms and information are provided with a higher level of protection than those which concern artistic and commercial expression.³¹³

Due to the lack of a common European concept of morality, states enjoy a wider margin of appreciation to that respect,³¹⁴ since state authorities are normally in a better position to give an opinion on the exact content of these requirements as well as on the 'necessity' of a restriction or penalty intended to meet them. It is thus up to the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. Consequently, article 10(2) leaves, to the contracting states, a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.³¹⁵ However, the limits of acceptable criticism is less wide when the target is a private individual than when he or she is a political individual. The same principle applies to other public figures such as prominent businessmen, who should expect their business dealing to be subject of public debate.³¹⁶

The freedom of expression can be enjoyed regardless of which medium is used, and can thus also be relied on when providing information on the Internet. According to article 1 of the 1950 European Convention on Human Rights, the convention is imposing an obligation on the contracting parties to secure to 'everyone' within their jurisdiction the rights and freedoms defined in the convention. The convention delimits the state's access to restrict other parties' freedom of expression. The judiciary constitutes in this context part of the state, and is thus obliged to ensure the freedoms of the 1950 European Convention on Human Rights, even in disputes between private parties, and all legal or natural persons benefit from the freedom of expression.³¹⁷ This means that also businesses

312 See Ovey, Clare and White, Robin C.A., Jacobs & White, *The European Convention on Human Rights*, third edition, Oxford University Press, 2002, pp. 276 to 289.

313 Ovey, Clare and White, Robin C.A., Jacobs & White, *The European Convention on Human Rights*, third edition, Oxford University Press, 2002, p.279.

314 Ovey, Clare and White, Robin C.A., Jacobs & White, *The European Convention on Human Rights*, third edition, Oxford University Press, 2002, p.285.

315 European Court of Human Rights, *Handyside v. The United Kingdom* (7 December 1976), paragraph 48.

316 Ovey, Clare and White, Robin C.A., Jacobs & White, *The European Convention on Human Rights*, third edition, Oxford University Press, 2002, p. 279 with references.

317 See European Court of Human Rights *Autronic AG v. Switzerland* (22 May 1990), Paragraph 47: 'In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 (art. 10). The Article (art. 10) applies to "everyone", whether natural or legal persons. The Court has, moreover, already held on three occasions that it is applicable to profit-making corporate

enjoy a freedom of, often commercial, expression and its private critics enjoy a right to express their opinions, whereas the state as such does not derive any rights from the 1950 European Convention on Human Rights. The state's freedom of expression is defined within its own democratic powers and liable under that democratic system. Unfavourable commenting by a state towards a business may constitute a restriction which can be unlawful under other international obligations subscribed to by the state, including those deriving from the legal framework of the Internal Market.

2.7.1. Justifiable Interference

The limitations set out in article 10(2) of the 1950 European Convention on Human Rights must be interpreted restrictively. According to the Court of Human Rights, the adjective 'necessary' involves, for the purposes of article 10(2), a pressing social need and, although the contracting states have a certain margin of appreciation in assessing whether such a need exists. The interference must be proportionate to the legitimate aim pursued and the reasons adduced by the national authorities to justify it must be relevant and sufficient.³¹⁸ Furthermore, the restrictions must be prescribed by legislative provisions which are worded with sufficient precision to enable interested parties to regulate their conduct, taking, if need be, appropriate advice.³¹⁹

The European Court of Human Rights summed up the major principles regarding article 10 in the case Observer and Guardian v. United Kingdom.³²⁰

(a) Freedom of expression constitutes one of the essential foundations of a democratic society; subject to article 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.

(b) These principles are of particular importance as far as the press is concerned. Whilst it must not overstep the bounds set, inter alia, in the 'interests of national security' or for 'maintaining the authority of the judiciary', it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.

(c) The adjective 'necessary', within the meaning of Article 10(2), implies the existence of a 'pressing social need'. The contracting states have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a

bodies...!.

318 See Bernard Connolly v. Commission of the European Communities, Case 274/99 (6 March 2001), paragraph 41 with references.

319 Bernard Connolly v. Commission of the European Communities, Case 274/99 (6 March 2001), paragraph 42 with references.

320 European Court of Human Rights, Observer and Guardian v. the United Kingdom, 26 November 1991, paragraph 59 with references.

*European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by article 10.*³²¹

(d) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.

2.7.1.1. Prescribed by Law

The requirement that interference must be prescribed by legislative provision does not mean that the laws must necessarily be framed in a manner that is absolutely precise. The court has noted that this is not always the case in spheres such as that of competition, in which the situation is constantly changing in accordance with developments in the market and in the field of communication. The interpretation and application of such legislation are inevitably questions of practice. In *Markt Intern Verlag*,³²² the European Court of Justice established that there, in the instance in question, was consistent case law on the matter from the national court and that that case law was sufficiently clear and abundant to enable commercial operators and their advisers to regulate their conduct in the relevant sphere. The court also attached importance to the extensive commentary on the subject.³²³

2.7.1.2. Legitimate Aim

Article 10(2) mentions a number of legitimate aims: 1) the interests of national security, 2) territorial integrity or public safety, 3) the prevention of disorder or crime, 4) the protection of health or morals, 5) the protection of the reputation or rights of others, 6) preventing the disclosure of information received in confidence and 7) maintaining the authority and impartiality of the judiciary. The margin of appreciation allowed to the contracting state in restricting the freedom of expression varies, depending on the purpose and nature of the limitation and of the expression in question.³²⁴ In addition to pursuing a legitimate aim, the interference must also be proportionate ('necessary in a democratic society'). Rules of

321 European Court of Human Rights, *Observer and Guardian v. the United Kingdom* (26 November 1991), paragraph 59 with references.

322 European Court of Human Rights, *Markt Intern Verlag GmbH and Klaus Beermann* (20 November 1989).

323 European Court of Human Rights, *Markt Intern Verlag GmbH and Klaus Beermann* (20 November 1989), paragraph 30 with references.

324 Ovey, Clare and White, Robin C.A., *Jacobs & White, The European Convention on Human Rights*, third edition, Oxford University Press, 2002, p.278.

professional conduct pursue a legitimate aim for the purposes of article 10(2) and are therefore capable of justifying a restriction of advertising opportunities. The European Commission of Human Rights also takes the view that advertising may be subjected to more extensive restrictions than the expression of political ideas.³²⁵

2.7.1.3. Necessary in a Democratic Society.

The contracting states enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the case. The supervision must be strict, because of the importance of the rights in question, and the necessity for restricting them must be convincingly established.³²⁶ The margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. The Court must confine its review to the question whether the measures taken on the national level are justifiable in principle and proportionate.³²⁷

In *Markt Intern Verlag*,³²⁸ the court noted that businesses inevitably expose themselves to close scrutiny of its practices by its competitors. Its commercial strategy and the manner in which it honours its commitments may give rise to criticism on the part of consumers and the specialised press. In order to carry out this task, the specialised press must be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities. However, even the publication of items which are true and describe real events may under certain circumstances be prohibited. The obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples hereof. It is also recognised that an isolated incident may deserve closer scrutiny before being made public, because otherwise an accurate description of one such incident can give the false impression that the incident is evidence of a general practice. The court has noted that these factors can legitimately contribute to the assessment of statements made in a commercial context, and it is primarily for the national courts to decide which statements are permissible and which are not.³²⁹

325 See *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Opinion of Mr Advocate General Alber delivered on 8 April 2003, Case 71/02, paragraph 77 with references.

326 *European Court of Human Rights, Autronic AG v. Switzerland* (22 May 1990), Paragraph 61.

327 *European Court of Human Rights, Markt Intern Verlag GmbH and Klaus Beermann* (20 November 1989), paragraph 33.

328 *European Court of Human Rights, Markt Intern Verlag GmbH and Klaus Beermann* (20 November 1989), paragraph 35.

329 *European Court of Human Rights, Markt Intern Verlag GmbH and Klaus Beermann* (20 November 1989), paragraph 35.

Markt Intern Verlag.³³⁰

A publishing firm, run by journalists, seeking to defend the interests of smaller businesses, and its editor-in-chief was punished under the German Unfair Competition Act for dishonest competition practices for publishing an article, reporting the dissatisfaction of a consumer, who had been unable to obtain the promised reimbursement for a product purchased from an English mail order firm. The author of the article also asked for information from its readers as to the commercial practices of that firm.

Even though the contested article was addressed to a limited circle of tradespeople and did not concern, directly, the public as a whole, the court found that it conveyed information of a commercial nature which cannot be excluded from the scope of article 10.³³¹ It was also found that the applicants clearly suffered an 'interference by public authority' in the form of the injunction issued by the Federal Court of Justice restraining them from repeating the statements. Such interference infringed the convention, unless it satisfies the requirements of article 10(2) which requires that the interference must be 1) prescribed by law, 2) pursue a legitimate aims set out in that paragraph and 3) be necessary in a democratic society to achieve such aims.³³²

The court found that the case law concerning the German provision on unfair competition was sufficiently clear and abundant to enable commercial operators to regulate their conduct in the relevant sphere which satisfied the first requirement.³³³ The Court also found the legitimate aims requirement to be satisfied in that it found that the interference was intended to protect the reputation and the rights of others under article 10(2), noting that the contested article was liable to raise unjustified suspicions concerning the commercial policy of the English firm and thus damage its business.

On the necessity of the interference, the court found it primarily for the national courts to decide which statements are permissible and which are not, noting that the margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. The court noted that a business in a market economy inevitably expose itself to close scrutiny of its practices by its competitors and which may give rise to criticism on the part of consumers and the specialised press. However, even the publication of items which are true and describe real events may under certain circumstances be prohibited - the obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples. In addition, a correct statement can be and often is qualified by additional remarks, by value judgments, by suppositions or even insinuations. The court found that an isolated incident, as dealt with in this case, may deserve closer scrutiny before being made public.

2.7.2. Licensing of Broadcasting

The freedom of expression does not only apply to the content of information, but also to the means of transmission or reception, since any restriction imposed on the

330 European Court of Human Rights, *Markt Intern Verlag GmbH and Klaus Beermann* (20 November 1989).

331 European Court of Human Rights, *Markt Intern Verlag GmbH and Klaus Beermann* (20 November 1989), paragraph 26.

332 European Court of Human Rights, *Markt Intern Verlag GmbH and Klaus Beermann* (20 November 1989), paragraph 27.

333 European Court of Human Rights, *Markt Intern Verlag GmbH and Klaus Beermann* (20 November 1989), paragraph 30 with references.

means necessarily interferes with the right to receive and impart information.³³⁴ The third sentence of article 10(1) provides that the freedom of expression shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises. The insertion of this sentence was due to technical and practical considerations such as the limited number of available frequencies and the major capital investment required for building transmitters. States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects, but the licensing measures is still subject to the requirements of article 10(2).³³⁵

Interferences whose aims will be legitimate under the third sentence of article 10(1) do not necessarily have to correspond to any of the aims set out in article 10(2), but must nevertheless be assessed in the light of the other requirements of article 10(2). The grant or refusal of a licence may thus be made conditional on considerations, including such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.³³⁶

*In Lentia and Others,*³³⁷ the court found that a broadcasting (radio and television) monopoly system operated in Austria was capable of contributing to the quality and balance of programmes and thus consistent with the third sentence of article 10(1). The monopoly was, however, not found to satisfy a pressing need required to justify the far-reaching character of a public monopoly.³³⁸ The court noted that, due to the technical progress made over the last decades, justification could no longer be found in considerations relating to the number of frequencies and channels available. The court emphasised that there were equivalent and yet less restrictive solutions available such as for example licence-systems, subject to specified conditions of variable content.

It was established by the European Court on Human Rights that the special characteristics of telecommunications satellites cannot justify a total ban on unauthorised reception of transmissions from telecommunications satellites.³³⁹ Such interference was not found to be 'necessary in a democratic society'. In *Groppera Radio*³⁴⁰ the European Court of Human Rights found that the

334 European Court of Human Rights, *Autronic AG v. Switzerland* (22 May 1990), paragraph 47.

335 European Court of Human Rights, *Groppera Radio AG and others v. Switzerland* (28 March 1990), paragraphs 60 and 61.

336 European Court of Human Rights, *Informationsverein Lentia and Others v. Austria* (24 November 1993), paragraph 32.

337 See European Court of Human Rights, *Informationsverein Lentia and Others v. Austria* (24 November 1993), paragraphs 33, 38 and 39.

338 Paragraph 39: '... Of all the means of ensuring that these values are respected, a public monopoly is the one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station and, in some cases, to a very limited extent through a local cable station...'

339 European Court of Human Rights, *Autronic AG v. Switzerland* (22 May 1990).

340 European Court of Human Rights, *Groppera Radio AG and others v. Switzerland* (28 March 1990).

retransmission in Switzerland of an Italian radio station's programs came under Swiss jurisdiction and that the ban on retransmission which was consistent with the Swiss local radio system, was justified in the pursuance of the protection of the international telecommunications order and the protection of the rights of others. The court noted that the interference was not a form of censorship directed against the content or tendencies of the programmes concerned, but a measure taken against a station which the authorities of the respondent state could reasonably hold to be in reality a Swiss station operating from the other side of the border in order to circumvent the statutory telecommunications system in force in Switzerland. The Court emphasised that the Swiss authorities never jammed the broadcasts from the radio station.³⁴¹

It can be discussed whether the Internet is to be considered as broadcasting within the meaning of the third sentence of article 10(1). Irrespective of the conclusion, it is clear that restrictions of the access to the Internet must be justified by a legitimate aim pursued in a proportionate manner either by article 10(1) or 10(2). Interference is a broad term which will comprise both traditional and alternative law enforcement as well as restrictions imposed on or through technical intermediaries. Since the assessment of restrictions is based on weighing up of colliding interests, it is obvious that a more general ban requires more counter-weight than a single action against a particular, unlawful activity.

States enjoy a wide margin of appreciation to hinder commercial speech. A margin of appreciation that is obviously wider than for the business and the state to hinder criticisms of the business - especially criticism which contribute towards social and political debate, criticisms and information. Criticism directed towards the Business may be restricted under the legitimate aim of protecting the reputation or rights of others (the Business) or in certain circumstances in order to prevent the disclosure of information received in confidence. Competitors must foresee a lower level of protection than for example an independent consumer organisations or the press.

The potential impact of the media in question should be considered. It was held by the court that television have a much more immediate and powerful effect than the printed word. It is unclear how the Internet should be appreciated in that context. The Internet has on the one hand a big potential in reaching the mass, but suffers on the other hand from the possibility of drowning in information. The impact of the Internet is likely to change in step with media convergence. The future media supply can probably not be appreciated in general as the television can nowadays, but it must be assessed on a case to case basis depending on the content in question and its impact in effect. The Internet is already an important medium and with no prospect of a diminishing importance in the future media supply, it must be quite difficult to justify a ban or other restrictions that affect the

341 European Court of Human Rights, *Groppera Radio AG and others v. Switzerland* (28 March 1990), paragraph 73.

access to content in a more arbitrary manner.

2.7.3. Human Rights in Community Law

When dealing with the nationals of states, Community obligations must be construed with due observance of fundamental human rights.³⁴² The European Court of Justice has established that fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the court draws inspiration from both the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The 1950 European Convention on Human Rights has special significance in that respect, and the Community cannot accept measures which are incompatible with observance of the human rights thus recognised and guaranteed.³⁴³ The human rights are observed by the European Court of Justice even if the subject matter falls outside the provisions on free movement of goods and services.³⁴⁴

These principles have been restated in article 6 of the Treaty establishing the European Union which provides that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. The Union must according to article 6(2) respect fundamental rights, as guaranteed by the 1950 European Convention on Human Rights,³⁴⁵ and as they result from the constitutional traditions common to the Member States, as general principles of Community law. It follows from article 11 of the 2000 Charter of Fundamental Rights³⁴⁶ that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The freedom and pluralism of the media shall be respected. It seems inevitable that the provisions of the European Convention on Human Rights will be incorporated in a

342 See in general Barnard, Catherine, *The Substantive Law of the EU - The Four Freedoms*, Oxford, 2004, p. 66ff.

343 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Case 260/89 (18 June 1991), paragraph 41.

344 *Stuyck, Jules, Case C-71/02, Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, judgment of the Fifth Chamber of 25 March 2004, *Court of Justice Common Market Law Review* 41 (2004), p. 1683–1700, at p. 1683 and 1695ff. It should be mentioned that the case concerned an area partially harmonised by Community law.

345 The European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

346 Charter of Fundamental Rights of the European Union (2000/C 364/01). See also Commission Communication on the Charter of Fundamental Rights of the European Union, COM(2000) 559 final (13 September 2000).

possible, future Constitution for Europe.³⁴⁷ The change, if any at all, will probably be insignificant by incorporating the references to human rights into such a constitution.

In the case, *Familiapress v. Heinrich Bauer Verlag*,³⁴⁸ the European Court of Justice established that a prohibition on selling publications which offer the chance to take part in prize games competitions may detract from freedom of expression. The court relied on the derogation in article 10(2) of the 1950 European Convention on Human Rights for the purposes of maintaining press diversity, in so far as the measure is prescribed by law and necessary in a democratic society. The court established that it must be determined whether the prohibition is proportionate to the aim of maintaining press diversity and whether that objective might not be attained by measures less restrictive of both intra-Community trade and freedom of expression.³⁴⁹

Even though the principle of freedom of expression constitutes one of the fundamental pillars of a democratic society, it is nevertheless subject to certain limitations justified by objectives in the public interest. The discretion enjoyed by national authorities in determining the balance to be struck between freedom of expression and the public interest objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question. For the commercial use of freedom of expression that does not contribute to a discussion of public interest, the interference must be reviewed only on its reasonableness and proportionality.

The discretion enjoyed by the Member States seems to be fairly large in the light of pursuing legitimate goals such as consumer protection and fair trading. The European Court of Justice has accepted a restriction on advertising which, irrespective of the truthfulness of the information, prohibits any reference to the fact that goods come from an insolvent estate when the goods no longer constitute part of the insolvent estate. The court found that the restriction on advertising was reasonable and proportionate in the light of the legitimate goals pursued by that provision, namely consumer protection and fair trading.³⁵⁰ The case shows that the European Court of Justice may examine national legislation's compatibility with the principle of freedom of expression as laid down in the 1950 European Convention on Human Rights, even though the legislation was considered a selling arrangement not covered by article 28 of the EC Treaty.³⁵¹

347 See Treaty establishing a Constitution for Europe, Official Journal C 310, 16 December 2004, Article II-11 on freedom of expression and information.

348 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case 368/95 (26 June 1997).

349 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case 368/95 (26 June 1997), paragraph 26 and 27 with reference to judgment of the European Court of Human Rights, *Informationsverein Lentia and Others v. Austria* (24 November 1993).

350 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Case 71/02 (25 March 2004), paragraphs 50 to 53 with references.

351 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*, Case 71/02 (25 March 2004),

This question was also dealt with in the case *Eugen Schmidberger*,³⁵² concerning a demonstration carried out on the Brenner motorway by an environmental group. The demonstration had the effect that the motorway, which is an important transit route, was closed to traffic for almost 30 hours. The Austrian authorities were pursuant to Austrian legislation informed about the demonstration, but the authorities refrained from banning the action which the authorities could do if the purpose of the meeting would run counter to criminal law or the meeting would be likely to endanger public order. Schmidberger brought an action in Austria seeking damages on the basis that five of its lorries were unable to use the Brenner motorway for four consecutive days due to the demonstration and in combination with other restrictions on holiday driving. The court noted that competent national authorities are required to take adequate steps to ensure the free movement of goods in situations where the authorities are faced with restrictions on the effective exercise of a fundamental freedom which result from actions taken by individuals. The obligation exists even if those goods merely pass through Austria en route for Italy or Germany.³⁵³ The court added that that obligation is all the more important when the case concerns a major transit route such as the Brenner motorway, which is one of the main land links for trade between northern Europe and the north of Italy.³⁵⁴

The court established that the fact that the competent authorities did not ban the demonstration was capable of restricting intra-Community trade in goods and was, therefore, regarded as constituting a measure of equivalent effect to a quantitative restriction which, in principle, is incompatible with Community law obligations unless such failure to ban the activity can be objectively justified.³⁵⁵ The court emphasised in the examination of possible justification that the specific aims of the demonstration are not in themselves material in the legal proceedings since the liability is to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway. Account must be taken only of the action or omission imputable to that Member State. In the present case, account should thus be taken solely of the objective pursued by the national authorities in their implicit decision to authorise or not to ban the demonstration in question.³⁵⁶ The Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to

paragraphs 43 and 44.

352 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003).

353 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraph 62.

354 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraph 63.

355 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraph 64.

356 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraphs 66 to 68

freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the 1950 European Convention on Human Rights³⁵⁷ and the Austrian Constitution.³⁵⁸

The European court of Justice noted that both the Community and its Member States are required to respect the fundamental rights enshrined in the 1950 European Convention on Human Rights which, in principle, justifies a restriction of the obligations imposed by Community law.³⁵⁹ The freedom of expression and freedom of assembly is guaranteed by articles 10 and 11 of the 1950 European Convention on Human Rights. It follows from the express wording of both articles that freedom of expression and freedom of assembly are subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.³⁶⁰ Consequently the balance between the two interests must be weighed in order to determine whether a fair balance was struck between those interests.

The court found that the national authorities in the case in question were reasonably entitled, with regards to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade.³⁶¹ Such inconvenience must be tolerated, provided that the objective pursued is essentially the public and lawful demonstration of an opinion. It was emphasised that all the alternative solutions which could be pursued would have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, confrontation between supporters and opponents of the group organising the demonstration or acts of violence on the part of the demonstrators, who considered that the exercise of their fundamental rights had been infringed.³⁶²

The Schmidberger case concerned a single occasion of a limited geographical scope, and it was clear that the purpose was to exercise the above-mentioned

357 Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome (4 November 1950).

358 Eugen Schmidberger, *Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraph 69

359 Eugen Schmidberger, *Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraph 74.

360 Eugen Schmidberger, *Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraph 79.

361 Eugen Schmidberger, *Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraph 93.

362 Eugen Schmidberger, *Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraph 92.

fundamental rights and not to restrict trade in goods of a particular type or from a particular source. In the latter case the competent authorities did take various administrative and supporting measures in order to limit as far as possible the disruption to road traffic. The court also noted that the demonstration on the Brenner motorway did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, in contrast to the serious and repeated disruptions to public order at issue in the case giving rise to the judgment in *Commission v. France* as dealt with below.³⁶³

2.8. Subjects to Community Obligations

Restrictions to the free movement of goods and services may be imposed by a number of players on the market, including governments, organisations competitors and private persons. In this part, it is examined to which extent community legislation may be relied on in cases between private parties (the 'horizontal direct effect' of community legislation).³⁶⁴ 'Direct effect' means in a broad sense that provisions of binding EC law which are clear, precise, and unconditional enough to be considered justiciable, can be invoked and relied on by individuals before national courts.³⁶⁵ This is relevant in this thesis in situations where a natural or legal person is imposing obstacles to the Business. Both the EC Treaty and derived, secondary community legislation may have direct effect which for the latter part is of importance in connection to the effect of the country of origin principle in the 2000 E-Commerce Directive. The discussion on the direct effect is also taken up later in this thesis³⁶⁶ in connection with the Business's access to apply measures of geographical delimitation of its activities.

2.8.1. The Direct Effect of Community Law

In *Walrave and Koch*,³⁶⁷ concerning a cycle organisation which required a pacemaker to be of the same nationality as the stayer, it was established that prohibition of discrimination based on nationality under EC law does not only

363 Eugen Schmidberger, *Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraphs 84 to 89. See *Commission of the European Communities v. French Republic*, Case 265/95 (9 December 1997) as dealt with under 2.8.1.1.

364 See in general Cruz, Julio Baquero, *Free Movement and Private Autonomy*, *European Law Review*, volume 24, no. 6, December 1999, p. 603 and Cruz, Julio Baquero, *Between Competition and Free Movement*, Hart Publishing, 2002, p. 105ff.

365 See in general Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 178ff with references.

366 See 5.2.2.

367 B.N.O. *Walrave and L.J.N. Koch v. Association Union cycliste internationale*, *Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo*, Case 36/74 (12 December 1974). See also J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. *Algemene Raad van de Nederlandse Orde van Advocaten*, intervenier: *Raad van de Balies van de Europese Gemeenschap*, Case 309/99 (19 February 2002), paragraph 120 with references.

apply to the action of public authorities, but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.³⁶⁸ The court noted that that abolition of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law.

The court noted that working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons.³⁶⁹ The court concluded that the first paragraph of article 49, in any event in so far as it refers to the abolition of any discrimination based on nationality, creates individual rights which national courts must protect.³⁷⁰ It is argued that the area of labour contracts may be treated differently than other activities, since that area of private activities normally fall outside the provisions on competition law.³⁷¹

The fact that certain provisions of the EC Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.³⁷² The court has in relation to article 141³⁷³ of the EC Treaty established that the rule is mandatory in nature and that the prohibition applies not only to the action of public authorities, but extends also to agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.³⁷⁴ There is, however, nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.³⁷⁵

368 B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo, Case 36/74 (12 December 1974), paragraph 17.

369 B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo, Case 36/74 (12 December 1974), paragraphs 18 and 19.

370 B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo, Case 36/74 (12 December 1974), paragraph 34.

371 Cruz, Julio Baquero, Free Movement and Private Autonomy, European Law Review, volume 24, no. 6, December 1999, p. 603, at p. 619.

372 Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena, Case 43/75 (8 April 1976), paragraph 31.

373 The principle of equal pay for male and female workers for equal work or work of equal value.

374 Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena, Case 43/75 (8 April 1976), paragraph 39. See also Roman Angonese v. Cassa di Risparmio di Bolzano SpA, Case 281/98 (6 June 2000), paragraph 34.

375 Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman, Case 415/93 (15 December 1995), paragraph 86.

In the *Buy Irish Case*,³⁷⁶ concerning the free movement of goods, it was established that the Irish government could not escape any liability from the provisions of the EC Treaty by relying on the fact that the activities were conducted by a private company. The European Court of Justice attached importance to the fact that the Irish government appointed the members of the management committee, granted it public subsidies and defined the aims and the broad outline of the campaign conducted by that institution.

The European Court of Justice has established that it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the treaty on the free movement of goods.³⁷⁷ The case concerned an agreement between a Danish business (Imerco) and a British manufacturer of specially decorated china service, prohibiting the selling of substandard pieces into Denmark or other Scandinavian countries. Another Danish merchant (Dansk Supermarked) bought the substandard pieces and imported them into Denmark. The court noted that it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the treaty on the free movement of goods. It follows that an agreement involving a prohibition on the importation into a Member State of goods lawfully marketed in another Member State may not be relied upon or taken into consideration in order to classify the marketing of such goods as an improper or unfair commercial practice.³⁷⁸

It seems clear that Member States cannot circumvent the obligations under the EC Treaty by conferring its powers to private bodies. Private bodies, also those without governmental support, are obliged to observe the EC Treaty's provisions on free movement of goods and services, i.e. national courts must take the provisions into consideration when dealing with private disputes. It has been argued that the national courts must be perceived as part of the machinery which applies law, and not as part of the state. The state may be liable for the judgments entered by the state's courts.³⁷⁹ It is, however, still unclear whether the EC Treaty's freedoms are fully horizontally applicable, in the sense of imposing legal obligations on all individuals and not only on powerful collective actors with powers akin to public law.³⁸⁰

It seems that both businesses and private persons are obliged to observe the provisions in contractual relations. It seems hard to find arguments supporting that this should also not be true for private persons' activities undertaken outside a contractual relationship. The private actions must still be evaluated in the light of the case law of the provisions, as discussed above. This entails that the activity

376 *Commission of the European Communities v. Ireland*, Case 249/81 (24 November 1982).

377 *Dansk Supermarked A/S v. A/S Imerco*, Case 58/80 (22 January 1981).

378 *Dansk Supermarked A/S v. A/S Imerco*, Case 58/80 (22 January 1981), paragraph 17.

379 Cruz, Julio Baquero, *Free Movement and Private Autonomy*, *European Law Review*, volume 24, no. 6, December 1999, p. 603, at p. 615.

380 Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 771.

must be able to hinder the free movement of goods and services and fall outside the possible justifications of such hindrance. Private parties, who impose discriminatory measures, may be more likely to be caught by the provisions. For good measure, it should be noted that businesses also may be limited under competition law which is not dealt with in this thesis.

This means in the context of this thesis that if the Business is met with sanctions, imposed by private parties from another Member State, it may invoke the freedom to provide goods and services. That is true for sanctions relating to both traditional and alternative law enforcement. As provided above,³⁸¹ private entities may rely on the freedom of expression which has to be taken into account when that freedom may apply to the imposed sanction, such as unfavourable commenting. In that context, it is likely to make a difference whether the unfavourable commenting is done by a powerful organisation rather than a private person, who may be sharing own experiences or disseminating his private opinion. Actions taken by powerful organisations are more likely to hinder the freedom to provide goods and services and less likely to rely on the freedom of expression, in particular if the measure may be characterised as a disguised restriction on trade between Member States.

2.8.1.1. Member States' Obligation to Control its Nationals

Even if the fundamental freedoms should not be fully horizontally applicable, it is clear that the obligations entailed in the cooperation between the Member States also extend to the state's control of natural and legal persons in order to achieve the goals. An obligation which is derived from article 10 of the EC Treaty, which provides that Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.

In the case *Commission v. France*,³⁸² the European Court of Justice established that the French Government had failed to fulfil its obligations under the EC Treaty by failing to adopt all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals.³⁸³ The actions consisted of inter alia interception of lorries and the destruction of their loads, violence against lorry drivers, threats against French supermarkets selling agricultural products originating from other Member States, and the damaging of those goods when on display in shops in France. The European Court of Justice emphasised that the treaty principle of free movement of goods does not prohibit solely measures emanating from the state which, in

381 See 2.7.3.

382 *Commission of the European Communities v. French Republic*, Case 265/95 (9 December 1997).

383 *Commission of the European Communities v. French Republic*, Case 265/95 (9 December 1997), paragraph 32 and 66.

themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the state.³⁸⁴

The court noted that failing to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory is just as likely to obstruct intra-Community trade as is a positive act.³⁸⁵ In the case in question importance was attached to the fact that the activities not only affected the importation of the products, but also created a climate of insecurity which had a deterrent effect on trade flows as a whole.³⁸⁶ The court recognised that Member States enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the importation of products in a given situation, and that it is not for the Community institutions to prescribe for them the measures which they must adopt and effectively apply in order to safeguard the free movement of goods on their territories. The court emphasised that it falls to the court to verify, in cases brought before it, whether the Member State concerned has adopted appropriate measures for ensuring the free movement of goods.³⁸⁷

Similarly in *Schmidberger*,³⁸⁸ the court established that the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours, is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from the EC Treaty unless that failure to ban can be objectively justified.

The fact that the Austrian authorities did not ban the demonstration was, however, not under the circumstances found to be incompatible with the free movement of goods.³⁸⁹ Even though the purpose of the demonstration was to draw attention to the threat to the environment and public health, these aims was not in themselves material in the legal proceedings which sought to establish the liability of a Member State in respect of an alleged breach of Community law, since that

384 Commission of the European Communities v. French Republic, Case 265/95 (9 December 1997), paragraph 30.

385 Commission of the European Communities v. French Republic, Case 265/95 (9 December 1997), paragraph 31.

386 Commission of the European Communities v. French Republic, Case 265/95 (9 December 1997), paragraph 53.

387 Commission of the European Communities v. French Republic, Case 265/95 (9 December 1997), paragraphs 33 to 35.

388 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003). See also 2.7.3.

389 See *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraph 64 and 94.

liability is to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway.³⁹⁰ The question to deal with was solely whether the objective pursued by the national authorities in their implicit decision to authorise or not to ban the demonstration in question.

This decision was made upon considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly as enshrined in the 1950 European Convention on Human Rights. The court attached importance to the fact that both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the EC Treaty such as the free movement of goods.³⁹¹

So even though Member States enjoy a margin of appreciation in its exercise of public powers, it is clear that severely insufficient governance is likely to constitute a breach of the fundamental freedoms of the EC Treaty. However, as showed in *Schmidberger* even deliberate failure to intervene may be justified under for example human rights considerations as dealt with above. It has been argued that a single solution as to the proper personal scope of the free movement of rules is to be based on convincing argumentation, and will obviously lie beyond certain dogmatic positions that can be traced in both case law and doctrine.³⁹²

2.8.2. The Direct Effect of the Country of Origin Principle

It is provided in article 249 of the EC Treaty that 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. In *Marshall v. Southampton*,³⁹³ the European Court of Justice concluded with reference to article 249 that the binding nature of a directive exists only in relation to 'each Member State to which it is addressed' and that a directive may not, of itself, impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person.³⁹⁴ In the case in question direct effect was allowed by maintaining a broad concept of a state which also comprised a (public) health authority as the defendant in this case. The court noted that a

390 Eugen Schmidberger, *Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraphs 65 and 66.

391 Eugen Schmidberger, *Internationale Transporte und Planzüge v. Republik Österreich*, Case 112/00 (12 June 2003), paragraph 74.

392 Cruz, Julio Baquero, *Free Movement and Private Autonomy*, *European Law Review*, volume 24, no. 6, December 1999, p. 603, at p. 611.

393 *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, Case 152/84 (26 February 1986). For a discussion on the reasoning see Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 206ff.

394 *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, Case 152/84 (26 February 1986), paragraph 48.

person who is able to rely on a directive against the state may do so regardless of the capacity in which the state is acting (whether employer or public authority). In either case, it is necessary to prevent the state from taking advantage of its own failure to comply with Community law.³⁹⁵

The rejection of horizontal direct effect has later been maintained in for example *Dori v. Recreb*,³⁹⁶ which concerned a consumer's possibility of relying against a trader on the right of cancellation provided in directive 85/577,³⁹⁷ which was not duly transposed. The court noted that the effect of extending that case law to the sphere of relations between individuals would be to recognise a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.³⁹⁸ In the absence of measures transposing the directive within the prescribed time-limit, consumers cannot derive from the directive itself a right of cancellation as against traders with whom they have concluded a contract or enforce such a right in a national court.³⁹⁹

2.8.2.1. *Indirect Effect*

Directives may entail an 'indirect effect',⁴⁰⁰ which means that national courts are required to interpret their national law in the light of the wording and the purpose of a directive. In the *von Colson* case⁴⁰¹ such obligation was derived from article 10 of the EC Treaty which provides that Member States shall take all appropriate measures to ensure fulfilment of community obligations. The court found that article 10 is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.⁴⁰² Although Member States are free to choose between different solutions suitable for achieving the directive's objective, it is nevertheless required that if a Member State chooses to penalise breaches of prohibition by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, it must be adequate in relation to the damage sustained.⁴⁰³

395 *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, Case 152/84 (26 February 1986), paragraph 49.

396 *Paola Faccini Dori v. Recreb Srl.*, Case 91/92 (14 July 1994), paragraph 20.

397 Directive 85/577 (20 December 1985) to protect the consumer in respect of contracts negotiated away from business premises.

398 *Paola Faccini Dori v. Recreb Srl.*, Case 91/92 (14 July 1994), paragraph 24.

399 *Paola Faccini Dori v. Recreb Srl.*, Case 91/92 (14 July 1994), paragraph 25.

400 Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 211ff.

401 *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, case 14/83 (10 April 1984).

402 *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, case 14/83 (10 April 1984), paragraph 26.

403 *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, case 14/83 (10 April 1984), paragraph 28.

The von Colson principle was refined in *Kolpinghuis Nijmegen*,⁴⁰⁴ where the court established that the obligation to refer to the content of a directive when interpreting national law is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity. The court emphasised that a directive cannot have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive.

In the *Marleasing* case,⁴⁰⁵ the European Court of Justice established that national courts are required to interpret national law, as far as possible, in the light of the wording and the purpose of directives in order to achieve the result pursued by the latter and thereby comply with the third paragraph of article 249 of the EC Treaty - no matter whether the national provision is adopted before or after the directive. In this case, the European Court of Justice precluded the national court from interpreting national law in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in the unimplemented directive in question.⁴⁰⁶

In *Océano Grupo v. Quintero*,⁴⁰⁷ the European Court of Justice decided in a case concerning an unfair jurisdiction clause in a consumer contract that the Spanish court should interpret national law, as far as possible, in accordance with the 1993 Directive on Unfair Contract Terms,⁴⁰⁸ and to favour the interpretation that would allow the court to decline of its own motion the jurisdiction conferred on it by virtue of an unfair term. All the facts giving rise to this case postdated the expiry of the period allowed for transposing the mentioned directive. Even though the court only obliged the directive provisions to be applied to the extent possible, it did not refrain from encouraging indirect effect of a directive in a civil dispute.

*The situation was summed up by the Advocate General Jaqcobs in Centrosteeel v. Adipol:*⁴⁰⁹ 'In summary, I am of the opinion that the Court's case law establishes two rules: 1) a directive cannot of itself impose obligations on individuals in the absence of proper implementation in national law; 2) the national courts must nevertheless interpret national law, as far as possible, in the light of the wording and purpose of relevant directives. While that process of interpretation cannot, of itself and independently of a national law implementing the directive, have the effect of determining or aggravating criminal liability, it may well lead to the imposition upon an individual of civil liability or a civil obligation which would not otherwise have

404 Criminal proceedings against *Kolpinghuis Nijmegen BV*, Case 80/86 (8 October 1987), paragraphs 13 and 14.

405 *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, Case 106/89 (13 November 1990). See especially paragraph 8.

406 Article 11 of Directive 68/151.

407 *Océano Grupo Editorial SA v. Rociy Murciano Quintero*, Case 240/98 (27 June 2000, joined with Cases 240-244/98). See especially paragraphs 31 and 32.

408 Directive 93/13 (5 April 1993) on unfair terms in consumer contracts.

409 *Centrosteeel Srl v. Adipol GmbH*, Case 456/98 (13 July 2000).

*existed'*⁴¹⁰

It should for good measure be mentioned that if the result prescribed by a directive cannot be achieved by way of interpretation, Community law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State's obligation and the damage suffered.⁴¹¹ Member States' liability for not transposing directives is not further dealt with in this thesis.

2.8.2.2. Incidental Horizontal Effect

The European Court of Justice has despite the ruling in *Marshall v. Southampton*,⁴¹² which established that 'a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual', occasionally attached horizontal direct effect to directives. The case law has been described as complex, confusing and difficult to distinguish, in convincing conceptual terms, from direct horizontal effect.⁴¹³

*CIA Security v. Signalson and Securitel*⁴¹⁴ concerned Belgian legislation requiring security systems to be approved under a specific procedure before being marketed. CIA Security sued two competing, foreign companies claiming unfair trading practices for failing to comply with the Belgian procedure. The Belgian procedure was not notified to the EU Commission in accordance with the required procedure in directive 83/189.⁴¹⁵ The European Court of Justice found that the directive lay down a precise obligation on Member States to notify draft technical regulations to the Commission before they are adopted. Being, accordingly, unconditional and sufficiently precise in terms of their content, those articles could be relied on by individuals before national courts.⁴¹⁶ The court concluded that the directive was to be interpreted as meaning that breach of the obligation to notify renders the technical regulations concerned inapplicable, so that they are

410 Opinion of Mr Advocate General Jacobs delivered on 16 March 2000, *Centrosteeel Srl v. Adipol GmbH*, Case 456/98, paragraph 35.

411 *Paola Faccini Dori v. Recreb Srl*. Case 91/92 (14 July 1994), paragraph 27 with references.

412 *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, Case 152/84 (26 February 1986).

413 Craig, Paul and Búrca, Gráinne de, *EU Law*, third edition, Oxford University Press, 2003, p. 220.

414 *CIA Security International SA v. Signalson SA and Securitel SPRL.*, Case 194/94 (30 April 1996).

415 Directive 83/189 (28 March 1983) laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended by Directive 88/182 (22 March 1988).

416 *CIA Security International SA v. Signalson SA and Securitel SPRL.*, Case 194/94 (30 April 1996), paragraph 44.

unenforceable against individuals and that national courts must decline to apply a national technical regulation which has not been notified in accordance with the directive.⁴¹⁷

The court attached importance to the fact that the directive was designed to preventively protect the free movement of goods and serves a useful purpose by only permitting obstacles which are necessary to satisfy compelling public interest requirements. The court noted that the aim of the directive is not simply to inform the Commission, but 1) to eliminate or restrict obstacles to trade, 2) to inform other Member States of technical regulations, 3) to give the Commission and the other Member States time to react and to propose amendments and 4) to afford the Commission time to propose a harmonising directive.⁴¹⁸

*Unilever v. Central Food*⁴¹⁹ concerned the direct effect of the directive⁴²⁰ dealt with in *CIA Security v. Signalson and Securitel*. This case concerned an Italian law on the labelling of origin of olive oil. The Commission was informed of the law, in accordance with the mentioned directive, but the Commission informed the Italian authorities of its intention to legislate in the field covered by the draft law and called on them to postpone the adoption, as provided for in directive 83/189. Unilever brought proceedings against Central Food concerning payment by Central Food for a consignment of olive oil supplied by Unilever.

The question concerned the direct effect between two private parties of the obligation to postpone adoption of the Italian labelling requirements. The European Court of Justice concluded that a national court is required, in civil proceedings between individuals concerning contractual rights and obligations, to refuse to apply a national technical regulation which was adopted during a period of postponement of adoption prescribed in directive 83/189. Building upon the reasoning in *CIA Security v. Signalson and Securitel*, the court noted that in the civil proceedings in question, the Italian rules were liable to hinder Unilever in marketing the extra virgin olive oil which it offers for sale.

The court emphasised that the finding of inapplicability as a legal consequence of breach of the obligation of notification in *CIA Security v. Signalson and Securitel* was made in connection with proceedings between competing undertakings based on national provisions prohibiting unfair trading. The court found no reason to treat disputes between individuals relating to unfair competition, as in *CIA Security v. Signalson and Securitel*, differently from disputes between individuals concerning contractual rights and obligations, as in

417 *CIA Security International SA v. Signalson SA and Securitel SPRL.*, Case 194/94 (30 April 1996), paragraphs 54 and 55.

418 *CIA Security International SA v. Signalson SA and Securitel SPRL.*, Case 194/94 (30 April 1996), paragraph 50.

419 *Unilever Italia SpA v. Central Food SpA*, Case 443/98 (26 September 2000).

420 Directive 83/189 (28 March 1983) laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 94/10 (23 March 1994) materially amending for the second time Directive 83/189.

the main proceedings.⁴²¹

The court recognised the Marshall/Dori doctrine, but emphasised that that case law does not apply to this directive, where non-compliance which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable. In such circumstances, and unlike the case of non-transposition of directives, with which the Marshall and Dori concerned, directive 83/189 does not in any way define the substantive scope of the legal rule on the basis of which the national court must decide the case before it. It creates neither rights nor obligations for individuals.⁴²² Directives can thus be directly invoked in proceedings against other individuals only in circumstances where they do not of themselves impose an obligation on a private party.⁴²³

2.8.2.3. The Country of Origin Principle

The country of origin principle in the 2000 E-Commerce Directive cannot of itself impose obligations on an individual or be relied upon against an individual. This is also emphasised by imposing obligations on 'Member States' in articles 3(1) and 3 (2). For the Business, the country of origin principle provides an obligation to comply with the legislation in the country of origin and a right to provide information society services unhindered to other Member States. The country of origin principle in the 2000 E-Commerce Directive does not share the same procedural characteristic as the directive mentioned above⁴²⁴ under incidental horizontal effect.

The country of origin principle could come into play between private parties if the Business is met with private cross-border law enforcement, either traditional or alternative law enforcement. In traditional law enforcement, the national court, before which the case is pending, would be obliged to apply the national provisions implementing the directive. If the directive is not correctly implemented, the national court would be obliged to construct national law in the light of the directive as provided for above. In connection to alternative law enforcement, the Member States will have an obligation, according to article 10 of the EC Treaty to take all appropriate measures to ensure fulfilment of the obligations arising out of the EC Treaty. But it should be emphasised that Member States enjoy a quite wide margin of appreciation in its exercise of public powers.⁴²⁵

421 CIA Security International SA v. Signalson SA and Securitel SPRL., Case 194/94 (30 April 1996), paragraph 49.

422 CIA Security International SA v. Signalson SA and Securitel SPRL., Case 194/94 (30 April 1996), paragraphs 50 and 51.

423 Craig, Paul and Búrca, Gráinne de, EU Law, third edition, Oxford University Press, 2003, p. 228.

424 See 2.8.2.2.

425 See 2.7.1.

2.9. Conclusion

Activities carried out on the Internet are, as a starting point, subject to the same rules and principles as for commerce carried out via other media. This includes in particular the fundamental freedoms in the Internal Market to provide goods and services respectively. As regards those freedoms, there are a number of similarities which in general pursue the goal of removing obstacles to free trade within the Internal Market. Both within goods and services, obstacles may be justified to pursue mandatory requirements subject to a proportionality test, and provided the area is not harmonised in the Internal Market. The test applied is basically a weighing up of the magnitude and (justifiable) reasons behind the obstacle in question compared to the overall goal of ensuring the free movement of goods and services.

There is only a limited amount of case law concerning Internet activities and the fundamental freedoms. It seems clear that the Internet as a medium will play an important role in realising the goals of the Internal Market, and that restrictions on for example online marketing may require better arguments than restrictions on more local media. It should be noted that both the Gambelli case and the DocMorris case concerned sensitive areas (gambling and medicinal products respectively), where states may have a relatively well-founded interest in enforcing strict regulation.

The country of origin principle in the 2000 E-Commerce Directive adds another test of justification on top of the above-mentioned freedoms. Even though there is no case law on the 2000 E-Commerce Directive and uncertainties as to the scope and in particular the general exception, it is clear that the country of origin principle will impose stricter conditions to justify obstacles to in particular online marketing, sale and delivery. The country of origin principle does not apply to goods as such, but it does apply also to 'certain selling arrangements' insofar and to the extent the obstacle is restricting the free movement of information society services.

The 1950 Convention on Human Rights provides a freedom of expression which may also be relied on by businesses. This freedom, as interpreted by the European Court of Human Rights, leaves a wide margin of appreciation when it comes to regulate (by law) the commercial freedom of speech, insofar such regulation is necessary in a democratic society and pursues a legitimate aim, including regulating professional conduct. It is clear that advertising may be subject to more extensive restrictions than for example the expression of political ideas or providing news which are important in a democratic society.

If human rights were not a part of the test applied by the European Court of Justice to justify restriction to cross-border trade, it would still be quite unlikely that a restriction which would be justified under the strict exceptions of the free movement of goods and services, would constitute an interference which would violate a business freedom to advertise itself or its ordinary products.

It should be borne in mind that the 1950 Convention on Human Rights is

ratified by a number of states which are not part of the Internal Market. If the Business would be met with restrictions from those states, it is likely that the freedom of expression could be invoked against such restriction - especially in cases where the restriction is applied in a discriminatory way, and where it consequently must be difficult to prove the necessity of such interference (only against foreign businesses).

The freedoms in the EC Treaty do not only apply to activities carried out by public authorities. The *Buy Irish* case shows that a government cannot escape liability from the provisions of the EC Treaty by relying on the fact that activities are conducted by a private company, when those activities are in fact supported by the government. When it comes to discriminatory actions carried out by private parties, the court seems to go quite far in the direction of attaching direct effect to the fundamental freedoms, especially in situations where measures are taken by powerful (private) organisations. It is, however, still uncertain to what extent the fundamental freedoms are fully horizontally applicable, insofar as that it can be applied to actions taken by competitors or private persons.

Even if the fundamental freedoms are not fully horizontally applicable, the implementation of the country of origin principle in the 2000 E-Commerce Directive will be when properly implemented. Even if the directive is not properly implemented, national law has to be constructed, as far as possible, in the light of the directive and if it is not possible to construct national legislation in accordance with the directive, the Member State may be liable to pay damages to the aggrieved party. Member States are obliged to ensure that its nationals are not hampering the aims of the fundamental freedoms. The state has a quite far margin of appreciation in determining what measures are most appropriate and it is not for the Community institutions to prescribe which measures they must adopt and effectively apply. It falls, however, to the European Court of Justice to verify whether a state has adopted necessary and proportionate measures.

3. Public Law Enforcement

In the previous chapter, fundamental principles of the Internal Market were discussed. It is clear from the previous chapter that enforcement of national legislation on foreign businesses within the Internal Market can easily constitute a restriction of the free movement of goods, services and/or information society services which, however, may be justified.

The purpose of this chapter is to discuss the possibilities in traditional cross-border public law enforcement across borders. Since the state is the law enforcer under public law enforcement, the applicability of Community law is obvious and not subject to a discussion of the direct effect hereof. Community legislation does not bind states which are not part of the Internal Market, but as demonstrated below, the access to carry out public law enforcement from those states is limited. The Business may under such circumstances invoke the principles of freedom of expression which, however, leave states with a wide margin of appreciation in limiting the commercial freedom of expression with a view to regulate professional conduct.

The starting point is that a state cannot take measures on another state's territory in order to enforce national law. 'Persons may not be arrested, a summons may not be served, police or tax investigations may not be mounted, orders for production of documents may not be executed on the territory of another state except under the terms of a treaty or other consent given'.¹ International criminal law is usually divided into issues of substantive law, procedure and enforcement mechanisms.²

Cross-border law enforcement through the judiciary requires either that the state, in which the Business is established, is willing to apply foreign law under a national procedure, or that that state will recognise a foreign judgment, where foreign substantive law is applied. The area of public law enforcement (criminal and administrative law) in this thesis is confined to sanctions including pecuniary penalties and injunctions since those penalties are most likely to be imposed for offences within unfair competition law. The thesis does notably not deal with custodial penalties, disqualification, confiscation, extradition, community service etc.

There are only a few international agreements on mutual recognition of pecuniary penalties, which are presented and to some extent discussed below. The Treaty establishing the European Union provides for a closer cooperation in

1 Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 306.

2 Peers, Steve, *Mutual recognition and criminal law in the European Union: Has the Council got it wrong?*, *Common Market Law Review* 41, 2004, p. 5 at p. 6.

criminal and administrative matters. At community level, the 2005 Framework Decision on Financial Penalties and the 1998 Injunctions Directive³ are adopted and of particular importance in this context.

3.1. Applying Foreign Law

When a judgment is entered in the offender's state, actual enforcement can be carried out within the legal system of that state, since states enforce judgments entered by the state's own courts. The legislation of the Member States on penalties varies widely,⁴ The range of application (geographical scope of application) of the criminal law must be considered at a national level.⁵ National standards on the range of application of national criminal law varies from the restrictive principle of territory to more liberal principles allowing application of foreign criminal law. Because the most important purpose of national legislation is to safeguard national interest, the scope of national criminal law is often widened to an extent that allows for conflicts with the criminal code of other states.⁶

States are likely to only apply national law (*lex fori*) in matters relating to public law enforcement.⁷ International law does not impose an obligation to apply foreign law.⁸ For example, it follows from section 10 of the Danish Criminal Code that the decision concerning the punishment or other legal consequences of the act shall be made under Danish law if the prosecution takes place in Denmark in accordance with rules of jurisdiction in the Danish Criminal Code. If the act was committed outside the territory of the Danish state, but within the territory recognised by international law as belonging to a foreign state, by a Danish national or a by a person resident in the Danish State, the punishment may not be more severe than that provided for by the law of that state.⁹ This does not prevent a state from considering public law requirements under private law enforcement,¹⁰ as dealt with in the following chapter.

3 Directive 98/27 (19 May 1998) on injunctions for the protection of consumers' interests.

4 Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 (30 April 2004), p. 26.

5 In the *Lotus* case the Permanent International Court of Justice recognised that though the territorial character of criminal law is fundamental, all or nearly all systems of law extend their jurisdiction to offences committed outside their territory, see Publications of the Permanent Court of International Justice, Ser. A, No.10 (1927).

6 Dietrich Oehler in Bassiouni, M. Cherif, *International Criminal Law*, Second Edition, vol 2, Transnational Publishers Inc., 1999, p. 609f.

7 Hörnle, Julia, *The European Union Takes Initiative in the Field of E-Commerce*, JILT 2000 (3), p. 333 at p. 354.

8 See Akehurst, Michael, *Jurisdiction in International Law*, *The British Year Book of International Law* 1972-73, University Press, Oxford, p. 145 at p. 218f.

9 Section 10(2) of the Danish Criminal Code with reference to section 7. See in general Høyer, Gitte, Spencer, Martin and Greve, Vagn, *The Danish Criminal Code*, DJØF Publishing, 1999.

10 Lookofsky, Joseph, *International Privatrete på Formuerettens Område*, 3. udgave, Jurist- og Økonomforbundets Forlag, 2004, p. 14.

The country of origin principle in the 2000 E-Commerce Directive, as described in the previous chapter,¹¹ provides that each Member State shall ensure that the information society services provided by a service provider established on its territory comply with, in questions which fall within the coordinated field, the national provisions applicable in the Member State.¹² The country of origin principle applies to both public and private law requirements. It is clear from the provision that the state must apply national legislation, also in criminal and administrative matters, on a business established within its territory and within the scope of the country of origin principle. An obligation which applies regardless of where the activity is directed and no matter if the activity is illegal under the law of the state(s) where the activity is directed.

The Country of origin principle does on the other hand not necessarily impose an obligation on foreign courts to apply the law of the state in which the Business is established. It follows from article 3(2) that Member States may not restrict the freedom to provide information society services from another Member State. This implies that the state may be barred from applying its own law, but not that it is obliged to apply foreign law.

3.1.1. Litigation Capacity

Private persons will normally have litigation capacity in foreign courts. Public authorities, and private organisations may, however, not be correspondingly recognised by foreign courts. The active capacity to bring an injunction for unfair conduct is a matter which must be determined in accordance with the procedural rules of each country. Generally, legal systems recognise any person who takes part in the market, whose interests are damaged or threatened by the action of unfair competition, including professional and consumer associations, when the interests they are safeguarding are damaged.¹³ Especially public law enforcers, which are dealt with in this chapter, are normally reduced to asking the local authorities, of the state in which the offender is established, to bring proceedings.¹⁴ Those authorities may not be likely to take action if the unwanted activity is not unlawful under the law of that state.

3.2. Recognition and Enforcement of Foreign Judgments

Traditional judicial cooperation in criminal matters is normally characterised by a principle of request which implies that one sovereign state makes a request to

11 See 2.5.

12 Directive 2000/31 (8 June 2000) on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, article 3(1).

13 Peidro, L. Marín, Sotomayor, S. Feliu Álvarez De, Giménez, A. Ortega and Sanchez, L. Heredia, Guide on Injunctions in the Electronic Commerce, 7 March 2003, III-6.

14 See, however, below in connection to the 1998 Injunctions Directive under 3.3.

another sovereign state which the requested state may consider.¹⁵ Until recently most criminal codes contained a principle that foreign penal judgments could not be enforced, based on the assumption that the enforcement would be contrary to the sovereignty of states.¹⁶ The criminal law of the member states of the Council of Europe is governed, with a few exceptions, by the classical concept of national sovereignty, which means that the effect of judicial decisions does not in general extend beyond the state's frontiers.¹⁷ It is generally accepted that sovereign states are not obliged to recognise foreign judgments unless they have agreed to do so.

3.2.1. Jurisdiction Under International Law

States have both legislative jurisdiction and enforcement jurisdiction.¹⁸ The enforcement jurisdiction is the power to take executive action in pursuance of or consequent on the making of decisions or rules.¹⁹ There is no essential distinction between the legal base for and limits to legislative and enforcement jurisdiction. The latter jurisdiction may be considered as a function of the former, which gives that if a state has legislative jurisdiction, the state will also be allowed to exercise enforcement jurisdiction within its own territory.²⁰ These powers are as a starting point territorial, but a base of extra-territorial jurisdiction rules, which are relevant for determining criminal jurisdiction over foreign natural or legal persons, has evolved within international law.²¹ The principles of jurisdiction recognised by international law may be subdivided in various manners.

Jurisdiction is generally based on either territory or nationality, and requires a genuine link between the subject matter and the source of the jurisdiction. Jurisdiction should not, unless established by treaty, be considered to be exclusive in the way that only one state can exercise jurisdiction over the same act.²² Six bases of jurisdiction seem to be generally accepted,²³ which are 1) subjective

15 Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final (26 July 2000), p. 2.

16 Dietrich Oehler in Bassiouni, M. Cherif, *International Criminal Law*, Second Edition, vol 2, Transnational Publishers Inc., 1999, p. 618.

17 European Convention on the International Validity of Criminal Judgments, Explanatory Report.

18 See Akehurst, Michael, *Jurisdiction in International Law*, *The British Year Book of International Law* 1972-73, University Press, Oxford, p. 145 and Spang-Hanssen, Henrik, *Cyberspace & International Law on Jurisdiction*, DJØF Publishing, 2004, p. 243ff.

19 Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 298.

20 See Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 308f. On enforcement jurisdiction see Spang-Hanssen, Henrik, *Cyberspace & International Law on Jurisdiction*, DJØF Publishing, 2004, p. 267ff.

21 See in general Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 299ff.

22 See Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 309f. See similarly Akehurst, Michael, *Jurisdiction in International Law*, *The British Year Book of International Law* 1972-73, University Press, Oxford, p. 145 at p. 152.

23 See for example Menthe, Darrel, *Jurisdiction In Cyberspace: A Theory of International Spaces*, 4

territoriality, 2) objective territoriality ('effects jurisdiction'), 3) nationality, 4) protective principle, 5) passive nationality and 6) universality. The purpose of this part of the thesis is not to provide an extensive discussion of the separate bases of jurisdiction, but merely to introduce the principles behind extraterritorial jurisdiction, since such jurisdiction is necessary in the context of this thesis to provide a judgment which may be recognised in the state in which the Business is established. This is also related to the inconvenience imposed on the Business, if it has to defend itself in a foreign state.

The territorial principle is universally recognised, and provides that the courts of the place where a crime is committed may exercise criminal jurisdiction. The territorial principle is recognised to apply in both cases where the crime is commenced in the state but is completed abroad (subjective application) and when any constituent element of a crime is consummated in the forum state (objective application).²⁴ It is the objective application of the territoriality principle ('effects jurisdiction') which is most likely to be applied in the context of this thesis. The effects jurisdiction's connection to the territoriality principle has also been recognised by the European Court of Justice in connection to the competition law laid down in the EC Treaty.²⁵ Other relevant bases of jurisdiction include the passive nationality principle, which provides jurisdiction for acts abroad which are harmful to nationals of the forum and the protective or security principle, which may be applied to exercise jurisdiction over aliens for acts done abroad and which affect the security of the forum state.

The nationality principle provides that jurisdiction can be exercised over extra-territorial acts if the indicted person has the nationality of the forum state. The nationality principle may also be relied upon if the indicted person is a resident of the forum state or have other connections as evidence of allegiance.²⁶ These requirements are not fulfilled in the situations dealt with in this thesis. In some situations, jurisdiction may be justified in matters which can be said to contravene with 'international public policy'.²⁷ This can be in situations where the courts of the state where the crime was committed refuse to prosecute the perpetrator or in situations where the offence is carried out by stateless persons in areas not subject to the jurisdiction of any state. A similar principle of 'universality' is found for crimes under international law such as war crimes.²⁸

Michigan Telecommunications and Technology Law Review, 1998, p. 69, paragraph 6.

24 See in general Shaw, Malcolm N., *International Law*, Fifth Edition, Cambridge University Press, 2003, p. 579ff.

25 See *A. Ahlström Osakeyhtiö and others v. Commission of the European Communities*, joined cases 89, 104, 114, 116, 117 and 125 to 129/85 (27 September 1988), paragraph 18.

26 Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 301f.

27 Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 303.

28 See also in general Reydams, Luc, *Universal Jurisdiction – International and Municipal Legal Perspectives*, Oxford University Press, 2003.

It is argued that the separate principles apart from the universality principle are generalisations of numerous legislations and that the principles can be boiled down to a principle of genuine link between the crime and the forum state.²⁹ It should be mentioned that the jurisdiction under criminal law may have consequences in connection with civil claims related to the crime in question which are dealt with under ancillary procedures in the following chapter.³⁰

3.2.2. Dual Criminality

The principle of dual criminality ('double criminal liability') is fundamental in recognition of foreign criminal decisions. It follows from this principle that recognition can only be carried out if the underlying actions are an offence in both the state entering the decision and the state in which recognition is sought. In the 1970 Hague Convention,³¹ as dealt with below, the principle of dual criminality is brought in by stating that 'the sanction shall not be enforced by another contracting state unless under its law the act for which the sanction was imposed would be an offence if committed on its territory and the person on whom the sanction was imposed liable to punishment if he had committed the act there'.³²

A tendency of partially abandoning the principle of dual criminality is found in acts adopted under Title VI (provisions on police and judicial cooperation in criminal matters) of the Treaty establishing the European Union. The first act under these provisions to depart from the principle of dual criminality is the 2002 Framework Decision on the European Arrest Warrant.³³ An area that falls outside the scope of this thesis. The approach adopted in this context is interesting since it constitutes an approach towards mutual recognition which is also applied in other areas.³⁴ This approach is pursued in the 2005 Framework Decision on Financial Penalties³⁵ as presented below.³⁶

In this thesis, it is assumed that the Business is complying with the legislation of the state in which it is established. Thus, the dual criminality principle will not be satisfied and recognition of foreign criminal judgments is not likely to be carried out to the extent dual criminality is required. Mutual recognition is less likely to

29 See for example Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 305 with references.

30 See 4.2.1.7.

31 Council of Europe, European Treaty Series No. 70 (28 May 1970).

32 Article 4(1). If the sentence relates to two or more offences, not all of which fulfil these requirements, the sentencing state must specify which part of the sanction applies to the offences that satisfy those requirements (article 4(2)).

33 Council Framework Decision 2002/584 (13 June 2002) on the European arrest warrant and the surrender procedures between Member States.

34 See for example the Council Framework Decision 2003/577/JHA (22 July 2003) on the execution in the European Union of orders freezing property or evidence.

35 Council Framework Decision 2005/214 (24 February 2005) on the application of the principle of mutual recognition to financial penalties.

36 See 3.2.3.3.1.

take place in situations where the state entering the judgment is applying extra-territorial jurisdiction and the state in which recognition is sought, is the state of the Business. Except for acts adopted under the Treaty Establishing the European Union, only the Nordic approach seems to depart from the principle of dual criminality in connection with mutual recognition of pecuniary penalties.³⁷

As mentioned in the previous chapter,³⁸ a departure from the dual criminality principle is also entailed in the country of origin principle since it requires a state to apply national law to activities targeted at foreign states even though the activity is not illegal under the law of that state.

3.2.3. Recognition of Criminal Judgments in Europe

A judgment is recognised in the state in which the judgment was rendered, but no state is by default obliged to recognise foreign judgments, since it is found to be contrary to the concept of sovereignty.³⁹ Treaties containing provision on the treatment of foreign penal judgments were introduced in the 19th century, including inter alia a treaty still in force between the Rhine states concerning shipment on the river Rhine.⁴⁰ Pursuant to the treaty, the Rhine-States⁴¹ are recognising judgments from other Rhine-states based on reciprocity and limited to fines. Other conventions have been adopted later, some of which are dealt with below.

A foreign penal judgment may have both negative and positive effect. The negative effect prevents prosecution at the defendant's home court in the same case, whereas the positive effect refers to the measures the home court can or must legally take. The more a state confines the scope of its own criminal law, the more readily it will be to recognise a foreign penal judgment.⁴² Most states have deliberately avoided to treat the negative and positive effects of foreign penal judgments. Most often, states allow renewed domestic prosecution without recognising foreign penal judgments, though some states have rules that to some (limited) extent exclude renewed prosecution after a valid foreign judgment has been executed.⁴³

One of the most important European conventions on mutual recognition in criminal matters is the 1970 Hague Convention on the International Validity of

37 See 3.2.3.2.

38 See 2.5.3.

39 See in general on the recognition of foreign penal judgments Dietrich Oehler in Bassiouni, M. Cherif, *International Criminal Law*, Second Edition, vol 2, Transnational Publishers Inc., 1999, p. 607f.

40 The Revised Act of Navigation on the Rhine, 17 October 1868.

41 Belgium, Germany, France, the Netherlands and Switzerland.

42 Dietrich Oehler in Bassiouni, M. Cherif, *International Criminal Law*, Second Edition, vol 2, Transnational Publishers Inc., 1999, p. 610f.

43 E.g. Denmark, Greece, the Netherlands, Switzerland and England. See Dietrich Oehler in Bassiouni, M. Cherif, *International Criminal Law*, Second Edition, vol 2, Transnational Publishers Inc., 1999, p. 610f.

Criminal judgment,⁴⁴ which notably is based on the principle of dual criminality. An extensive work under the Treaty establishing the European Union seems to be taking over the stage of providing principles for mutual recognition of criminal decisions, including in particular the newly adopted 2005 Framework Decision on Financial Penalties as dealt with below.

3.2.3.1. European Conventions

The 1970 European Convention on the International Validity of Criminal judgments⁴⁵ is ratified by 15 of the Council of Europe's 45 members.⁴⁶ 11 EU Member States have signed⁴⁷ the convention, but only five have ratified it.⁴⁸ Numerous reservations have been entered by most of the contracting parties with respect to the convention's implementation.⁴⁹ The convention deals with the enforcement of sanctions involving deprivation of liberty, fines, confiscation and disqualifications. Sanctions are only to be enforced upon request from the rendering state and a judgment must not be enforced unless the act for which the sanction was imposed would be an offence if committed on its territory, and the person on whom the sanction was imposed liable to punishment had he committed the act there (the principle of dual criminality).

The 1991 Brussels Convention⁵⁰ is signed by eight Member States.⁵¹ Since it has never been ratified by any of the Member States, the convention is not in force.⁵² The 1991 Brussels Convention is drafted by the member states of the European Communities in order to strengthen judicial cooperation in view of the creation of a European area without internal frontiers. The potential value of this convention has disappeared in the wake of the ongoing work under the Treaty establishing the European Union.

Article 4 of the 1991 Brussels Convention provides that the transfer of a sentence involving a pecuniary penalty or sanction may be requested where a) the sentenced person is a natural person which is permanently resident in the territory of the administering State or has realisable property or income in its territory or b) the

44 Council of Europe, European Treaty Series No. 70 (28 May 1970).

45 Council of Europe, European Treaty Series No. 70 (28 May 1970). The convention entered into force on 26 July 1974.

46 As of 11 July 2003: Austria, Cyprus, Denmark, Estonia, Georgia, Iceland, Lithuania, the Netherlands, Norway, Romania, San Marino, Spain, Sweden, Turkey and Ukraine. See <http://conventions.coe.int> for reservation and declarations etc.

47 Austria, Belgium, Denmark, Germany, Spain, Italy, Luxembourg, the Netherlands, Portugal and Sweden.

48 Austria, Denmark, Spain, the Netherlands and Sweden.

49 Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 (30 April 2004), p. 34.

50 Convention on the Enforcement of Foreign Criminal Sentences, Convention of 13 November 1991.

51 Belgium, Denmark, Germany, Greece, Spain, France, Italy and Luxembourg.

52 Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 (30 April 2004), p. 35.

sentenced person is a legal person having its seat in the territory of the administering State or having realisable property or funds in its territory. Transfer of enforcement requires that the judgment is final and enforceable and that the act would constitute an offence within the scope of the convention in the administering state if the act were committed there (dual criminality).⁵³ If the administering state cannot comply with the request on account of the fact that the pecuniary penalty is related to a legal person, the administering state may by virtue of bilateral agreements indicate its willingness to recover the amount under civil procedure.⁵⁴

The 1968 Benelux Treaty on the Enforcement of judgments in Criminal Matters⁵⁵ is another European convention which never entered into force.⁵⁶ This convention is also based on dual criminality.

3.2.3.2. Cooperation Between the Nordic States

In the Nordic States,⁵⁷ there is a long tradition for cooperation in legal matters. A cooperation agreement⁵⁸ between those states has led to the adoption of identical or at least similar rules allowing the authorities of one signatory state to recognise and enforce judgments entered by authorities in other signatory states.⁵⁹ It is provided, in section 1(1) of the Danish law implementing the agreement,⁶⁰ that fines imposed in the other signatory states can be enforced in Denmark. Section 2 provides that similar Danish decisions can be enforced in the other signatory states. The agreement is not based on dual criminality, and enforcement is, as a starting point, to be carried out without verification on the substance.⁶¹ It goes without saying that public policy considerations may be invoked in exceptional situations. Enforcement is based on request,⁶² and requires enforceability of the decision in the rendering state.⁶³ The Nordic approach is built upon the

53 See article 5(1)(b).

54 1991 Brussels Convention, article 9(2).

55 The Treaty of 26 September 1968 between Belgium, the Netherlands and Luxembourg on the enforcement of judgments in criminal matters.

56 Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 (30 April 2004), p. 37 with references.

57 Denmark, Finland, Iceland, Norway and Sweden.

58 The Helsinki Agreement between Denmark, Finland, Iceland, Norway and Sweden of 23 March 1962 which replaced a convention between Norway, Denmark and Sweden (8 March 1948) concerning the recognition and enforcement of judgments in criminal matters.

59 See in general Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union, COM(2004)334 (30 April 2004), p. 38f.

60 Lov 1963-05-31 nr. 214 om samarbejde mellem Finland, Island, Norge og Sverige angående fuldbyrdelse af straf mv., som ændret ved L 1986-06-04 nr. 322, L 1996-04-24 nr. 291, L 2000-05-31 nr. 433 og L 2001-04-25 nr. 280.

61 L 5 (som fremsat): Forslag til lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union. Fremsat den 6. oktober 2004 af justitsministeren (Lene Espersen), point 2.2.

62 Practical issues are dealt with in a Danish circular. See Cirkulære nr. 220 af 16. december 1963, som ændret ved cirkulære nr. 148 af 3. august 1994.

63 See section 17 and 18.

geographical proximity of these states, their historical, cultural, legal and linguistic ties⁶⁴ and their shared political and economic interests.⁶⁵ Denmark, Iceland, Norway and Sweden have also ratified the above-mentioned 1970 Hague Convention.

3.2.3.3. *Mutual Recognition in the European Union*

Article 31(1)(a) of the TEU provides that common action on judicial cooperation in criminal matters is to include 'facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States...'.⁶⁶ Mutual recognition of decisions in criminal matters is not mentioned directly, but in an action plan on how to implement the provisions on freedom, security and justice,⁶⁷ it is mentioned at point 45(f) that measures should be taken to initiate a process with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters.

The European Council has endorsed the principle of mutual recognition in both civil and criminal matters within the European Union, and has asked the Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition.⁶⁸ Article III-270 of the draft Treaty Establishing a Constitution for Europe⁶⁹ provides similarly that judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions.

The Commission has proposed basic guidelines for mutual recognition of final decision in criminal matters.⁷⁰ Since mutual recognition⁷¹ of criminal decisions requires mutual trust in the concerned foreign states, harmonisation is required to ensure inter alia the rights of the indicted,⁷² including agreeing to principles as

64 Except for Finland.

65 Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union, COM(2004)334 (30 April 2004), p. 38.

66 See in general Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 (30 April 2004) and Communication on Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 (26 July 2000).

67 Action plan of the council and the commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (adopted by the Justice and Home Affairs Council of 3 December 1998), OJ 1999/C 19/01 (23 January 1999).

68 See Tampere European Council (15 and 16 October 1999), Presidency Conclusions, paragraphs 33 to 37.

69 Official Journal C 310 (16 December 2004).

70 See Communication to the Council and Parliament on Mutual Recognition of Final Decisions in Criminal Matters. COM(2000)495 (26 July 2000).

71 Mutual recognition can appear in the form that the state just enforce the foreign decision or it may be required that the state converts the foreign decision to a national decision which is hereafter enforced.

72 Mutual recognition of public law decisions might require harmonisation of both substantial and procedural nature. In EU work was initiated in the wake of the Amsterdam Treaty. See Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final (26 July 2000) and EU programme of measures to implement the principle of mutual recognition of decision in criminal matters (Official Journal of the

found in the 1950 European Convention on Human Rights in particular articles 5 to 7.⁷³

It is said that the abolishing of the principle of dual criminality is a logical consequence of the principle of mutual recognition, whereby a foreign decision is recognised without review.⁷⁴ Even though the abolition of dual criminality can be compared to the Internal Market principle, it is argued that this analogy is false, because the Internal Market rules require at least a minimum degree of underlying comparability between the host and home state's rules, while the abolition of dual criminality is intended to achieve the entirely opposite result and precludes such a comparability test.⁷⁵

It has been argued that the requirement of dual criminality is only acceptable in the form of the system established within the Internal Market, whereby a certain level of harmonisation or comparability of the substantive law is required before decisions of other Member States can be accepted.⁷⁶ It should be noted that the internal market principles not always require harmonisation and that there seems to be a trend towards establishing principles of mutual recognition extending further than what is in fact harmonised, as is the case with the country of origin principle in the 2000 E-Commerce Directive.

It was noted that the executing state in principle loses some of its sovereign power over the full control of the enforcement of criminal decisions on its territory,⁷⁷ and that sovereign states are free to take different views as to what should be criminalised and to what extent in accordance with different cultures and national identities.⁷⁸ This is not different from the losing of sovereign powers under the principles of the Internal Market, whereby states are limited in the enforcement of national law.

The approach adopted in the 2002 Framework Decision on the European Arrest Warrant⁷⁹ departs from the principle of dual criminality in certain specified areas,

European Communities, C12/10, 15 January 2001).

73 Principles on 5) Right to liberty and security, 6) Right to a fair trial and 7) No punishment without law.

74 Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM(2001)522 (25 September 2001), p. 16. For another opinion see Peers, Steve, Mutual recognition and criminal law in the European Union: Has the Council got it wrong?, Common Market Law Review 41, 2004, p. 5.

75 See for a discussion: Peers, Steve, Mutual recognition and criminal law in the European Union: Has the Council got it wrong?, Common Market Law Review 41, 2004, p. 5 at p. 23. The author states that 'the arguments for mutual recognition in criminal matters by analogy with other EU policies must be rejected as clearly invalid'.

76 Peers, Steve, Mutual recognition and criminal law in the European Union: Has the Council got it wrong?, Common Market Law Review 41, 2004, p. 5 at p. 34. See this article for a list of harmonisation initiatives at p. 29.

77 Peers, Steve, Mutual recognition and criminal law in the European Union: Has the Council got it wrong?, Common Market Law Review 41, 2004, p. 5 at p. 10.

78 Peers, Steve, Mutual recognition and criminal law in the European Union: Has the Council got it wrong?, Common Market Law Review 41, 2004, p. 5 at p. 24.

79 Council Framework Decision 2002/584 (13 June 2002) on the European arrest warrant and the surrender procedures between Member States.

but keeps the principle in connection with other areas.⁸⁰ Recognition may also be denied where the European arrest warrant relates to offences which a) are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place treated as such or b) have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory.⁸¹

A state is considered to exercise extraterritorial jurisdiction when none of the components of the offence are located on its territory, which avoids obliging a Member State to execute a European arrest warrant for an offence committed entirely on its territory but not classified as such by its own law.⁸² In the situation dealt with in this thesis, it is clear that a Member State, even though the dual criminality principle is departed from in specific areas, maintains the possibility (but notably not an obligation) to refuse execution. The criterion to be taken into account is the definition of the offence in the substantive criminal law and not the question of the jurisdiction of the state in which execution is requested. This means that execution can be refused under this article only if the offence does not exist in the state in which execution is requested.⁸³

3.2.3.3.1. The 2005 Framework Decision on Financial Penalties

The 2005 Framework Decision on Financial Penalties⁸⁴ deals with mutual recognition of financial penalties in the European Union. The framework decision applies to final decisions requiring a financial penalty to be paid by a natural or legal person. A decision, imposing a financial penalty, may be adopted either by a court or by an administrative authority, provided that the person concerned was given the opportunity to have the case heard by a court whose jurisdiction includes criminal matters.⁸⁵ The criminal liability of legal persons is not an accepted concept in all Member States, and Member States are not required to introduce criminal liability for legal persons, since the act also covers administrative liability.⁸⁶ In the framework decision, the terminology of 'issuing state' and

80 See article 4(1).

81 Article 4(7).

82 Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM(2001) 522 (25 September 2001), p. 16.

83 Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM(2001) 522 (25 September 2001), p. 16.

84 Council Framework Decision 2005/214 (24 February 2005) on the application of the principle of mutual recognition to financial penalties. See also Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union, COM(2004)334 (30 April 2004), p. 23.

85 See article 1(a) and Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 (30 April 2004), p. 23.

86 Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 (30 April 2004), p. 20.

'executing state' covers the EU Member State in which a decision was delivered and the EU Member State to which a decision was transmitted for the purpose of enforcement respectively.

A financial penalty is an obligation to pay 1) a sum of money on conviction of an offence imposed in a decision, 2) compensation imposed in the same decision for the benefit of victims, where the victim may not be a civil party to the proceedings and the court is acting in the exercise of its criminal jurisdiction, 3) a sum of money in respect of the costs of court or administrative proceedings leading to the decision or 4) a sum of money to a public fund or a victim support organisation, imposed in the same decision. A financial penalty does notably not include orders which have a civil nature and arise out of a claim for damages and restitution and which are enforceable in accordance with the 2000 Brussels Regulation on jurisdiction in and recognition of judgments in civil and commercial matters.⁸⁷

It is provided in article 3 that the framework decision is not amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in article 6 of the TEU.⁸⁸ As mentioned above, the framework decision follows the approach of departing the principle of dual criminality for a number of offences listed in article 5(1). The law of the issuing state is to be applied to determine whether the act in question falls under one of the categories listed in article 5(1). For offences not on this list, the executing state may make the recognition and execution of a decision subject to the condition that the decision is related to conduct which would constitute an offence under the law of the executing State, whatever the constituent elements or, however, it is described. This is notably not an obligation.

*The list in article 5(1) includes in particular fraud, computer-related crime, racism and xenophobia, illicit trafficking in cultural goods, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, illicit trafficking in hormonal substances and other growth promoters, infringements of intellectual property rights and offences established by the issuing state and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty.*⁸⁹

It is important to note that the principle of dual criminality is departed from in

87 Regulation 44/2001 (22 December 2000) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See 4.2.1.

88 Article 6(1) provides that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. See also 2.7.

89 The mentioned offences do not cover all of the exhaustively listed offences in article 5(1). According to article 5(2), the Council may decide to add other categories of offences at any time, acting unanimously after consultation of the European Parliament under the conditions laid down in article 39(1) of the EU Treaty. The Council is to consider, in the light of the report submitted to it pursuant to article 20(5), whether the list should be extended or amended.

obligations arising from the EC Treaty, including those relating to unfair competition law. It should be noted that EC measures do not in practice require criminal liability to be imposed.⁹⁰

It follows from article 9 that the enforcement of the decision as a main rule must be governed by the law of the executing state in the same way as a financial penalty of the executing state, and that the authorities of the executing state alone shall be competent to decide on the procedures for enforcement and to determine all the measures relating thereto, including the grounds for termination of enforcement. It is emphasised in article 9(3) that a financial penalty imposed on a legal person is to be enforced even if the executing state does not recognise the principle of criminal liability of legal persons.⁹¹

The starting point is that the competent authorities in the executing state must recognise a decision which has been transmitted in accordance with the described procedure, without any further formality being required and it must take all the necessary measures for its execution. The requirement applies without a certain maximum penalty for the offence in question.

The European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.⁹² Concerning the framework decision on the execution of orders freezing property or evidence, the departure of the principle of dual criminality applies only to the listed offences insofar as the offence is punishable in the issuing state by a custodial sentence of a maximum period of at least three years.⁹³

Article 7 provides a list of grounds for non-recognition or non-execution which may be invoked by the competent authority. The list includes the principle of *ne bis in idem*⁹⁴ and financial penalties below 70 euros or the equivalent hereof.⁹⁵ It is clear from the list that the defendant's failure to appear cannot be invoked if the defendant was properly informed.⁹⁶

An important, in the context of this thesis, ground for non-recognition and non-execution is, similar to the 2002 Framework Decision on the European Arrest Warrant, if the decision relates to acts which are regarded by the law of the executing state as having been committed in whole or in part in the territory of the

90 Peers, Steve, Mutual recognition and criminal law in the European Union: Has the Council got it wrong?, Common Market Law Review 41, 2004, p. 5 at p. 31.

91 Article 6.

92 2002 Framework Decision on the European Arrest Warrant article 2.

93 Council Framework Decision on the execution in the European Union of orders freezing property or evidence, 2003/577/JHA (22 July 2003), article 3(2).

94 2005 Framework Decision on Financial Penalties, article 7(2)(a).

95 2005 Framework Decision on Financial Penalties, article 7(2)(h). A similar requirement is not found in the 1970 Hague Convention and states which means that even smaller penalties have to be recognised, provided the other requirements in the convention are fulfilled.

96 2005 Framework Decision on Financial Penalties, article 7(2)(g)(ii).

executing state or in a place treated as such.⁹⁷ A similar principle is found in the 1970 Hague Convention where enforcement can be refused if the act was committed outside the territory of the requesting state.⁹⁸ In the Danish implementation of the framework decision, it is made mandatory for Danish courts to refuse recognition if the act was committed in whole or in part on Danish territory, provided the act is not punishable under Danish law.⁹⁹ It is most likely that the state in which the Business is established will consider the offence to have been committed, at least partially, in that state, which is also in accordance with the territoriality principle.¹⁰⁰

If the act in question was not carried out within the territory of the issuing state, the executing state may decide to reduce the amount of the penalty enforced to the maximum amount provided for acts of the same kind under the national law of the executing state, when the act falls within the jurisdiction of that state.¹⁰¹ In the Danish implementation, this requirement is construed to mean that the amount must be reduced to the amount which would normally be applied to similar acts under Danish law.¹⁰²

This means that an attempt of public cross-border law enforcement, as dealt with in this thesis and under this framework decision, in most cases will leave the possibility of non-recognition. Non-recognition is likely to be applied in situations, such as the one dealt with in this thesis, where the principle of dual criminality is not satisfied. In situations where recognition is provided for under the 1970 Hague Convention or another instrument, states have to recognise decisions according to that convention even though an exemption in the framework decision is applicable.

The 2005 Framework Decision on Financial Penalties does not preclude the application of bilateral or multilateral agreements or arrangements between Member States in so far as such agreements or arrangements allow the prescriptions of this framework decision to be exceeded and help to simplify or facilitate further the procedures for the enforcement of financial penalties.¹⁰³ This means that other instruments, such as in particular the agreement between the Nordic States, still apply to the extent they provide for a more far-reaching recognition of pecuniary penalties.

97 2005 Framework Decision on Financial Penalties, article 7(2)(d)(a).

98 2005 Framework Decision on Financial Penalties, article 6(1)(g).

99 L 5 (som fremsat): Forslag til lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union (fremsat den 6. oktober 2004), section 20(1)(2).

100 See 3.2.1.

101 2005 Framework Decision on Financial Penalties, article 8(1).

102 Section 24. See also point 4.3.4 of L 5 (som fremsat): Forslag til lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union (fremsat den 6. oktober 2004).

103 2005 Framework Decision on Financial Penalties, article 18.

3.3. The 1998 Injunctions Directive

The purpose of the of the 1998 Injunctions Directive¹⁰⁴ is to ensure that qualified entities may bring proceedings before national courts requiring the cessation or prohibition of any act contrary to particular directives listed in the annex of the directive as transposed into the internal legal order of the Member States and which harms the collective interests of consumers.¹⁰⁵ The qualified entities may be either independent public bodies and/or (private) organisations whose purpose is to protect the interests of consumers.¹⁰⁶ The 1998 Injunctions Directive may thus apply to both private and public law enforcement as defined in this thesis.

The 1998 Injunctions Directive¹⁰⁷ provides certain qualified bodies¹⁰⁸ with litigation capacity to seek injunctions in the home court of the offender. The directive builds upon a principle of prior consultation, meaning that the party who intends to seek an injunction is firstly to consult the defendant, and, if prescribed by the enforcing state, also a qualified entity in the state in which injunction is sought. If the cessation of the infringement is not achieved within two weeks after the request for consultation is received, the party concerned may bring an action for an injunction without further delay.¹⁰⁹

It follows from article 1(2) that an 'infringement' is any act contrary to the listed directives as transposed into the internal legal order of the Member States. The 1998 Injunctions Directive does, however, not determine the applicable law.¹¹⁰ It is noted that the rules of private international law, with respect to the applicable law normally lead to the application of either the law of the Member State where the infringement originated or the law of the Member State where the infringement has its effects.¹¹¹ The reference to private international law may be a bit deceptive since it is not unlikely that an injunction is sought under the directive by a public law enforcer based on a provisions punishable under criminal liability.

As mentioned above,¹¹² it is unlikely that a state will apply foreign public law, whereas it is more likely to happen under civil procedure as dealt with in the

104 Directive 98/27 (19 May 1998) on injunctions for the protection of consumers' interests. See in general Peidro, L. Marín, Sotomayor, S. Feliu Álvarez De, Giménez, A. Ortega and Sanchez, L. Heredia, *Guide on Injunctions in the Electronic Commerce*, 7 March 2003, Title II.

105 See also Koch, Harald, *Non-Class Group Litigation Under EU and German Law*, 11 *Duke J. of Comp. & Int'l L.*, 2001, p. 355 at p. 356.

106 1998 Injunctions Directive, article 3.

107 Directive 98/27 (19 May 1998) on injunctions for the protection of consumers' interests.

108 See Commission communication concerning Article 4(3) of Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests, concerning the entities qualified to bring an action under Article 2 of this Directive, *Official Journal C* 321/26 (31.12.2003).

109 1998 Injunctions Directive, article 5.

110 1998 Injunctions Directive, article 2 (2).

111 1998 Injunctions Directive, recital 6.

112 See 3.1.

following chapter.¹¹³ In that chapter, it is also established that a number of the qualified entities under the 1998 Injunctions Directive may benefit from the tort forum in order to sue the Business in a foreign court, and not in the court of the Business as provided for in the 1998 Injunctions Directive.

Since most of the activities carried out by the Business fall under the coordinated field of the country of origin principle in the 2000 E-Commerce Directive,¹¹⁴ the courts of the state in which the Business is established is all the more less likely to apply foreign law. It should, however, be emphasised that the choice of law in this context only concerns a harmonised area, and that differences only may occur when a Member State is utilising a minimum clause in one of the listed directives.

3.4. Cooperation on Public Law Enforcement

A number of initiatives have been taken to promote and enhance cooperation between states in order to improve mutual assistance. These initiatives are of a practical nature and do not oblige states to recognise foreign criminal decision or apply foreign criminal law. The reluctance to apply foreign criminal law in combination with the fundamental principle of dual criminality makes it most unlikely that the state in which the Business is established will take actions against the Business if the activity is not unlawful under the law of that state.

A number of agreements have been drawn up, including in particular the 2000 Regulation on Consumer Protection Cooperation,¹¹⁵ the 2000 Convention on Cybercrime,¹¹⁶ the 2003 agreement on mutual legal assistance between the European Union and the United States of America¹¹⁷ and the 2003 OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders.¹¹⁸ The mutual assistance dealt with in these agreement is of a more practical nature and does not oblige states to take actions against activities which are lawful under their national law.

The 1972 European Convention on the Transfer of Proceedings in Criminal Matters¹¹⁹ provides rules for the transfer of proceedings, which could be a situation where the country of destination asks the country of origin to take action against

113 See 4.1.

114 See 2.5 and 4.1.3.

115 Regulation 2006/2004 (27 October 2004) on cooperation between national authorities responsible for the enforcement of consumer protection laws.

116 Council of Europe, ETS 185, Budapest, 23 November 2001. The convention has of 11 July 2003 only been ratified by Albania, Croatia and Estonia which mean that the convention has not yet entered into force. See <http://conventions.coe.int>.

117 Official Journal L 181 (19/07/2003), pp. 34 to 42.

118 www.oecd.org/document/56/0,2340,en_2649_201185_2515000_1_1_1_1,00.html.

119 European Convention on the Transfer of Proceedings in Criminal Matters, Council of Europe, European Treaty Series - No. 73 (15 May 1972).

the Business. A transfer of proceedings in criminal matters is a form of international legal assistance, where a state waives its claim to prosecute in order to enable another state to do so instead.¹²⁰ According to article 6(1), a contracting state may request another contracting state to take proceedings in the cases provided for in the convention. Proceedings may not be taken in the requested state unless the offence in respect of which the proceedings are requested would be an offence if committed in its territory and when, under these circumstances, the offender also would be liable to sanction under its own law (dual criminality).¹²¹ Only five Member States¹²² have ratified the 1972 Convention and five have still not signed it.¹²³

3.5. Conclusion

International law allows for foreign states to regulate and enforce its legislation upon the Business, provided there is a genuine link between the activity and the jurisdiction. The 'effects jurisdiction' is of particular relevance in the context of this thesis. The enforcement of national law must, however, respect the sovereignty of other states, and states may as a starting point not take measures in the territory of other states. In the situations dealt with in this thesis, such measures are necessary and traditional cross-border law enforcement can thus only be carried out with the consent of the state in which the Business is established.

Based on the generally recognised principle of dual criminality, it is highly unlikely that the state in which the Business is established will allow for cross-border law enforcement, when the activity in question is not unlawful in that state. The state of the Business is not likely to accept foreign judgments under public law or apply foreign law under national procedures. These questions are mainly dealt with under national law, and due to the delimitation of this thesis, it cannot be excluded that some states under certain condition may allow for cross-border law enforcement of public law. It depends on the national law of the state in which the Business is established.

The approach adopted by the Nordic Countries departs from the principle of dual criminality, which means that between those states, foreign judgments under public law may be recognised. A trend of departing the dual criminality principle in the European Union was started in connection to the 2002 Framework Decision on the European Arrest Warrant and is also found in the 2005 Framework Decision on Financial Penalties. The latter framework decision departs from the principle of dual criminality within certain areas, but allows for non-recognition if the decision

120 See in general Julian Schutte in Bassiouni, M. Cherif, *International Criminal Law*, 2d ed., vol 2, Transnational Publishers Inc., 1999, p. 643ff.

121 1972 European Convention on the Transfer of Proceedings in Criminal Matters, article 7(1).

122 Austria, Denmark, the Netherlands, Spain and Sweden.

123 Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004)334 (30 April 2004), p. 28f.

in question relates to acts which are regarded by the law of the executing state as having been committed in whole or in part in the territory of the executing state or in a place treated as such. This means that an attempt of public cross-border law enforcement, as dealt with in this thesis and under this framework decision, in most cases will leave the possibility of non-recognition to be determined by national law, including the implementation of the framework decision.

As demonstrated in the previous chapter, Member States must still observe the free movement of goods and services and the country of origin principle of the 2000 E-Commerce Directive. The country of origin principle in particular, is likely to have the effect, in the situations dealt with in this thesis, that foreign law may not be invoked to the extent it will hinder the free movement of information society services.

4. Private Law Enforcement

In the previous chapter, it was established that cross-border law enforcement carried out by public entities is difficult. This is mainly due to the lack of international agreements on the subject and because of the dual criminality principle. The 2005 Framework Decision on Financial Penalties opens for recognition of fines, but with some significant exceptions, leaving it possible for EU Member States to refuse recognition in situations dealt with in the thesis.

The purpose of this chapter is to identify and discuss possibilities in cross-border law enforcement carried out by private entities, i.e. entities not exercising public powers. The focus is, like the previous chapter, only on enforcement through the judiciary. As for public law enforcement, traditional, private law enforcement can be carried out in two ways, i.e. when the state in which the Business is established applies foreign law or when that state recognises a foreign judgment where foreign law is applied. The Business may also suffer substantial inconvenience of litigating before a foreign court even though the law of the Business is applied.

This chapter is based on the assumption that the Business and the User have not entered an agreement on neither forum or applicable law. Agreements on choice of forum and applicable law is dealt with in the following chapter. The situations dealt with in this chapter may for example arise when a competitor or an organisation is suing for damages or in order to issue an injunction. The situation may also arise in connection to a contract entered between the Business and another business or a consumer.

The legal area dealt with in this chapter is private international and procedural law, where the former comprises the choice of law and the latter other procedural aspect such as, in particular, jurisdiction and recognition and enforcement of judgments. Private international and procedural law is build upon the idea of sovereign states. Private international and procedural law has its source in national law, but has been further developed in international fora which has lead to a number of conventions voluntarily joined by states. As accounted for below, a number of activities in the European Union have lead to obligations, which are now derived from mandatory EU legislation. According to standards of international law regarding the treatment of aliens, states are normally required to provide a system of courts empowered to decide civil cases and private international law should be appropriately applied.¹

1 Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 298.

The Hague Conference on Private International Law,² the European Union,³ the Council of Europe⁴ and the European Free Trade Association⁵ have been the primary providers of conventions and other legal instruments for European cooperation on private international and procedural law. The contracting parties to the Treaty Establishing the European Economic Community have elaborated a fundamental convention on international procedural law in civil and commercial matters, the 1968 Brussels Convention,⁶ which concerns jurisdiction and enforcement of judgments in civil and commercial matters.

The 1988 Lugano Convention⁷ is a parallel convention to the 1968 Brussels Convention which is also open to other states, including in particular members of the European Free Trade Association.⁸ The primary convention on private international law in Europe is the 1980 Rome Convention⁹ on the law applicable to contractual obligations. The convention may pursuant to article 28 be signed (only) by states which are party to the Treaty establishing the European Economic Community. Since private international law is a part of national law, any state may freely choose to adopt rules similar to those of the 1980 Rome Convention.

The Treaty of the European Community as amended by the 1997 Amsterdam Treaty and the 2001 Nice Treaty opens for closer judicial cooperation in the European Union and by utilising the legal instruments hereof.¹⁰ This cooperation relates to judicial cooperation within both private and public law.¹¹ Within private international private and procedural law, the main focus has been on enhancing the judicial cooperation between the EU Member States by transforming existing convention into EU secondary legislation (directives and regulations). This transformation was done with the 1968 Brussels Convention, which to a large

2 www.hcch.net.

3 www.eu.int.

4 www.coe.int.

5 www.efta.int

6 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels). Acceded to by Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and United Kingdom.

7 Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano). Acceded to by Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland and United Kingdom.

8 See for example Bogdan, Michael, The "Common Market" for judgments: The extension of the EEC Jurisdiction and Enforcement Treaty to Non-Member Countries, Saint Louis University Public Law Review, 1990, Vol. 9, p. 113.

9 Convention on the Law Applicable to Contractual Obligations (consolidated version), opened for signature in Rome on 19 June 1980. Official Journal C 027, 26/01/1998 p. 0034 - 0046. See also www.rome-convention.org. The convention is acceded to by Austria, Belgium, Denmark, Germany, Greece, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.

10 See in particular article 65.

11 See also conclusions from the Council meeting in Tampere, Finland in October 1999 which was devoted issues regarding justice and home affair. http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm.

extent is replaced by the 2000 Brussels Regulation.¹² This regulation is adopted by all EU Member States but Denmark.¹³ The 1968 Brussels Convention and the 1988 Lugano Convention still applies between Denmark and the respective contracting states. Some of the newer EU Member States have, however, not acceded to neither of the conventions.¹⁴ A similar transformation process is going on concerning the 1980 Rome Convention.¹⁵

4.1. Private International Law

When the Business is being sued, the court seized will apply its own national choice of law rules in order to determine the law applicable to the case. In connection to this thesis, it is important to determine in which situations the Business may expect foreign law to apply. Most states allow for the application of foreign law in certain private law suits and under certain conditions. The starting point of private international law is the contacts approach,¹⁶ which provides that the law with the closest connection to the matter should be applied. Most states also accept the contracting parties' freedom to choose the applicable law (parties' autonomy).¹⁷

In Europe, the main provisions for choice of law in contract are found in the 1980 Rome Convention.¹⁸ Besides laying down the parties' autonomy and the contacts approach as key principles, the convention contains choice of law rules for inter alia certain consumer contracts and contracts on sale of goods and services. A protocol concerning interpretation of the convention was elaborated by

12 Council regulation No 44/2001 (22 December 2000) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

13 Denmark is not covered by the 2000 Brussels Regulation due to a Danish reservation concerning the 1997 Amsterdam Treaty.

14 Cyprus, Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Slovenia and Slovakia (i.e. all but Poland). See also Lookofsky, Joseph, *International Privatrecht på Formuerettens Område*, 3. udgave, Jurist- og Økonomforbundets Forlag, 2004, p. 21f.

15 See Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation, COM(2002)654 (14 January 2003). See also López-Rodríguez, Ana M., *The Revision of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations - A Crucial Role within the European Contract Law Project?*, *Nordic Journal of International Law*, Volume 72, Number 3, 2003, p. 341.

16 Also known as 'center of gravity'. See Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 392f.

17 Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 393ff.

18 See in general Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 395ff. See also Giuliano-Lagarde Report, *Official Journal of the European Communities*, no. C 282/1, 31 October 1980.

the European Court of Justice;¹⁹ this became effective on 1 August 2004.²⁰ The European Court of Justice has not yet had the opportunity to provide any case law on the convention.

The 1980 Rome Convention does not apply to tort cases and there is no other general, international agreement on the choice of law in such cases.²¹ There is, however, in the European Union an ongoing work on a Rome II regulation, which seeks to approximate the choice of law in tort.²²

4.1.1. Contractual Obligations

The starting point of the 1980 Rome Convention is according to article 3 that a contract shall be governed by the law chosen by the parties. It is, however, in this chapter assumed that the parties have not entered an agreement on the applicable law. In the following chapter it will be examined to which extent and under which circumstances the Business can mitigate legal risks by choosing the applicable law.²³

In the absence of a choice of applicable law, a contract must, according to article 4(1), be governed by the law of the country with which it is most closely connected (the contacts approach / closest link). This starting point is supplemented with a number of presumption rules which notably are rebuttable presumptions.²⁴ A contract is presumed to be most closely connected with the country where the party who is to effect the characteristic performance of the contract, has his habitual residence or central administration at the time of conclusion of the contract.²⁵

If the contract, like in the test set-up of this thesis, is entered into in the course of that party's trade or profession, the closest connection is presumed to be the country in which the principal place of business is situated. It is assumed in this thesis that the Business is to perform the characteristic performance of the contract. This means that if the Business is sued in a state which has acceded to the 1980 Rome Convention, the applicable law to that contract will most likely be the law of the state in which the Business is established. It should for good measure be mentioned that foreign states may not necessarily apply the law of the state in

19 See first and second protocol to the 1980 Rome Convention, 19 December 1980. www.rome-convention.org

20 See www.fco.gov.uk/Files/kfile/CM6314.pdf

21 See, however, Hague Convention no 22 (2 October 1973) on the Law Applicable to Products Liability and Hague Convention no. 19 (4 May 1971) on the Law Applicable to Traffic Accidents.

22 Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II'), COM(2003)427 final (22. July 2003).

23 See 5.3.3.

24 Giuliano-Lagarde Report, p. 23. See also various examples of application in national law in Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 426ff.

25 1980 Rome Convention, article 4(2).

which the Business is established correctly. And as demonstrated below, there are only limited possibilities of refusing recognition under the Brussels/Lugano System as dealt with below.²⁶

The characteristic performance is normally easy to establish in the sale of goods or service, where the consideration is payment of a monetary nature which is assumed to be the case in this thesis. The habitual residence, the central administration or the place of business is easily determined in the case examined in this thesis, assuming that an electronic presence on the Internet cannot constitute such place. It is clear from the Giuliano-Lagarde Report that the intention of the presumption rule in article 4(2) is only to focus on the place of establishment rather than the place where the contract is entered and where the inherent obligations are to be performed because these concepts usually are more difficult to determine. This solution was chosen because the concept of characteristic performance links the contract to the social and economic environment of which it will form a part.²⁷

If the characteristic performance cannot be determined or if it appears from the circumstances as a whole that the contract is more closely connected with another country, article 4(2) does not apply,²⁸ and the choice of law has to be determined by applying the contacts approach. In this thesis, it is assumed that the characteristic performance is the obligation which lay on the Business to perform. It cannot, however, be excluded that given the circumstances and with the margin of discretion left in article 4(5) that a court may determine the contract to have a closer connection to that foreign country, where the User is established. The possibility of disregarding the presumptions in article 4(2-4) can be invoked when all the circumstances show the contract to have closer connections with another country.²⁹

There are considerable differences between how much the courts of different states require to depart from the presumption rules.³⁰ The Giuliano-Lagarde Report does not provide examples of relevant factors or situations, which would weigh in favour of departing the presumption rule in article 4(2). As mentioned above, it is clear that the intention of article 4(2) is that in particular the places where the contract is entered and obligations are to be performed should not in itself lead to a departure from the main rule. For the situations examined in this thesis, it could be argued that extensive marketing in a foreign state, performance in that state and in particular the nature of electronic commerce should lead to a closer connection to a foreign state.

26 See 4.2.1.7.

27 See Giuliano-Lagarde Report, p. 20f.

28 1980 Rome Convention, article 4(5).

29 Giuliano-Lagarde Report, p. 22. See also Lookofsky, Joseph, *International Privatrete på Formuerettens Område*, 3. udgave, Jurist- og Økonomforbundets Forlag, 2004, p. 71ff.

30 See Nielsen, Peter Arnt, *International Privat- og Procesret*, Jurist- og Økonomforbundets forlag, 1997, p. 506.

In general, there has been detected a homeward trend which entails that national courts have a tendency to apply the law of the forum (*lex fori*).³¹ This could lead to a higher risk of the application of foreign law, when the Business is being sued in a foreign court. It should be noted that the EC Treaty and the 2000 E-Commerce Directive may limit such departure from the main rule.³² Article 4(2) of the 1980 Rome Convention does not apply to all contracts. Consumer contracts are for example dealt with separately in article 5, as elaborated on below.

The 1980 Rome Convention is without prejudice to the application of international conventions to which a contracting state is, or becomes, a party.³³ Of particular relevance in this context, is the 1955 Hague Convention³⁴ which concerns the choice of law in international sales of goods. In default of a law declared applicable by the parties, a sale must according to article 3 be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order. This convention has the same starting point concerning sales of goods as the 1980 Rome Convention, but notably without providing the more flexible presumption-approach.³⁵ The only mean of departure from this rule is for public policy reasons.³⁶

A sale must be governed by the law of the country in which the purchaser has his habitual residence or establishment, if the order is received in that country, whether by the vendor or by his representative, agent or commercial traveller. It should be obvious that this exception should not apply to a situation where the vendor receives the order through a website available in the country of the purchaser.³⁷ The 1955 Hague Convention also applies, in principle, to consumer contracts, but the Hague Conference has declared³⁸ that the convention does not prevent contracting states from applying special rules on the law applicable to

31 See for example López-Rodríguez, Ana, *Lex Mercatoria*, Retsvidenskabeligt Tidsskrift, 2002, p. 46, at p. 51, Lookofsky, Joseph, *International Privatret på Formuerettens Område*, 3. udgave, Jurist- og Økonomforbundets Forlag, 2004, p. 13f. and Nielsen, Peter Arnt, *International Privat- og Procesret*, Jurist- og Økonomforbundets forlag, 1997, p. 96 ('the *lex fori* tendency'). See also International Law Association, *Transnational Enforcement of Environmental Law*, Second Report, Berlin Conference (2004), Dr Christophe Bernasconi and Dr Gerrit Betlem (Rapporteurs), p. 13 with reference to *Sutherland v. Kennington Truck Segice Ltd*, decided in 1997 (562 N.W. 2d 466, 467-470 (Mich. 1997)).

32 See 4.1.3.1.

33 See article 21.

34 Convention of 15 June 1955 on the law applicable to international sales of goods (The Hague). Acceded by Denmark, Finland, France, Italy, Norway, Sweden, Switzerland and Niger. See also Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 462f. and Hague Convention no. 31 (22 December 1986) on the Law Applicable to Contracts for the International Sale of Goods which has, however, not entered into force.

35 It should be noted that the scope of the 1955 Hague Convention is more limited than the 1980 Rome Convention which may also be the reason for maintaining a stricter rule.

36 See article 6.

37 See the discussion under 4.2.1.3.

38 See Declaration and Recommendation Relating to the Scope of the Convention on the Law Applicable to International Sales of Goods, Concluded June 15th, 1955, Fourteenth Session (1980).

consumer sales. The majority of states which are part of both the 1980 Rome Convention and 1955 Hague Convention have chosen to do so.³⁹

4.1.1.1. *Mandatory Rules*

Article 7(1) of the 1980 Rome Convention provides that when applying the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection. This provision reflects the generally accepted principle that national courts, under certain conditions, can give effect to mandatory provisions other than those applicable to the contract by virtue of the choice of the parties or by virtue of a subsidiary connecting factor.⁴⁰ It should be emphasised that article 7(1) is not itself a mandatory rule.⁴¹

A close (genuine) connection to the law of another country may exist when the contract is to be performed in that other country or when one party is resident or has his main place of business in that other country.⁴² The connection must exist between the contract as a whole and the law of a country other than that to which the contract is submitted, and effect may be given to both legislative provisions and common law rules.⁴³ When effect is given to mandatory rules, it does not as such alter the law applicable to the contract, but it imposes on the court the extremely delicate task of combining the mandatory provisions with the law normally applicable to the contract in the particular situation in question.⁴⁴ It is further provided in article 7(1) that this applies if and in so far as, under the law of the other country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.⁴⁵

It is emphasised in article 7(2) that nothing restricts the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract. The origin of this paragraph is found in the concern to safeguard the rules of the law of the forum (notably rules on cartels, competition and restrictive practices, consumer protection and certain rules concerning carriage), which are mandatory in the situation, whatever the law applicable to the contract may be.⁴⁶

39 This counts at least for Denmark, Sweden and Finland (information concerning France and Italy has not been found). None of these states have, however, notified the Hague Conference as required in the mentioned declaration.

40 Giuliano-Lagarde Report, p. 26.

41 Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 449. See also article 22 of the 1980 Rome Convention.

42 Giuliano-Lagarde Report, p. 27.

43 Giuliano-Lagarde Report, p. 27.

44 Giuliano-Lagarde Report, p. 27f.

45 1980 Rome Convention, article 7(1).

46 Giuliano-Lagarde Report, p. 28.

This provision is of particular importance in connection with an agreement on choice of law which is dealt with in the following chapter.⁴⁷ It is mentioned in this context because it also applies in situations where the applicable law is found by virtue of subsidiary connecting factors. In relation to this thesis, the provision may be relevant when a contract has a close connection to another state. In such situations specific (mandatory) provisions of that law may be given effect even though the contract as such is governed by the law of the state in which the Business is established. To the extent the Business is carrying out a commercial activity in another state, in particular through trade, it is likely to have a close connection to that state. Under such circumstances, it is not unlikely that foreign law on unfair competition may be invoked under a civil procedure.⁴⁸

4.1.1.2. Certain Consumer Contracts

Consumers often benefit from certain legal protection. In the 1980 Rome Convention, consumers are granted protection through a mandatory rule which designates the consumer's substantive law in 'certain consumer contracts'. The text of the 1980 Rome Convention consumer provisions raises a number of uncertainties. Case law on this part is limited, possibly due to preventively high litigation cost compared to the subject matter normally dealt with in consumer contract.⁴⁹ It should be emphasised that the consumer rules in the 1980 Rome Convention apply regardless of the magnitude of the amount in question. It is a prerequisite for designating the consumer's law under article 5 of the 1980 Rome Convention that the contract concerns the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object and:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country.

The requirements listed are identical to the corresponding requirements in article 13(1)(3) of the 1968 Brussels convention. It is clear from the Schlosser Report on the 1968 Brussels Convention that the identical wording is intended.⁵⁰ It

47 See 5.3.3.

48 See Nielsen, Peter Arnt, *International Privat- og Procesret*, Jurist- og Økonomforbundets forlag, 1997, p. 83f.

49 Vasiljeva, Ksenija, 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online, *European Law Journal*, Volume 10 (January 2004), Issue 1, p. 123, at page 136 with references.

50 See Schlosser Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention, OJ 1979 C 59, p. 71, p. 119. See also Rudolf Gabriel, case 96/00 (11 July 2002), paragraphs 42 and 43. When the 1980 Rome

should for good measure be mentioned that article 5 of the 1980 Rome Convention does not apply to a contract of carriage or a contract 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. Article 5 applies, however, to contracts concerning package tours.⁵¹

It follows from the 1980 Rome Convention that while maintaining the parties freedom to choose the applicable law, the choice of law may not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the state in which the consumer resides, provided the requirements above are satisfied.⁵² Only the first indent mentioned above will be subject to further scrutiny in this thesis. The first indent is intended to cover *inter alia* orders where the trader has carried out certain acts such as advertising in the press, on radio or television, in cinemas or by catalogue aimed specifically at that country. Business proposals made by canvassing are also comprised.⁵³

Normally, it will be straightforward to establish that a specific invitation was addressed to a certain consumer. Even though e-mail was not commonly available at the time of conclusion of the 1980 Rome Convention, such an approach to a consumer must be a 'specific invitation' to a consumer. It is more uncertain whether an offer on a website will be considered a specific invitation. It does not make a difference whether such a website is considered a 'specific invitation' or 'advertising [in that country]'. An important question and a common theme for this thesis is how to determine when advertising on a website can be said to be carried out in a certain state.⁵⁴ There is no basis in the Giuliano-Lagarde Report or the convention text itself for establishing that the required advertising cannot be carried out via a website or other electronic means.

It is a prerequisite that the advertising was aimed at the state in which the consumer is domiciled. The word 'aim' may be interpreted as purposefully directing advertising at a specific state. The Giuliano-Lagarde Report uses the example of advertising in a German publication versus an American publication which is also sold in Germany. The first situation is included whereas the latter requires that the advertisement appears in special editions intended for the European countries.⁵⁵ This distinction may also be applied to a website. In that

Convention may be transformed into an EU regulation, the text may be adjusted along the line of the corresponding requirements in the 2000 Brussels Regulation. See, however, Giuliano-Lagarde Report, p. 24 concerning differences between the provisions.

51 Contract which, for an inclusive price, provides for a combination of travel and accommodation. See articles 5(4) and 5(5) and Giuliano-Lagarde Report p. 25.

52 The provision on consumer contracts does not apply to contract of carriage and contract 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, except for contracts which, for an inclusive price, provides for a combination of travel and accommodation.

53 Giuliano-Lagarde Report, p. 24.

54 See the discussion under 5.1.

55 Giuliano-Lagarde Report, p. 24.

context it is noteworthy that special editions intended for the European countries are included, which provides that a website does not necessarily have to be targeted exclusively at a specific state, but may also be directed to a number of states, including the state in which the consumer is domiciled.

Another requirement is that the consumer took the steps necessary for the conclusion of the contract in which he has his habitual residence. The word 'steps' includes inter alia writing or any action taken in consequence of an offer or advertisement.⁵⁶ The wording 'steps' was chosen to avoid confusion with the problem of determining the place where the contract is concluded.⁵⁷ Applied on a typical Internet transaction, it means that the consumer must physically be in his state of habitual residence when operating the computer to conclude to contract.

Due to the link to the corresponding consumer protection rules of the 1968 Brussels Convention, the discussion and case law presented below on that convention should also be included in the construction of the consumer protection rules in the 1980 Rome Convention. This is all the more important in the light of the ratification of the interpretation protocol, which empowers the European Court of Justice to interpret the convention.⁵⁸

4.1.1.3. Possible Objections

It follows from article 2 of the 1980 Rome Convention that any law specified by the convention must be applied whether or not it is the law of a contracting state. It is possible to object to the choice of law by questioning the material or formal validity of the contract or if the choice of law is manifestly incompatible with the public policy ('ordre public') of the forum.

According to article 9(2), a contract concluded between persons, who are in different countries, is formally valid if it satisfies the formal requirements laid down by the law of one of those countries or of the law governing the substance of the contract.⁵⁹ This means that the Business will have to observe the formal contracting rules of the state where the User has his habitual residence. There is in article 9(5) an exception for certain consumer contracts as defined above. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence. This means that the Business may not rely on its own contracting law. Article 9 applies to both contracts and unilateral acts intended to have legal effect, such as for example notice of termination, remission of debt, declaration of recession or repudiation.⁶⁰

The existence and material validity of a contract is to be determined by the law

56 See for example Rudolf Gabriel (Case 96/00), recital 52.

57 Giuliano-Lagarde Report, p. 24.

58 See first and second protocol to the 1980 Rome Convention, 19 December 1980. www.rome-convention.org

59 Giuliano-Lagarde Report, p. 31. See also article 7 on mandatory rules.

60 Giuliano-Lagarde Report, p. 29.

which would govern the contract under the convention, if the contract was valid.⁶¹ This principle applies also to the determination of the existence and validity of terms of a contract, including the existence and validity of the parties consent as to choice of the applicable law.⁶² A party may, however, rely upon the law of the state in which he has his habitual residence to establish that he did not consent to a term (existence, not material validity) if it appears from (all) the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law which would govern the contract under the convention if the contract were valid. This exception is designed *inter alia* to solve the problem of the implications of silence by one party as to the formation of the contract.⁶³ This objection may also be invoked if the contract does not fall within the scope of the rules concerning certain consumer contracts. Even if the contract is comprised by these specific consumer rules, the material validity may be relevant.

Article 16 of the 1980 Rome Convention contains a restrictively worded reservation concerning public policy. The reservation covers situations where the application of certain provisions of the law specified by the convention would lead to consequences contrary to the public policy of the forum. The result must be 'manifestly' incompatible with the public policy of the forum which provides that the court must find special grounds for upholding an objection. The expression in the 1980 Rome Convention also comprises EU public policy.⁶⁴ 'Ordre public' usually implies a narrow exception to a general rule, and the 'manifestly incompatible' emphasises the requirement of a clear-cut case.⁶⁵

4.1.2. Tort

Tort cases arise when a private party claims damages from or wants to put an end to a certain activities which do not relate to a contractual relationship between the parties. Tort claims may arise from a number of different legal areas, such as unfair competition, defamation and infringement of intellectual property rights. The claims will usually consist of demand for compensation (damages) and/or an injunction. Neither the 1980 Rome Convention nor the 1955 Hague Convention apply to tort cases. Unfair competition law is formulated differently according to the country and the structure of the protection conferred by national legislation against unfair competition shows divergences. The protection may be ensured either through a special law or specific provisions inserted into legislation of general scope or through general rules on civil liability.⁶⁶ Only a few Member

61 Article 8(1).

62 Giuliano-Lagarde Report, p. 28. See article 8.

63 Giuliano-Lagarde Report, p. 28.

64 Giuliano-Lagarde Report, p. 38.

65 Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 450.

66 Note on Conflicts of Laws on the Question of Unfair Competition: Background and Updated, drawn up

States have codified their conflict of law rules concerning tort.⁶⁷

The dominant approach in Europe concerning choice of law in tort is the 'lex loci delicti commissi', which favours the law of the place where the act was committed.⁶⁸ This solution raises difficulties when the wrongful act is committed in a different state than the state in which the damage was suffered (distance torts). The situations dealt with in this thesis concern distance torts. It falls outside the scope of this thesis to provide a complete analysis of the approaches applied in different states. The majority of states prefer, in unfair competition, the place where the damage becomes apparent rather than the place where the competitive acts were committed. When determining the concrete criteria, according to which the place of the damage must be localised, most writers tend to favour seeking out the market which is affected by the unfair practices (lex injuriaie).⁶⁹ This is where the wrongdoer and his competitors meet and where potential customers are misled.⁷⁰

The approach determining the law of the market affected by the acts of unfair competition corresponds with a resolution of the Institute of International Law⁷¹ and has also been adopted by several national legislatures.⁷² Article II of the mentioned resolution provides that 'where injury is caused to a competitor's business in a particular market by conduct which could reasonably have been expected to have that effect, the internal law of the state in which that market is situated should apply to determine the rights and liabilities of the parties, whether such conduct occurs in that state or in some other state or states'. This rule may be departed from in exceptional situations where the appointed law does not have a sufficiently significant relationship with the parties, their conduct and the injury⁷³ or the application hereof would be manifestly incompatible with the public policy (ordre public) of the forum.⁷⁴

The concept of market is not limited to the territory of a single country, and

by the Permanent Bureau, Prel. Doc. No 5, April 2000.

67 Proposal for a Regulation of the European Parliament and the Council on the law Applicable to Non-Contractual Obligations ('Rome II'), COM(2003) 427 (22 July 2003), p. 5.

68 Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 466f. See p. 471ff for a number of cases under European national law. See also Kronke, Herbert, *Applicable Law in Torts and Contracts in Cyberspace, Internet Which Court Decides? Which Law Applies?*, Law and Electronic Commerce, Volume 5, Kluwer Law International, 1998, p. 65 at p. 67ff.

69 Note on Conflicts of Laws on the Question of Unfair Competition: Background and Updated, drawn up by the Permanent Bureau, Preliminary Document No. 5, April 2000, p. 21 with references.

70 Kronke, Herbert, *Applicable Law in Torts and Contracts in Cyberspace, Internet Which Court Decides? Which Law Applies?*, Law and Electronic Commerce, Volume 5, Kluwer Law International, 1998, p. 65 at p. 71.

71 The Institute of International Law, *The Conflict-of-laws Rules on Unfair Competition*, Session of Cambridge - 1983, Rapporteurs: Willis L.M. Reese and Frank Vischer.

72 Note on Conflicts of Laws on the Question of Unfair Competition: Background and Updated, drawn up by the Permanent Bureau, Preliminary Document No. 5, April 2000, p. 23ff with references.

73 Resolution of the Institute of International Law, article III.

74 Resolution of the Institute of International Law, article VII.

linkage to the market affected pinpoints the state, in which the person whose interests are damaged (competitor, consumer and/or the public in general), is directly affected or threatened by a malfunctioning of the interplay of competition. It is thus only the direct and substantial effects of a restriction on competition that are to be taken into consideration, whereas subsidiary effects are not taken into account. The effect needs not to be realised in concrete form, but may also be behaviour which threatens objectively to have a prejudicial effect on competition.⁷⁵ At least the Netherlands, Germany, Austria and Switzerland applies the 'market rule' which means that the law of the country of the market where the relations between the competitors are troubled applies.⁷⁶

An act of unfair competition carried out through a website will usually be likely to affect the markets of several states. The question is, however, whether such situation will lead to the application of the law with the closest connection or lead to a multiplication of applicable laws. It seems reasonable to assume that the party disseminating advertising must make sure that it is in conformity with the law of all the states in which it is received.⁷⁷ It is argued that such territorial partitioning is impracticable, particularly within the framework of unfair competition committed on the Internet, because such advertising is available to any computer connected to the network.⁷⁸ This argument may be opposed by emphasising that only substantial effects of a restriction of competition may lead to a linkage with the effects on a particular market and that simple spill-over may be ignored.⁷⁹ If the unlawful act is directed exclusively against the operational interests of a specific competitor, it may be reasonable to apply the law of the country in which the injured establishment is located.⁸⁰ Thus, the law of the market affected seems to be a reasonable approach from a conflicts of law perspective. The linkage to a market is further dealt with in the following chapter and below the country of origin principle, which may affect the applicable law in unfair competition disputes, is discussed.⁸¹

It is provided in article 1 of the ICC Guidelines on Advertising and Marketing on the Internet⁸² that advertising and marketing messages should be legal in their country of

75 Note on Conflicts of Laws on the Question of Unfair Competition: Background and Updated, drawn up by the Permanent Bureau, Preliminary Document No. 5, April 2000, p. 27 with references.

76 Vermeer, Marike, Electronic Unfair Competition and Applicable Law: An Open Spot in the European Jungle, vol 7.5 Electronic Journal of Comparative Law, December 2003, p. 3.

77 See in general 5.1.

78 See 5.1.

79 Note on Conflicts of Laws on the Question of Unfair Competition: Background and Updated, drawn up by the Permanent Bureau, Preliminary Document No. 5, April 2000, p. 32ff.

80 See article 136(2) of the Swiss Private International Law Statute, cf. Note on Conflicts of Laws on the Question of Unfair Competition: Background and Updated, drawn up by the Permanent Bureau, Preliminary Document No. 5, April 2000, p. 30f.

81 See 4.1.3.

82 ICC Guidelines on Advertising and Marketing on the Internet, April 1998.

origin. Conversely, it is given in article II of the OECD Guidelines for Consumer Protection in the Context of Electronic Commerce⁸³ that businesses should take into account the global nature of electronic commerce and, wherever possible, should consider the various regulatory characteristics of the markets they target. Due to the nature of the guidelines, they are not likely to have substantial bearing on the choice of law.

There is in the European Union an ongoing work on a Rome II regulation, which is to approximate the choice of law in tort.⁸⁴ The proposed regulation confirms, with some exceptions, the *lex loci delicti commissi* for most non-contractual obligations. Article 3(1) provides that the law of the place where the direct damage arises or is likely to arise shall apply. This will in most cases correspond to the law of the injured party's country of residence.⁸⁵ The proposed regulation comprises, in article 5, a specific clause on non-contractual obligations arising out of an act of unfair competition. In such cases the law of the country where competitive relations or the collective interests of consumers are directly and substantially affected shall, as a starting point, apply. Any law specified by the proposed regulation must be applied whether or not it is the law of a Member State.⁸⁶

4.1.3. Community Law and Private International Law

As established in chapter 2,⁸⁷ the concept of 'restriction' within the meaning of article 28 and 49 of the EC Treaty is constructed broadly by the European Court of Justice. There is no case law where the European Court of Justice establishes that a national rule on private international constitutes a restriction of the freedom to provide goods or services.⁸⁸ On the other hand, it is clear from the existing case law that the concept is so broad that private international law, which in fact hinders these freedoms, must be considered a restriction. The fact that judicial cooperation was not introduced to the European Union before the 1997 Amsterdam Treaty, does not make a difference, since it is seen in a number of cases that for example taxation may constitute a hindrance, even though direct taxation does not as such fall within the purview of the European Community. Powers retained by Member States must also be exercised consistently with

83 OECD Guidelines for Consumer Protection in the Context of Electronic Commerce, 1999.

84 Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II'), COM(2003)427 (22. July 2003). See also Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 463ff.

85 Proposal for a Regulation of the European Parliament and the Council on the law Applicable to Non-Contractual Obligations ('Rome II'), COM(2003) 427 (22 July 2003), p. 11.

86 Proposal for a Regulation of the European Parliament and the Council on the law Applicable to Non-Contractual Obligations ('Rome II'), COM(2003) 427 (22 July 2003), article 2.

87 See 2.3.1 and 2.4.1.

88 The reason is probably that conflict rules traditionally have regarded relations between private persons and thus not a barrier to the freedom to provide services. See Hörnle, Julia, *The European Union Takes Initiative in the Field of E-Commerce*, JILT 2000 (3), p. 333 at p. 353f.

Community law.⁸⁹ As established in chapter 2,⁹⁰ it does not make a difference whether the restriction is imposed through legislation or is derived from a practice exercised by national courts.

Private international law may lead to imposing a restriction, within the meaning of article 28 and 49 of the EC Treaty, when the Business, in a private dispute, is met with legal requirements under the law of another Member State by virtue of national choice of law rules. Foreign law is in particular likely to be appointed in tort cases under the *lex loci delicti commissi* doctrine and in cases concerning certain consumer contracts. Foreign law may also, under certain circumstances, be imposed in other contracts.⁹¹ In general, foreign law may also be applied under article 7 concerning mandatory rules or as a matter of the contacts approach.

National choice of law rules must be applied by the courts in accordance with Community law. This does not preclude situations where such restrictions are justified. National choice of law rules may not in themselves be inconsistent with Community law, but their application can nonetheless entail restrictions which may not be justified under Community law.

The situation can be illustrated by the Saeger-case,⁹² which concerned a German business's (Manfred Saeger) request for an injunction against a UK-based business (Dennemeyer & Co) which offered its patent renewal services in Germany without proper German license. The European Court of Justice recognised that the German courts had international jurisdiction and that, in the main proceedings, German law was applicable, on the ground that Dennemeyer was pursuing its activity in Germany.⁹³

The national court asked the European Court of Justice to ascertain whether article 49 of the EC Treaty precludes judgment being given on the basis of the applicable provisions of national law. The court reformulated the question as to whether article 49 is opposed to such national legislation.⁹⁴ The court hereby changed focus from the procedural part of the underlying case to the effect of the application of the national provision. It was thus neither the jurisdiction or the choice of law which was a problem, but the national, substantial provision itself.⁹⁵

The European Court of Justice has acknowledged consumer protection and unfair competition as mandatory requirements.⁹⁶ This does not mean that any requirement can be justified, and in its assessment of proportionality, the court must be assumed to include the state's legitimate interest in applying its own law and the consequences entailed for the Business, which is providing goods and

89 Jessica Safir v. Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län. Case 118/96 (28 April 1998). Paragraph 21 with references.

90 See 2.3.1.

91 See 4.1.1.

92 Manfred Säger v. Dennemeyer & Co. Ltd, Case 76/90 (25 July 1991).

93 Manfred Säger v. Dennemeyer & Co. Ltd, Case 76/90 (25 July 1991), paragraph 10.

94 Manfred Säger v. Dennemeyer & Co. Ltd. Case 76/90 (25 July 1991), paragraph 11.

95 Manfred Säger v. Dennemeyer & Co. Ltd, Case 76/90 (25 July 1991), paragraph 21.

96 See 2.3.2.2.

services over the Internet. As accounted for in chapter 2,⁹⁷ the free movement of services also includes restrictions imposed in the country of origin, and under this provision, it may also constitute an unlawful restriction if a foreign law is appointed by the national choice of law rules. The situation seem to have become more complicated in the wake of the 2000 E-Commerce Directive, as discussed immediately below.

Jurisdiction, as dealt with below,⁹⁸ is not likely to constitute a restriction to the free movement of goods and services, firstly because the rules are harmonised in the European Union and secondly because of the procedural nature of jurisdiction. It may be argued that (the risk of) defending itself in a foreign court (for example in a tort-case) may be a burden to the Business, but the application of foreign law is what would make the situation a real problem, since the Business is already assumed to comply with the law of the state in which it is established. It should be emphasised that it may be a problem for the Business if it is sued in a foreign court which apply the law of the Business wrongly, since possible objections to recognition and enforcement is very limited under the Brussels/Lugano System as discussed below.⁹⁹

4.1.3.1. The 2000 E-Commerce Directive and Applicable Law

The 2000 E-Commerce Directive introduced a country of origin principle,¹⁰⁰ which provides that information society services within the Internal Market, as a starting point, only needs to comply with the legal requirements of the state in which the provider is established. As described above, it is possible that a Member State will apply foreign law in a number of cases. This conflicts with the idea of the country of origin principle. The situation could be that a tort action for infringement of unfair competition is instituted against the Business in a foreign court. According to the *lex loci delicti* principle, the foreign court is likely to apply foreign law (*lex loci delicti*), but according to article 3(2) of the 2000 E-Commerce Directive, Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State. The 2000 E-Commerce Directive is not unambiguous in dealing with this conflict and an interpretation by the European Court of Justice is desirable.

Recital 23 of the directive provides that the directive does not aim to establish additional rules on private international law relating to conflicts of law. This is in accordance with article 1(4), which provides that the directive does not establish additional rules on private international law. This apparently clear reading does not necessarily mean that the 2000 E-Commerce Directive does not have any influence on private international law. Further reading of recital 23 gives that 'provisions of the applicable law designated by rules of private international law

97 See 2.4.

98 See 4.2.

99 See 4.2.1.8.

100 See 2.5.3.

must not restrict the freedom to provide information society services as established in this Directive', and recital 25 provides that national courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in the directive.

This apparent contradiction between a directive article and its corresponding recital would normally be resolved in favour of the directive article.¹⁰¹ That solution is troublesome because it would mean that for example a business established in Denmark should comply with Danish law with regards to public law enforcement, whereas the business should comply with the law of the country of destination (*lex loci delicti*) in connection with private law enforcement. In for example the field of unfair competition, similar legal requirements may be enforced by both public and private parties. According to the country of origin principle, the Business must comply with the law of the state in which it is established, but if the country of origin principle does not have any bearing on private international law, the Business may be met with requirements under foreign law in the same legal sphere (unfair competition law) in civil law suits, where for example a competitor or a consumer organisation is suing the Business in another Member State.

It has been argued that the rules within the coordinated field of the country of origin principle must be regarded as internationally mandatory.¹⁰² This means that the national rules of the country of origin must be applied regardless of which state's law would otherwise have been designated. This solution corresponds with both article 1(4) and recital 22, because the country of origin principle will affect only the territorial applicability of substantive law which will not make it a choice of law rule as such.¹⁰³ It is generally recognised that national courts under certain circumstances may give effect to mandatory provisions other than those applicable to a contract by virtue of the choice of the parties or by virtue of a subsidiary connecting factor.¹⁰⁴ Article 12(1) of the draft Rome II regulation,¹⁰⁵ on overriding mandatory rules, provides that effect may be given to international mandatory rules of another country with which the situation is closely connected. It is further emphasised in article 12(2) that nothing in the regulation is to restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual

101 For this approach, see Mathiasen, Jacob Plesner, Jørgensen, Niels Bo and Schlüter, Johan, *E-handelsloven med kommentarer*, DJØF Publishing, p. 48ff.

102 See Hellner, Michael, *The Country of Origin Principle in the E-Commerce Directive - A Conflict with Conflict of Laws?*, *European Review of Private Law*, 2004, p. 193. See in particular p. 206ff.

103 See Hellner, Michael, *The Country of Origin Principle in the E-Commerce Directive - A Conflict with Conflict of Laws?*, *European Review of Private Law*, 2-2004, p. 193 at p. 209.

104 Giuliano-Lagarde Report, p. 26 on article 7 ('Mandatory Rules') of the 1980 Rome Convention.

105 Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II'), COM(2003)427 (22 July 2003). See comments to article 12 at page 24.

obligation.

In a case concerning an agency contract, the European Court of Justice found that articles 17 and 18 of the directive on self-employed commercial agents¹⁰⁶ are internationally mandatory.¹⁰⁷ Article 19 of that directive provides that the parties may not derogate from those articles to the detriment of the commercial agent before the agency contract expires. The court emphasised that the purpose of the regime, established in articles 17 to 19 of the directive, is to protect both freedom of establishment and the operation of undistorted competition in the Internal Market and that those provisions therefore must be observed throughout the community if those treaty objectives are to be attained.¹⁰⁸ It can be argued that the 2000 E-Commerce Directive has similar objectives as the agency directive.¹⁰⁹ This would mean that if the Business is sued in the country of origin, the law of that state should be applied not as a matter of choice of law, but as a matter of applying international mandatory rules. It may be more questionable whether a foreign court would be obliged to apply the law of the country of origin as a matter of international mandatory rules.¹¹⁰ Such a solution cannot at the current stage be completely rejected, but one could argue that this solution would in fact lead to 'additional rules on private international law'.

Another approach to dealing with this question is to construct 'establishment of additional rules' in article 1(4) of the directive, in the sense that the directive does not establish new statutory law in the area, but rather introduces a limitation on the application of existing principles of private international law.¹¹¹ This approach corresponds with the effect on choice of law rules of the EC Treaty provisions on freedom to provide goods and services as discussed above.¹¹² This approach is also supported by the recommendation of the Parliament's second reading of the draft directive,¹¹³ which provides that 'the Council's common position puts an end to any

106 Directive 86/653 on the coordination of the laws of the Member State relating to self-employed commercial agents (18 December 1986).

107 *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*, Case 381/98 (9 November 2000).

108 *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.*, Case 381/98 (9 November 2000), paragraph 24.

109 Hellner, Michael, The Country of Origin Principle in the E-Commerce Directive - A Conflict with Conflict of Laws?, *European Review of Private Law*, 2004, p. 193 at p. 210.

110 Hellner, Michael, The Country of Origin Principle in the E-Commerce Directive - A Conflict with Conflict of Laws?, *European Review of Private Law*, 2004, p. 193 at p. 211.

111 See a similar conclusion in Mäntysaari, Petri, *The Electronic Commerce Directive and the Conflict of Law - the Case of Investment Services*, *Tidskrift utgiven av Juridiska Föreningen i Finland*, Häfte 3/2003, Helsingfors 2003, p. 340f. with reference to Mankowski, Peter, *Das Herkunftslandprinzip als Internationales Privatrecht der e-commerce-rechlinie*, *Zeitschrift für vergleichende Rechtswissenschaft*, 2001, p. 145. See also Heine, Kasper, Grønbaek, Martin von Haller and Trzaskowski, Jan, *Internetjura*, 2. udgave, Forlaget Thomson, 2002, p. 581.

112 See 2.3 and 2.4.

113 Recommendation for Second Reading on the Council common position for adopting a European Parliament and Council directive on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce (4263/1/1999, C5-0099/2000 - 1998/0325(COD))), Committee on Legal Affairs and the Internal Market, A5-0106/2000 (12 April 2000).

doubt as to the primacy of the directive over international private law by stipulating that, although the directive does not as such constitute an additional set of rules of international private law, the effect of applying that law must not be such as to restrict the free movement of information society services as provided for in the directive. Article 3 is applicable in all areas of national law, including private law (with the exception of the questions referred to in the annex).¹¹⁴ This approach does not as such change private international law, but provides, as illustrated above,¹¹⁵ that the application of national law may not, without proper justification, hamper the idea of the Internal Market.

Support for this approach may also be found in the exceptions to the country of origin principle listed in the annex. Some of the exceptions seem to be introduced in order not to change the existing private international law regime on these counts. These exceptions include 'the freedom of the parties to choose the law applicable to their contract' and 'contractual obligations concerning consumer contracts'. Consumer contracts is likely to have become exempt from the scope of the country of origin principle in order not to conflict with the choice of law rules of the 1980 Rome Convention as presented above.¹¹⁶

*A similar exception has not been made for choice of law in tort and it is fair to expect that the principle of *lex loci delicti* only can be applied to the extent that it does not restrict the freedom to provide information society services as established in the 2000 E-Commerce Directive and expressed in recital 23 and 25 of the directive.*

It has been emphasised that the derogations listed in the annex concern areas which cannot benefit from the country of origin principle because it is impossible to apply the principle of mutual recognition or it is an area where there is insufficient harmonisation to guarantee an equivalent level of protection between Member States.¹¹⁷ It is thus not expressly stated that these exceptions are introduced to avoid a conflict with private international law.

The draft Rome II regulation suggests that the regulation is not to prejudice the application of Community instruments which, in relation to particular matters and in areas coordinated by such instruments, subject services to the laws of the Member State where the service provider is established and, in the area coordinated, allow restrictions on freedom to provide services originating in another Member State only in limited circumstances.¹¹⁸ A business established in the Internal Market can thus reasonably argue that applying the (more

114 See also Thunken, Alexander, Multi-State Advertising Over the Internet and the Private International Law of Unfair Competition, *International and Comparative Law Quarterly*, October 2002, p. 909 at p. 20, where it is argued that the country of origin principle should be looked at as a conflicts rule.

115 See Manfred Säger v. Dennemeyer & Co. Ltd, Case 76/90 (25 July 1991) under 4.1.3.

116 See also recital 55 which provides that 'This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence'.

117 Proposal for a European Parliament and Council directive on certain legal aspects of electronic commerce in the internal market, COM(1998)586 (18 November 1998), p. 32.

118 Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM(2003)427 (22 July 2003), article 23(2).

burdensome) tort law of another Member State is in contravention of the free movement of information society services as defined in the country of origin principle of the 2000 E-Commerce Directive.

At this stage, it cannot clearly be determined what influence the country of origin principle has on private international law. There seems to be reasonable arguments to establish that private international law is influenced in areas which are not exempt in the annex, provided that the measure is not justified by the general exemption clause. There seem to be some consensus of opinion that the choice of law is not altered by 2000 E-Commerce Directive, but that the country of origin may limit the application of the appointed law. It may either be so that the law of the country of origin must be applied as a matter of international mandatory rules or that the apply (foreign) law must not impose a restriction on the free movement of information society services. In practice the difference between these approaches is rather limited.

It is also clear that 'restrictions' to the free movements as established in the EC Treaty applies to the law applicable under private international law.¹¹⁹ This means that the choice of law must be compatible with the fundamental freedoms of the Internal Market, including its requirements for justifiable restrictions.

4.2. Recognition and Enforcement of Foreign Judgments

As a matter of public law, states are not obliged to recognise or enforce foreign judgments, but may choose to enter mutual treaties on the subject or choose to recognise and enforce foreign judgments as a matter of comity ('mutual respect').¹²⁰ A judgment is normally recognised and enforced in the state in which the judgment was rendered. Cooperation between states has led to agreements on recognition of some foreign judgments. Recognition of foreign judgments is more widely accepted within private law than the recognition and enforcement of public law judgment as dealt with in the previous chapter.¹²¹

The Brussels/Lugano System, as discussed below,¹²² provides a principle of free movement of judgments. Outside the Brussels/Lugano System, or other international agreements, it is up to each state to decide whether to recognise or enforce foreign judgments.¹²³ The states' decision varies from no recognition over recognition on a reciprocity basis to recognition in respect of cooperation among

119 See in general Nielsen, Ruth, *E-handelsret*, 2. udgave, DJØF, 2004, p. 100ff. See also Hellner, Michael, *The Country of Origin Principle in the E-Commerce Directive - A Conflict with Conflict of Laws?*, *European Review of Private Law*, 2-2004, p. 193 at p. 205 with references.

120 See in general Akehurst, Michael, *Jurisdiction in International Law*, *The British Year Book of International Law* 1972-73, University Press, Oxford, p. 145 at p. 214ff. and Hay, Peter, Weintraub, Russel J. and Borchers, Patrick J., *Conflict of Laws*, Foundation Press, 2000, p. 206ff.

121 See 3.2.

122 See 4.2.1.

123 Akehurst, Michael, *Jurisdiction in International Law*, *The British Year Book of International Law* 1972-73, University Press, Oxford, p. 145 at p. 236f.

sovereign nations based on certain procedural and substantive standards.¹²⁴ Civil law states are generally more reluctant to recognise foreign judgment than common law states.¹²⁵ Most courts in the United States recognise foreign judgments (non-US) as a matter of mutual respect and cooperation among sovereign nations ('comity'), provided that the recognising state finds the judgment state to have proper jurisdiction and that fair procedures have been employed.¹²⁶

There are a number of bilateral and unilateral conventions between Member States on recognition and enforcement of foreign judgments which are superseded by the Brussels/Lugano system.¹²⁷ The Hague Conference has adopted a convention on recognition and enforcement of foreign judgments in civil and commercial matters,¹²⁸ which has only been ratified by Cyprus, the Netherlands, Portugal and Kuwait. There is under the Hague Conference an ongoing work on a global convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters.¹²⁹ None of the Hague Conference initiatives will be elaborated further on due to limited the limited number of ratifying states and lack of adoption respectively. It also falls outside the scope of this thesis to elaborate on national law concerning the recognition of foreign judgments outside the Brussels/Lugano System.

Recognition of a judgment means treating the claim, which was adjudicated, as having been determined once and for all. The matter is then *res judicata*, and the losing party will be estopped from contradicting it in subsequent proceedings.¹³⁰ If a successful claimant wants to execute the judgment (for example by claiming money or executing an injunction), the claimant must bring proceedings for the enforcement of the judgment. When enforcement is ordered, the judgment may be executed as if the courts of the enforcing state have entered it.¹³¹

Cross-border law enforcement as dealt with in this thesis is about imposing sanctions, under foreign law, on the Business. A law enforcer may take legal action either in the home court of the Business or in a foreign court. As dealt with above, the applicable law has to be determined in accordance with the private

124 See in general Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 673ff. with references.

125 Nielsen, Peter Arnt, *Den Globale Domskonvention*, Julebogen 2003, DJØF Publishing, p. 113 at p. 114.

126 See Kay, Herma Hill, *Conflict of Laws*, Harcourt Brace Legal and Professional Publications Inc., 1998, p. 152.

127 See article 55 of the 1968 Brussels Convention.

128 Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. See also Supplementary Protocol of 1 February 1971 to the Convention at www.hcch.net.

129 See Preliminary Result of the Work of the Informal Working Group on the judgments Project which includes a draft Convention on Choice of Court Agreements. Preliminary Document No 8 of March 2003 (corrected) for the attention of the Special Commission of April 2003 on General Affairs and Policy of the Conference (http://hcch.e-vision.nl/upload/wop/genaff_pd08e.pdf).

130 Briggs, Adrian, *The Conflict of Laws*, Oxford University Press, 2002, p. 115 with references.

131 Briggs, Adrian, *The Conflict of Laws*, Oxford University Press, 2002, p. 115f.

international law of the forum state. In relation to international procedural law, the focus is on the situations where the Business may be sued in a foreign court, and the obligations for the state of the Business to recognise and enforce such judgments. It should be mentioned that even when the foreign court is applying the law of the state, in which the Business is established, it may do so wrongly, but the judgment must still be enforced in the state of the Business. This constitutes a risk to the Business since a foreign law enforcer is most likely to prefer to sue in his own home court, provided the judgment entered there can be enforced in the state of the Business.

4.2.1. The Brussels/Lugano System

The main acts on recognition and enforcement of foreign judgments in Europe are the 2000 Brussels Regulation,¹³² the 1988 Lugano Convention¹³³ and the 1968 Brussels Convention.¹³⁴ These acts regulate both jurisdiction (choice of forum) and mutual recognition and enforcement of judgments.¹³⁵ They provide a system for free circulation of judgments in civil and commercial matters within EU Member States plus Iceland, Norway and Switzerland. The 2000 Brussels Regulation is a revised version of the 1968 Brussels Convention brought into EU legislation.¹³⁶ The 1988 Lugano Convention is a parallel convention to the 1968 Brussels Convention and it contains identical rules on jurisdiction, recognition and enforcement.¹³⁷ Denmark is due to a legal reservation not part of the 2000 Brussels Regulation.¹³⁸ The 1968 Brussels Convention and the 1988 Lugano Convention

132 Council regulation No 44/2001 (22 December 2000) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See also Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 697ff.

133 The EC and EFTA Lugano Convention on Jurisdiction and the Enforcement of judgments Civil and Commercial Matters from 16 September 1988.

134 EC Convention on Jurisdiction and Enforcement of judgments in Civil and Commercial Matters (27 September 1968). See in general Hertz, Ketilbjørn, *Jurisdiction in Contract and Tort under the Brussels Convention*, DJØF Publishing, Copenhagen, 1998, p. 45ff.

135 See also proposal for a Council Regulation creating a European enforcement order for uncontested claims, COM(2002)159 (27 August 2002).

136 Article 68 of the 2000 Brussels Regulation provides that the Regulation shall, as between the Member States, supersede the Brussels Convention, and in so far as the regulation replaces the provisions of the 1968 Brussels Convention between Member States, any reference to that convention shall be understood as a reference to the Regulation.

137 See for example Bogdan, Michael, *The "Common Market" for judgments: The extension of the EEC Jurisdiction and Enforcement Treaty to Non-Member Countries*, Saint Louis University Public Law Review, 1990, Vol. 9, p. 113.

138 See recitals 21 and 22 of the 2000 Brussels Regulation. See also Recommendation for a Council Decision authorising the Commission to open negotiations for the conclusion of two agreements between the European Community and the Kingdom of Denmark, extending to Denmark the provisions of Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and the provisions of Regulation (EC) No 1348/2000 concerning the service in the Member States of judicial and extra-judicial documents in civil or commercial matters, 2504th Council meeting Justice and Home Affairs (8 May 2003), pt. A 6.

still apply.

The European free circulation of judgments is only applicable to judgments in civil or commercial matters entered by courts in one of the above-mentioned states. The free circulation of judgments is combined with a harmonisation of jurisdiction rules applicable when suing a person domiciled in another state, which is part of the Brussels/Lugano System. The acts, which constitute the Brussels/Lugano System, specify a number of rules of national jurisdiction ('exorbitant jurisdiction') which may not be applied against a defendant in another state within the Brussels/Lugano System.¹³⁹ A plaintiff, who is not domiciled in a contracting state, may also choose to sue the defendant in a contracting state in accordance with the jurisdiction rules set out in the Brussels/Lugano System.¹⁴⁰ If the defendant is not domiciled in one of these states, the jurisdiction is to be determined in accordance with the national procedural rules of the forum state.

A judgment given in one of the above-mentioned states must be recognised in another state within the Brussels/Lugano System without any special procedure being required and the judgment is to be enforced in another state within the Brussels/Lugano System when, on the application of any interested party it has been declared enforceable there. A declaration of enforceability is to be granted on completion of certain formalities. Recognition and hence enforcement may be refused on certain procedural grounds or if enforcement is manifestly contrary to the public policy of the recognising state.¹⁴¹ These issues are dealt with below.¹⁴² This thesis does not deal with questions concerning *lis pendens* because it concerns competing competence in the same dispute. It is assumed that the Business is only being sued by one party in one court.

The European Court of Justice has been granted jurisdiction to interpret the 1968 Brussels Convention.¹⁴³ The parties to the 1988 Lugano Convention have agreed to pursue a uniform interpretation of the provisions which are found in both conventions.¹⁴⁴ The principles laid down in judgments relating to the 1968 Brussels Convention will to a far extent be applicable also to the 2000 Brussels Regulation.¹⁴⁵ So far, the European Court of Justice has not ruled on a case

139 See the annex of the 2000 Brussels regulation as referred to in article 3(2) and Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 26ff.

140 Case 412/98 (13 July 2000) *Josi Reinsurance Company SA v. Universal General Insurance Company*, paragraph 61.

141 See article 34 and 35 of the 2000 Brussels Regulation.

142 See in general on similarities between mutual recognition in civil and criminal matters Peers, Steve, *Mutual recognition and criminal law in the European Union: Has the Council got it wrong?*, *Common Market Law Review* 41, 2004, p. 5.

143 See Protocol on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (3 June 1971).

144 See protocol Protocol 2, on the uniform interpretation of the Convention.

145 See recital 19 of the 2000 Brussels Regulation which provides that 'continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by

concerning the 2000 Brussels Regulation. To both the 1968 Brussels Convention and to the 1988 Lugano Convention, interpretive reports have been drawn up, including instance the Jenard Report and Schlosser Report (1968 Brussels Convention)¹⁴⁶ and Jenard-Möller Report (1988 Lugano Convention).¹⁴⁷ In the examination of the Brussels/Lugano System, focus will be on preparatory works and case law concerning in particular the 1968 Brussels Convention. Unless otherwise stated, that case law is also applicable to the other acts constituting the Brussels/Lugano System.

The European Court of Justice has established that, in the absence of any reason for interpreting the two provisions in question differently, consistency requires that article 5(3) of the 1968 Brussels Convention to be given a scope identical to that of the equivalent provision of the 2000 Brussels Regulation which is all the more necessary given that that regulation is intended to replace the 1968 Brussels Convention in relations between Member States with the exception of the Kingdom of Denmark.¹⁴⁸ This shows that the European Court of Justice is likely to find inspiration in the 2000 Brussels Regulation when interpreting the 1968 Brussels Convention. This principle may apply generally and in particular have consequences in connection with the articles corresponding to those which were amended in the 2000 Brussels Regulation to ensure that the convention also applies to electronic commerce.¹⁴⁹ Such an approach may be problematic in the light of the legal certainty which the 1968 Brussels Convention is supposed to promote. It is therefore not evident that the European Court of Justice will depart from principles already established in case law when the actual wording of the article in question does not leave room for an identical interpretation.

The purpose of the 2000 Brussels Regulation is to promote the free movement of judgments.¹⁵⁰ The European Court of Justice has established that the essential aim of the 1968 Brussels Convention is to strengthen the legal protection of persons established in the European Community. For that purpose, the convention provides a collection of rules which are designed inter alia to avoid the occurrence, in civil and commercial matters, of concurrent litigation in two or more contracting states and which, in the interests of legal certainty and for the benefit of the parties, confer jurisdiction upon the national court territorially best qualified to

the Court of Justice of the European Communities and the 1971 Protocol should remain applicable also to cases already pending when this Regulation enters into force'.

146 Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters - Brussels Convention, 72/454 (27 September 1968), L 304 1978. - Jenard Report on Convention and Protocol, C 59 1979, Schlosser Report on Convention and Protocol, C 1979.

147 Convention of 16th September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters. Lugano Convention, 88/592 (16 September 1988), L 319 1988 - Jenard-Möller Report on the Convention, Protocols and Declarations, C 189 1990.

148 Verein für Konsumenteninformation v. Karl Heinz Henkel, Case 167/00 (1 October 2002), paragraph 49.

149 See Nielsen, Ruth, E-handelsret, 2. reviderede udgave, DJØF 2004, p. 357f.

150 Lookofsky, Joseph and Hertz, Ketilbjørn, Transnational Litigation and Commercial Arbitration, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 698.

determine a dispute.¹⁵¹

4.2.1.1. Civil and Commercial Matters

The Brussels/Lugano System concerns 'civil and commercial matters', and does not extend, in particular, to revenue, customs or administrative matters ('public matters').¹⁵² Civil and commercial matters are classified according to their nature and not to the nature of the actual court or tribunal, and include for example civil proceedings before a criminal court or an administrative tribunal.¹⁵³ In most cases it will be clear whether a specific matter is of civil or public nature or which parts of a case is a civil or commercial matter. Due to the effectiveness in cross-border law enforcement under the Brussels/Lugano System, it is relevant to examine the borders of the scope of application and thus the distinction between private and public law enforcement as applied in this thesis.

The working party in connection to the 1968 Brussels Convention found it to be obvious that criminal proceedings and criminal judgments of all kinds were excluded from the scope of the convention, including other proceedings imposing sanctions for breaches of orders or prohibitions intended to safeguard the public interest. Possible difficulties was recognised in connection to classifying private penalties known to some legal systems. It was emphasised that 'since in many legal systems criminal proceedings may be brought by a private plaintiff, a distinction cannot be made by reference to the party which instituted the proceedings. The decisive factor is whether the penalty is for the benefit of the private plaintiff or some other private individual'.¹⁵⁴

'Civil and commercial matters' is an independent concept which is interpreted by reference, firstly, to the objectives and scheme of the convention and, secondly, to the general principles which stem from the corpus of the national legal systems. Certain judgments given in actions between a public authority and a person governed by private law may fall within the area of application of the convention, but not in cases where the public authority acts in the exercise of its powers.¹⁵⁵ The key criterion is the nature of the legal relationships between the parties to the action or of the subject matter of the action.¹⁵⁶ In a case concerning an action brought by an agent responsible for administering public waterways against a person having liability in law in order to recover the costs incurred in the removal

151 Effer SpA v. Hans-Joachim Kantner, Case 38/81 (4 March 1982), paragraph 6.

152 Article 1 of the 2000 Brussels Regulation and the 1968 Brussels Convention.

153 Jenard Report on Convention and Protocol, C59/1979, p. 9. See also Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann. Case 172/91 (21 April 1993), paragraphs 16 and 19 with reference to article 5(4) of the 1968 Brussels Convention.

154 See Schlosser Report, paragraph 29

155 LTU Lufttransportunternehmen GmbH & Co. KG v. Eurocontrol, Case 29/76 (14 October 1976), paragraphs 3 to 4.

156 Lookofsky, Joseph and Hertz, Ketilbjørn, Transnational Litigation and Commercial Arbitration, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 32f with references.

of a wreck, the European Court of Justice established that the (private) agent was exercising public authority. The court emphasised that the fact that the agent acted pursuant to a debt which arose from an act of public authority was sufficient for its action, whatever the nature of the proceedings afforded by national law for that purpose, to be treated as being outside the ambit of the 1968 Brussels convention.¹⁵⁷

It was established by the European Court of Justice that a civil servant is not always exercising public powers even though he acts on behalf of a state. This is the case when the conduct does not entail the exercise of any powers going beyond those existing under the rules applicable to relations between private individuals. The court has emphasised that even if the activity in question (supervising pupils) was characterised in the state of origin as an exercise of public powers, that would not affect the characterisation of the dispute as being covered by the term 'civil matters' within the meaning of the 1968 Brussels Convention.¹⁵⁸ Certain types of dispute are thus excluded from the scope of the 1968 Brussels Convention, by reason either of the legal relationships between the parties to the action or of the subject matter of the action.¹⁵⁹

The Karl Heinz Henkel case¹⁶⁰ concerned an action seeking injunction against a German business to prevent it from using certain terms in contracts concluded with Austrian clients. The action was brought before an Austrian court by an Austrian consumer association. The UK government argued that the consumer protection organisation must be regarded as a public authority and its right to obtain an injunction to prevent the use of unfair terms in contracts constitutes a public law power. The court established, however, that not only was the consumer protection organisation in question a private body, but in addition, the subject matter of the main proceedings was not an exercise of public powers, since the proceedings did not in any way concern the exercise of powers derogating from the rules of law applicable to relations between private individuals. On the contrary, the action pending before the national court concerned the prohibition on traders using unfair terms in their contracts with consumers and thus sought to make relationships governed by private law subject to review by the courts.¹⁶¹ Hence, the court concluded that an action of that kind was a civil matter within the meaning of the 1968 Brussels Convention.

157 Netherlands State v. Reinhold Rüffer. Case 814/79 (16 December 1980), paragraphs 15-16.

158 Volker Sonntag v. Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann. Case 172/91 (21 April 1993), paragraphs 21, 22, 25 and 26.

159 Verein für Konsumenteninformation vs. Karl Heinz Henkel, Case 167/00 (1 October 2002), paragraph 29.

160 Verein für Konsumenteninformation vs. Karl Heinz Henkel, Case 167/00 (1 October 2002).

161 Verein für Konsumenteninformation vs. Karl Heinz Henkel, Case 167/00 (1 October 2002), paragraphs 25 and 30. See also below under the tort forum.

It should be noted that article 7 of the 1993 Directive on Unfair Contract Terms¹⁶² provides that Member States are to ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. The means is to include provisions whereby persons or organisations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

4.2.1.2. Defendants Domicile and Special Jurisdiction

The starting point in private law enforcement is that the plaintiff must have the inconvenience of suing the defendant at the defendant's domicile,¹⁶³ which is reflected in the traditionally accepted maxim 'actor sequitur forum rei'.¹⁶⁴ That is also the main rule within the Brussels/Lugano System.¹⁶⁵ This situation, where the Business is sued in its home court, is dealt with above under private international law, since it in those situations is assumed that the Business is being sued in the state where the Business is domiciled. This part of the thesis deals with the situation where the Business is being sued in a foreign court. The rules of jurisdiction in matters relating to branches, contracts, tort and civil claims under criminal proceedings are dealt with below.

In order to apply the special jurisdiction there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it.¹⁶⁶ The European Court of Justice has established that the special jurisdiction must be restrictively interpreted and cannot give rise to an interpretation going beyond the cases expressly envisaged by the Convention.¹⁶⁷ The special jurisdictions are based on a particular close connecting factor between the dispute and the court in certain clearly defined situations which is in accordance with the objective of the convention, i.e. to avoid a wide and multifarious interpretation of the exception to the general rule contained in article 2 (actor sequitur forum rei).¹⁶⁸

The plaintiff may normally choose to use either the special jurisdiction, provided the requirements are satisfied, or to sue at the defendant domicile. The analysis below includes also specific provisions on jurisdiction over consumer

162 Directive 93/13 (5 April 1993) on unfair terms in consumer contracts.

163 See in general Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 19ff.

164 Which provides that the defendant may be sued in the courts of the state of his domicile (defendant's home court), Jenard Report on Convention and Protocol, C59/1979, p. 19.

165 It is provided in article 60 of the 2000 Brussels Regulation that a company, a legal person or association is domiciled at the place where it has its a) statutory seat, or b) central administration, or c) principal place of business.

166 Jenard Report on Convention and Protocol, C59/1979, p. 22.

167 See for example *Freistaat Bayern v. Jan Blijdenstein*, case 433/01 (15 January 2004), paragraph 25 with references.

168 *Somafer SA v. Saar-Ferngas AG*, Case 33/78 (22 November 1978), paragraph 7.

contracts which may not, as a starting point, be departed by agreement.

4.2.1.3. *Branch, Agency or Other Establishment*

Article 5(5) of the acts constituting the Brussels/Lugano System provides for special jurisdiction in the courts for the place in which the branch, agency or other establishment is situated, for disputes arising out of the operations of that branch, agency or other establishment.¹⁶⁹ The concept of branch, agency or other establishment implies a place of business, which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties.¹⁷⁰ Article 5(5) applies also to cases in which a legal person, established in a contracting state, does not operate any dependent branch, agency or other establishment in another contracting state, but nevertheless pursues its activities there by means of an independent undertaking which has the same name and identical management which negotiates and conducts business in its name and which it uses as an extension of itself.¹⁷¹

It has been argued that a website under certain conditions can be considered a branch as defined by article 5(5).¹⁷² In particular if the site is inter-active, programmed to 'negotiate' with customers. It is mentioned that the use of a particular country-code ('top level domain'),¹⁷³ may create a legitimate expectation on the side of the customer that he is dealing with an establishment situated in a particular country.¹⁷⁴

The European Court of Justice has in connection to article 5(5) of the 1968 Brussels Convention established that the concept of article 5(5) must be interpreted independently and that the option granted to the plaintiff, by definition, is a question of factors concerning two entities established in different contracting states.¹⁷⁵ From the two cases mentioned above,¹⁷⁶ it seems clear that article 5(5) is meant for situations where the defendant has a physical presence.¹⁷⁷ This approach

169 See in general Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 160ff.

170 *Somafer SA v. Saar-Ferngas AG*, Case 33/78 (22 November 1978), paragraph 12. See also *Jenard-Muller Report*, p. 100.

171 *SAR Schotte GmbH v. Parfums Rothschild SARL*, case 218/86 (9 December 1987), paragraph 17.

172 Bogdan, Michael, *Electronic Commerce: Problems of Jurisdiction and Applicable Law*, Fejø, Jens, Nielsen, Ruth and Riis, Thomas (editors), *Legal Aspects of Electronic Commerce*, DJØF Publishing, 2001, p. 75 at p. 78f. with references.

173 See 5.2.1.1.

174 Bogdan, Michael, *Electronic Commerce: Problems of Jurisdiction and Applicable Law*, Fejø, Jens, Nielsen, Ruth and Riis, Thomas (editors), *Legal Aspects of Electronic Commerce*, DJØF Publishing, 2001, p. 75, p79.

175 *Somafer SA v. Saar-Ferngas AG*, Case 33/78 (22 November 1978), paragraph 7 and 8.

176 *Somafer SA v. Saar-Ferngas AG*, Case 33/78 (22 November 1978) and *SAR Schotte GmbH v. Parfums Rothschild SARL*, Case 218/86 (9 December 1987).

177 Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second

should be considered in the light of the principle that the special jurisdiction must be restrictively interpreted and cannot give rise to an interpretation going beyond the cases expressly envisaged by the convention.

One aim of the 2000 Brussels Regulation was to update the rules of the 1968 Brussels Convention to suit electronic commerce. There were no changes or comments on the branch forum, and it could be argued that if the drafters envisaged the branch forum to include a website, such consideration would appear in the proposal.¹⁷⁸

It seems difficult, especially in the light of the strict construction of the special jurisdiction, to consider a website to be independently established in any state.¹⁷⁹ This conclusion seems to correspond with the definition of established service provider in article 2(c) of the 2000 E-Commerce Directive which provides that the presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider.¹⁸⁰

The concern regarding an 'implied establishment' seems reasonable, in particular in situations where the Business gives the User a reasonable expectations of dealing with a business established in the state of the User. It seems, however, to be stretching the provision beyond its scope, to use the branch forum in that situation. For good measure, it should be mentioned that the 2000 E-Commerce Directive in article 5, introduces a requirement under which providers of information society services must render easily, directly and permanently accessible the name and geographic address at which the service provider is established to the recipients of the service and competent authorities.¹⁸¹

4.2.1.4. *Matters Relating to a Contract (Performance Forum)*

A person may, in matters relating to a contract, be sued in the courts for the place of performance of the obligation in question.¹⁸² The obligation to be taken into

edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 169.

178 See Proposal for a regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(1999) 348 (14 July 1999). See also Gillies, Lorna, A Review of the New Jurisdiction Rules for Electronic Consumer Contracts Within the European Union, JILT 2001(1), under 2.2.1, where the author wonders why the drafters of the 2000 Brussels Regulation did not take the opportunity to clarify whether a server could constitute a branch within this article.

179 See for a similar opinion, Nielsen, Ruth, E-handelsret, 2. reviderede udgave, DJØF 2004, p. 360f. It should for good measure be mentioned that the author recognises that his opinion is 'highly controversial'. See Bogdan, Michael, Electronic Commerce: Problems of Jurisdiction and Applicable Law, Fejø, Jens, Nielsen, Ruth and Riis, Thomas (editors), Legal Aspects of Electronic Commerce, DJØF Publishing, 2001, p. 75, p. 79.

180 See to this end Mankowski, Peter, Jurisdiction and Enforcement in the Information Society, Nielsen, Ruth, Jakobsen, Søren Sandfeld and Trzaskowski, Jan (editors), EU Electronic Commerce Law, Djøf Publishing, 2004, p. 125 at p. 131.

181 See in general Howells, Geraint and Nordhausen Annette, Information Obligations in EC E-Commerce Law, Nielsen, Ruth, Jakobsen, Søren Sandfeld and Trzaskowski, Jan (editors), EU Electronic Commerce Law, DJØF Publishing, 2004, p. 49.

182 1968 Brussels Convention article 5(1), 1998 Lugano Convention article 5(1) and 2000 Brussels

consideration is the contractual obligation which forms the actual basis of the legal proceedings.¹⁸³ This means that the court firstly will have to apply national choice-of-law rules to determine the applicable law in order to establish the place of performance of the obligation in question and whether the court has jurisdiction to hear the case.¹⁸⁴

The concept of 'matters relating to a contract' is an independent concept which is not simply referring to the national law of one or other of the states concerned.¹⁸⁵ Article 5(1) does not require a contract to have been concluded, but it is nevertheless essential, for that provision to apply, to identify an obligation, since the jurisdiction of the national court is determined, in matters relating to a contract, by the place of performance of the obligation in question.¹⁸⁶ Accordingly, the application of the rule of special jurisdiction provided for matters relating to a contract in article 5(1) presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based.¹⁸⁷

It has been established by the European Court of Justice that a letter sent to a consumer's domicile, without any request by her, a letter designating her by name as the winner of a prize may constitute an obligation 'freely assumed'.¹⁸⁸ The court emphasised that the addressee of the letter at issue expressly accepted the prize notification made out in her favour by requesting payment of the prize she had ostensibly won, and at least from that moment, the intentional act of a professional vendor must be regarded as an act capable of constituting an obligation which binds its author as in a matter relating to a contract.¹⁸⁹

The national court's jurisdiction to determine questions relating to a contract includes the power to consider the existence of the constituent parts of the contract itself, since that is indispensable in order to enable the national court in which proceedings are brought to examine whether it has jurisdiction under the convention.¹⁹⁰ The concept of 'matters relating to contract' referred to in article 5 (1) of the Brussels Convention is not interpreted narrowly by the European Court of Justice.¹⁹¹

Regulation article 5(1)(a). See also Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 36ff.

183 Hassan Shenavai v. Klaus Kreischer, Case 266/85 (15 January 1987), paragraph 20.

184 See *Industrie Tessili Italiana Como v. Dunlop AG*, Case 12/76 (6 October 1976), paragraph 15.

185 *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging*, Case 34/82 (22 March 1983), paragraphs 9 and 10.

186 *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, Case 334/00 (17 September 2002), paragraph 22.

187 *Petra Engler v. Janus Versand GmbH*, Case 27/02 (20 January 2005), paragraph 51.

188 *Petra Engler v. Janus Versand GmbH*, Case 27/02 (20 January 2005), paragraphs 52 and 53.

189 *Petra Engler v. Janus Versand GmbH*, Case 27/02 (20 January 2005), paragraphs 55 and 56.

190 *Effer SpA v. Hans-Joachim Kantner*, Case 38/81 (4 March 1982), paragraph 7.

191 *Petra Engler v. Janus Versand GmbH*, Case 27/02 (20 January 2005), paragraph 48.

This concept of matters relating to a contract in the 1968 Brussels Convention and the 1988 Lugano Convention does also include the place of performance of payment or compensation (in matters relating to a contract).¹⁹² It has been established that article 5(1) must be interpreted as meaning that, in the case of a demand for payment made by a supplier to his customer under a contract of manufacture and supply, the place of performance of the obligation to pay the price is to be determined pursuant to the substantive law governing the obligation in dispute under the conflicts rules of the court seized.¹⁹³ In the 2000 Brussels Regulation it is specified that unless otherwise agreed, the place of performance of the obligation in question is where, under the contract, the goods/services were delivered/provided or should have been delivered/provided in a Member State for the sale of goods and provision of services respectively.

As provided above under private international law,¹⁹⁴ the applicable law in contracts will normally be the law of the Business. Even though it is determined that the place of performance is in a foreign state and that the Business may be sued there, it is still most likely that the private international law of that state will favour the law of the Business. This means that cross-border law enforcement under this forum will be possible only in those cases where a foreign court will find both that the case is closer connected to another law than the vendor's and that the obligation in question has to be performed in the country where the court is residing. The Business may, however, experience the inconvenience of litigating before a foreign court which may make errors in interpreting the law of the Business.

4.2.1.4.1. Electronically Delivered 'Goods' or Services

Normally, it is easy to establish the place of performance of goods, services and payment. When dealing with electronic commerce it may be difficult to determine the place of performance of an obligation to provide 'digital goods' or services electronically. The situation may for example be that the Business provides a piece of music or a weather report either by e-mail or by making it available for downloading on a website.

It may be argued that a contract concerning digital goods delivered online should not be perceived as a sales contract, but rather as a license which deals with the usage (rights) of the digital good rather than the delivery hereof. It may also seem reasonable to consider the online delivery of digital goods as a service.¹⁹⁵

192 See for example *Hassan Shenavai v. Klaus Kreischer*, Case 266/85 (15 January 1987) and *SPRL Arcado v. SA Haviland*, Case 9/87 (8 March 1988), paragraphs 12 and 13.

193 *Custom Made Commercial Ltd v. Stawa Metallbau GmbH*, Case 288/92 (29 June 1994), paragraph 29.

194 See 4.1.1.

195 Mankowski, Peter, *Jurisdiction and Enforcement in the Information Society*, Nielsen, Ruth, Jacobsen, Søren Sandfeld and Trzaskowski, Jan (editors), *EU Electronic Commerce Law*, DJØF Publishing, 2004, p. 124 at p. 127ff. with references.

Delivery can basically be where the Business uploads the product or where the User downloads it. An appealing approach will be to focus on the passing of the risk, which would have to be determined by national law. Such a solution would probably favour the state where the downloading is carried out. It seems, however, difficult to reach a clear conclusion on the matter.¹⁹⁶

The European Court of Justice has established that the performance forum, as a special jurisdiction, is not applicable where the place of performance of the obligation in question cannot be determined because it consists in an undertaking not to do something, which is not subject to any geographical limit and is therefore characterised by a multiplicity of places for its performance.¹⁹⁷ In such cases the proper jurisdiction is the courts of the defendant's domicile. It can be argued that the uncertainty of article 5(1) in connection with electronically delivered products similarly should render this special jurisdiction inapplicable. Such a solution would also be in accord with the overall purpose of encouraging legal certainty.

It has been established that jurisdictional rules, which derogate from the general principle, must be interpreted in such a way as to enable a normally well-informed defendant reasonably to predict before which courts, other than those of the state in which he is domiciled, he may be sued.¹⁹⁸

4.2.1.5. Certain Consumer Contracts¹⁹⁹

The 2000 Brussels Regulation provides for the consumer forum in matters relating to a contract concluded by a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession if the contract concerns a sale on credit or if the contract was concluded with a person who pursues commercial or professional activities in the state of the consumer's domicile or, by any means,

196 The question is touched upon in Bogdan, Michael, *Electronic Commerce: Problems of Jurisdiction and Applicable Law*, Fejø, Jens, Nielsen, Ruth and Riis, Thomas (editors), *Legal Aspects of Electronic Commerce*, DJØF Publishing, 2001, p. 75. The author seems to prefer the idea of categorizing downloading as sending which would mean that the place of performance is the place where the user is downloading the product (p. 78). A more thorough discussion is found in Mankowski, Peter, *Jurisdiction and Enforcement in the Information Society*, Nielsen, Ruth, Jakobsen, Søren Sandfeld and Trzaskowski, Jan (editors), *EU Electronic Commerce Law*, Djøf Publishing, 2004, p. 125 at p. 129ff. Notably without reaching a conclusion. The question is also mentioned in Kronke, Herbert, *Applicable Law in Torts and Contracts in Cyberspace, Internet Which Court Decides? Which Law Applies?*, *Law and Electronic Commerce*, Volume 5, Kluwer Law International, 1998, p. 65 at p. 79, however, without providing a usable solution.

197 *Besix SA v. Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & KG (Plafog)*. Case 256/00 (19 February 2002), paragraph 55.

198 *Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA*, Case 26/91 (17 June 1992), paragraph 18.

199 See in general Foss, Morten and Bygrave, Lee A., *International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law*, *International Journal of Law and Information Technology*, Vol. 8, No. 2, 2000, Øren, Joakim ST., *International Jurisdiction over Consumer Contracts in e-Europe*, *ICLQ* vol 52, July 2003, p. 665 and Debussère, Frederic, *International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?*, *International Journal of Law and Information Technology*, Vol. 10 No. 3, 2002.

directs such activities to that state, and the contract falls within the scope of such activities. The consumer definition and the inclusion of contract concerning sale on credit is the same as in the 1968 Brussels Convention and the 1988 Lugano Convention. These conventions furthermore include by article 13(1)(3) contracts which 1) in the state of the consumer's domicile were preceded by a specific invitation addressed to him or by advertising and 2) provided the consumer took the steps necessary for the conclusion of the contract in that state.

The similarities in the scope of the jurisdiction rules on consumer contracts in both the 1968 Brussels Convention and the 1988 Lugano Convention compared to the scope of the choice of law rules regarding consumer contract in the 1980 Rome Convention is, as described above, intentional.²⁰⁰ The scope of the corresponding jurisdiction rules in the 2000 Brussels Regulation is somewhat modified as accounted for above.

When the requirements of the jurisdiction rules regarding certain consumer contracts are met, the consumer can choose to sue the defendant in the courts where he is domiciled and the business may only sue him in these courts. The parties can as a starting point not agree to reduce the protection afforded by these jurisdiction rules.²⁰¹ The system is inspired by the concern to protect the consumer as the party deemed to be economically weaker and less experienced in legal matters than his professional co-contractor, and the consumer must not therefore be discouraged from suing by being compelled to bring his action before the courts in the contracting state in which the other party to the contract is domiciled.²⁰²

It has been argued that a vendor may refrain from entering into contracts with consumers in a specific jurisdiction if they do not wish to become subject to the jurisdiction of the consumer's state.²⁰³ It should, however, be mentioned, that this will not be true, where for example the website presents a binding offer²⁰⁴ under the law of the consumer.²⁰⁵ Under such circumstances, the Business is bound when the consumer

200 See for example Rudolf Gabriel, Case 96/00 (11 July 2002), paragraph 44.

201 The parties may depart these provisions by an agreement 1) which is entered into after the dispute has arisen, 2) which allows the consumer to bring proceedings in courts other than those indicated in this Section or 3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same contracting state, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.

202 Shearson Lehmann Hutton Inc v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen GmbH, Case 89/91 (19 January 1993), paragraph 18. See also Rudolf Gabriel, Case 96/00 (11 July 2002), paragraphs 38 and 39 with references. Recital 13 of the 2000 Brussels Regulation provides that in relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.

203 See Hertz, Ketilbjørn, Jurisdiction in Contract and Tort under the Brussels Convention, DJØF Publishing, Copenhagen, 1998, p. 205f. and Foss, Morten and Bygrave, Lee A., International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law, International Journal of Law and Information Technology, Vol. 8, No. 2, 2000, p. 99 at p. 120f.

204 See in general Ramberg, Christina Hultmark, The E-Commerce Directive and formation of contract in a comparative perspective, 26 European Law Review 429 (2001).

205 See Trzaskowski, Jan, Forbrugeraftaler og Reklamering på Internettet – Internationale Privat- og Procesretlige Aspekter, Ugeskrift for Retsvæsen, 1998, p. 285 at p. 289. See similarly Mankowski, Peter,

legally accepts the offer.

Article 13 of the 1968 Brussels Convention must be interpreted independently, by reference principally to the system and objectives of the convention, in order to ensure that it is fully effective.²⁰⁶ The specific rules of jurisdiction provided for in articles 13 to 15 are interpreted strictly and the interpretation must not go beyond the cases envisaged by the convention.²⁰⁷ Article 13 to 15 are applicable only in so far as the action relates generally to a contract concluded by a consumer for a purpose outside his trade or profession. The provision applies only in so far as, firstly, the claimant is a private final consumer not engaged in trade or professional activities, secondly, the legal proceedings relate to a concluded contract, between that consumer and the professional vendor for the sale of goods or services, which has given rise to reciprocal and interdependent obligations between the two parties and, thirdly, that the two conditions specifically set out in article 13(1), point 3(a) and 3(b) are fulfilled.²⁰⁸

In situations where a contract is concluded with a customer for a purpose which is only partly outside his trade or profession, the customer cannot rely on the protection afforded by the consumer forum, unless the part which concerns his professional sphere is insignificant.²⁰⁹ In accordance with normal principles concerning burden of proof, it is for the customer to prove that the commercial part is insignificant.²¹⁰ The national court must take all relevant factors into consideration in order to examine whether the vendor had reason to believe that the transaction was mainly commercial. For example whether the customer is using a commercial letterhead, a business-address for delivery or mention the possibility of deducting VAT.²¹¹ The use of a commercial e-mail signature may also incur in such an examination. A customer who concludes a contract with a view to pursuing a trade or profession, not at the present time but in the future, may also not be regarded as a consumer.²¹²

Another difference between the two jurisdiction regimes is that the reference to 'contracts concerning goods or services' in the 1968 Brussels Convention and the 1988 Lugano Convention was changed to 'in all other cases' in the 2000 Brussels Regulation. Presumably to emphasise that digital products are comprised which is questionable concerning the two older conventions.²¹³ The use of general terms

Jurisdiction and Enforcement in the Information Society, Nielsen, Ruth, Jacobsen, Søren Sandfeld and Trzaskowski, Jan (editors), EU Electronic Commerce Law, DJØF Publishing, 2004, p. 124 at p. 245ff.

206 Rudolf Gabriel, Case 96/00 (11 July 2002), paragraphs 37 with references.

207 Rudolf Gabriel, Case 96/00 (11 July 2002), paragraphs 43 with references.

208 Petra Engler v. Janus Versand GmbH, Case 27/02 (20 January 2005), paragraph 35 with references.

209 Johann Gruber v. Bay Wa AG, Case 464/01 (20. January 2005), paragraphs 40 and 41.

210 Johann Gruber v. Bay Wa AG, Case 464/01 (20. January 2005), paragraph 46.

211 Johann Gruber v. Bay Wa AG, Case 464/01 (20. January 2005), paragraphs 50 to 52.

212 Francesco Benincasa v. Dentalkit Srl, Case 269/95 (3 July 1997), paragraphs 18 and 19.

213 See for example Debusseré, Frederic, International Jurisdiction over E-Consumer Contracts in the

makes it clear that the consumer forum applies to all contracts, whether they relate to goods or to services, as long as they are consumer contracts.²¹⁴ It seems reasonable to assume that digital goods may also be included under the conventions.

It has been argued that a number of reasons, including in particular the amount usually at stake,²¹⁵ may prevent consumer from taking legal actions, even though the consumer have access to sue at his home court.²¹⁶ A common European small claims procedure is proposed by the European Parliament and Council.²¹⁷ According to the proposal, the intention is to simplify and speed up litigation concerning small claims, and reduce costs. The 'European Small Claims Procedure' is intended to be an alternative to procedures existing under national laws.²¹⁸ The proposed regulation applies to civil and commercial matters,²¹⁹ where the total value of a monetary or non-monetary claim excluding interests, expenses and outlays does not exceed 2000 Euro at the time the procedure is commenced. The procedure is not confined to consumer disputes.²²⁰ There are also possibilities in Alternative Dispute Resolution,²²¹ which is not dealt with in this thesis.

4.2.1.5.1. Advertising and Specific Invitation

Both the conventions and the regulation require commercial activities directed toward the state in which the consumer is domiciled. The main difference, as of interest for this thesis, between the two sets of rules is that the 2000 Brussels Regulation requires the contract to be concluded in connection with these commercial activities, whereas the 1968 Brussels Convention and 1988 Lugano Convention requires that the contract is concluded by steps taken in the state

European Union: Quid Novi Sub Sole?, International Journal of Law and Information Technology, Vol. 10 No. 3, 2002, p. 356f. The change in wording does, however, not necessarily mean that digital goods is not comprised in the 1968 Brussels Convention and the 1988 Lugano Convention.

214 Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(1999) 348 (15 July 1999), p. 16.

215 See, however, Hans-Hermann Mietz v. Intership Yachting Sneek BV, Case 99/96 (27 April 1999) concerning construction and delivery of a motor yacht.

216 Mankowski, Peter, Jurisdiction and Enforcement in the Information Society, Nielsen, Ruth, Jacobsen, Søren Sandfeld and Trzaskowski, Jan (editors), EU Electronic Commerce Law, DJØF Publishing, 2004, p. 124 at p. 142ff. See also proposal for a regulation establishing a European Small Claims Procedure, COM(2005) 87 (15 March 2005), p. 3.

217 Proposal for a regulation establishing a European Small Claims Procedure, COM(2005) 87 (15 March 2005).

218 Article 1.

219 The scope of application (civil and commercial matters) coincides with that of the 2000 Brussels Regulation, however, excluding employment law. See Commission staff working document, Annex to the Regulation of the European Parliament and of the Council establishing a European Small Claims Procedure - Comments on the specific articles of the proposal COM(2005) 87 (15 March 2005).

220 Article 2.

221 See for example Schiavetta, Susan, Does the Internet Occasion New Directions in Consumer Arbitration in the EU?, JILT 2004 (3) and Vasiljeva, Ksenija, 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online, European Law Journal, Volume 10 (January 2004), Issue 1, p. 123 at page 139ff.

where the consumer is domiciled.

The concept of advertising and specific invitation common to the 1968 Brussels Convention and 1980 Rome Convention covers all forms of advertising carried out in the contracting state in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means of catalogues sent specifically to that State, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman.²²² There seems to be no reason to exclude that also advertising on a website is to be included in this list.²²³

In the initial proposal for the 2000 Brussels Regulation, it is stated that 'the material scope of the provisions governing consumer contracts has been extended so as to offer consumers better protection, notably in the context of electronic commerce'.²²⁴ It is noticed in the proposal that the concept of activities pursued in or directed towards a Member State is designed to clarify that it 'applies to consumer contracts concluded via an interactive website accessible in the state of the consumer's domicile'.²²⁵ The notion 'interactive website' is not further defined, but the proposal states that 'the fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction'.²²⁶

In the amended proposal of the 2000 Brussels Regulation it is stated that 'the very existence of a consumer 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'.²²⁷ The Council and the Commission have stressed that the mere fact that an Internet site is accessible is not sufficient for article 15 of the 2000 Brussels Regulation 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.²²⁸

It is argued that it is circular to state that 1) a consumer contract is a clear indication for direction of commercial activity and 2) that direction of commercial activity is a necessary condition for the existence of a consumer contract covered

222 Rudolf Gabriel, Case 96/00 (11 July 2002), paragraph 44.

223 See for example Gillies, Lorna, A Review of the New Jurisdiction Rules for Electronic Consumer Contracts Within the European Union, JILT 2001(1), under 2.2.1.

224 See proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (1999) 348 (14 July 1999), p. 7.

225 Proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (1999) 348 (14 July 1999), p. 16.

226 Proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (1999) 348 (14 July 1999), p. 16.

227 Amended proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2000) 689 final, 26 October 2000, p. 6.

228 Statement on Articles 15 and 73, 14 December 2000, p. 5, <http://register.consilium.eu.int/pdf/en/00/st14/14139en0.pdf>.

by article 15.²²⁹ As mentioned above, the existence of a consumer contract is a prerequisite for applying the consumer forum. It does not seem problematic to consider the conclusion of a contract, within the scope of a website activity, to indicate that the commercial activity was in fact directed to that state. It is solely an indication, which presumable may be overruled in cases where a contract is entered without the website being directed towards the state of the consumer.

There has in general been discussions on the notions 'interactive website', 'passive website' and 'active website'. The use of the term 'interactive websites' and the distinction between active and passive websites may evoke associations to the American jurisdiction approach concerning website activities.²³⁰

*US courts have roughly speaking grouped websites into 'active websites' (allowing for online contracting and distribution of the product purchased), 'interactive websites' (online contracting without online delivery) and 'passive websites' (providing solely information about the business, its products etc.).*²³¹

A number of technical arguments can be made against importing the American concept into the interpretation of the consumer forum,²³² and such an approach seems to be rejected by the Commission in connection to a proposal made by the Parliament in the legislative process. The Commission found that such an 'essentially American concept' is 'quite foreign to the approach taken by the Regulation'.²³³

Being aware of the different contexts,²³⁴ the Commission's guidelines on vertical restraints,²³⁵ within the area of competition law, may provide guidance for determining whether a website is active or passive in this context. The guidelines

229 See Debusseré, Frederic, International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?, International Journal of Law and Information Technology, Vol. 10 No. 3, 2002, p. 359ff. with references. The author argues that point of view of the Commission should not be supported.

230 See Debusseré, Frederic, International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?, International Journal of Law and Information Technology, Vol. 10 No. 3, 2002, p. 357f and Øren, Joakim S. T., International Jurisdiction over Consumer Contracts in e-Europe, ICLQ vol 52, July 2003, p. 665 at p. 684.

231 Debusseré, Frederic, International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?, International Journal of Law and Information Technology, Vol. 10 No. 3, 2002, p. 347 with references. See also 5.1.2.3.

232 Mankowski, Peter, Jurisdiction and Enforcement in the Information Society, Nielsen, Ruth, Jakobsen, Søren Sandfeld and Trzaskowski, Jan (editors), EU Electronic Commerce Law, Djøf Publishing, 2004, p. 125 at p. 136ff.

233 Amended proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2000) 689 final, 26 October 2000, p. 5f.

234 Both contexts can be said to concern consumer protection, but where the consumer forum concerns the protection of a specific consumer in a specific case, the guidelines on vertical restraints concerns effective markets. In the former case the consumer protection will be improved by a more gentle construction of an 'active website', whereas consumer protection increases by a stricter construction in the latter context. See also Mankowski, Peter, Jurisdiction and Enforcement in the Information Society, Nielsen, Ruth, Jakobsen, Søren Sandfeld and Trzaskowski, Jan (editors), EU Electronic Commerce Law, Djøf Publishing, 2004, p. 125 at p. 135f.

235 Commission Notice on Guidelines on Vertical Restraints (2000/C 291/01). See in particular recital 51.

provide that the Internet should not in general be considered a form of active sales since it is a reasonable way to reach every customer. If, for example, a customer visits the web site of a distributor and contacts the distributor and if such contact leads to a sale, including delivery, then it is considered passive selling. It is further noted that 'the language used on the website or in the communication plays normally no role in that respect. Insofar as a website is not specifically targeted at customers primarily inside the territory or customer group exclusively allocated to another distributor, for instance with the use of banners or links in pages of providers specifically available to these exclusively allocated customers, the website is not considered a form of active selling'.²³⁶

It seems reasonable to assume that the notion of active and passive websites, in this context, means whether a commercial website activity is actively directed towards a state²³⁷ or whether it is solely (passively) available in the state in question.²³⁸ The use of 'interactive website' must be understood as whether it is possible to interact, via the website, with the entity behind the website. This does not necessarily have a bearing on whether the website is active or passive. This interpretation is not only in line with the use of active and passive websites in the guidelines on vertical restraints, but does also eliminate any confusion between the different preparatory works and official comments on article 15 of the 2000 Brussels Regulation.

It has been questioned whether there on this subject has been a substantive change between the two jurisdiction regimes, provided it is assumed that a website activity may be regarded as advertising under art. 13(1)(3) of the 1968 Brussels Convention (and similar for the 1988 Lugano Convention).²³⁹ In this situation, both jurisdiction regimes leave an unsolved and maybe slightly dissimilar construction of when the marketing material of a website can be considered to be directed toward a specific state.

4.2.1.5.2. Steps Necessary for the Conclusion of the Contract

The 1968 Brussels Convention and the 1988 Lugano Convention have a further

236 Commission Notice on Guidelines on Vertical Restraints (2000/C 291/01), recital 51. It is further stated that unsolicited e-mails sent to individual customers or specific customer groups are considered active selling.

237 See also Bainbridge, David, Trademark Infringement, The Internet, and Jurisdiction, JILT 2003(1), under 2 where it is, notably in another context, said that whether a website goes beyond being merely passive, the question is whether the owner seeks business in a particular jurisdiction.

238 See similarly Mankowski, Peter, Jurisdiction and Enforcement in the Information Society, Nielsen, Ruth, Jakobsen, Søren Sandfeld and Trzaskowski, Jan (editors), EU Electronic Commerce Law, Djøf Publishing, 2004, p. 125 at p. 138f.

239 Mankowski, Peter, Jurisdiction and Enforcement in the Information Society, Nielsen, Ruth, Jakobsen, Søren Sandfeld and Trzaskowski, Jan (editors), EU Electronic Commerce Law, Djøf Publishing, 2004, p. 125 at p. 135, 'no material changes have been implemented, but only slight alterations and clarifications in the wording'. See for a comparison Vasiljeva, Ksenija, 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online, European Law Journal, Volume 10 (January 2004), Issue 1, Page 123.

requirement that is removed from the 2000 Brussels Regulation. In the two conventions, it is a requirement that 'the consumer took in that State the steps necessary for the conclusion of the contract'.²⁴⁰ The expression refers to any document written or any other step whatever taken by the consumer in the state in which he is domiciled and which expresses his wish to take up the invitation made by the professional.²⁴¹ The word 'steps' includes *inter alia* writing or any action taken in consequence of an offer or advertisement.²⁴² This requirement is to be understood literally in the sense that the consumer physically must be present in his own country when taking those steps.²⁴³ By removing the requirement in the 2000 Brussels Regulation the scope of application also concerns consumer contracts entered by consumers who are outside the state in which they are domiciled as far as the purchase is within the scope of the commercial activities directed towards the state in which the consumer is domiciled.²⁴⁴

4.2.1.5.3. Contracts, Consumer Contract or Tort?

The relationship between the consumer forum and those of tort (article 5(3)) and contracts in general (article 5(1)) was discussed in two cases, *Gabriel* and *Engler*,²⁴⁵ in connection to an Austrian rule which provides that undertakings which send prize notifications or other similar communications to specific consumers, and by the wording of those communications give the impression that a consumer has won a particular prize, must give that prize to the consumer.²⁴⁶ The particular prize may also be claimed in legal proceedings. This rule is an illustrative example of unfair competition (misleading advertising) which is sanctioned by establishing a rights for private persons. Such a practice could also be sanctioned through pecuniary penalties or damages.

In the first case (*Gabriel*), the European Court of Justice established that judicial proceedings by which a consumer seeks an order in his home court, requiring a mail order company, established in another contracting state, to send to him a prize which he has apparently won, must be capable of being brought before the same court as that which has jurisdiction to deal with the contract concluded by that consumer.²⁴⁷ In this case, the consumer made a purchase with the business as

240 2000 Brussels Regulation, article 13.

241 Rudolf Gabriel, case 96/00 (11 July 2002), paragraph 45.

242 Giuliano-Lagarde Report, p. 24. The Giuliano-Lagarde Report concerns the 1980 Rome Convention, but the consumer contract definition of this convention is purposefully worded similar to the definition in the 1968 Brussels Convention (see p. 23 of the Giuliano-Lagarde Report).

243 See Rudolf Gabriel, case 96/00 (11 July 2002), paragraphs 52 and 53.

244 'The philosophy of new Article 15 is that the co-contractor creates the necessary link when directing his activities towards the consumer's state'. See COM(1999) 348 final, 14. July 1999, p. 16.

245 Rudolf Gabriel, case 96/00 (11 July 2002) and *Petra Engler v. Janus Versand GmbH*, Case 27/02 (20 January 2005).

246 See Rudolf Gabriel, case 96/00 (11 July 2002) and *Petra Engler v. Janus Versand GmbH*, Case 27/02 (20 January 2005).

247 Rudolf Gabriel, case 96/00 (11 July 2002), paragraph 55.

required by it in order to claim the alleged prize. The court emphasised that the consumer and the professional vendor were indubitably linked contractually once the consumer had ordered goods offered by the business, thereby demonstrating his acceptance of the offer, and therefore the intention between the two parties gave rise to reciprocal and interdependent obligations within the framework of a contract which has specifically one of the objects described in article 13(1)(3).²⁴⁸

The court emphasised that requirement to carry out a purchase made an indissociable link between the promised financial benefit and the purchase, so that a different treatment of those to relations could not be accepted.²⁴⁹ The European Court of Justice finds it essential to avoid, so far as possible, creating a situation in which a number of courts have jurisdiction in respect of one and the same contract.²⁵⁰ That need is all the more compelling in cases concerning a party deemed to be weak, such as a consumer.²⁵¹

In the second case (Engler), the consumer did not, and was not required to, make any purchase, but he solely claimed the prize. The misleading statement from the business was sent together with a catalogue of goods sold by the business, whereby pre-contractual relations were established between the business and the consumer. The European Court of Justice firstly examined the applicability of article 13, since this article constitutes *lex specialis* in relation to article 5(1) and because the tort forum concerns actions which are defined as not being related to a contract within the meaning of article 5(1).²⁵² Since the business's initiative was not followed by the conclusion of a contract between the consumer and the business, which has given rise to reciprocal and interdependent obligations between the two parties, the action could not be regarded as being contractual in nature for the purposes of article 13(1)(3) of the 1968 Brussels Convention, since it requires a contract to be concluded.²⁵³

The court found that even though the legal action brought in the main proceedings was not contractual in nature for the purposes of article 13(1), it does not in itself prevent that action from relating to a contract for the purposes of article 5(1),²⁵⁴ since the concept 'matters relating to a contract' as described above, does not require the conclusion of a contract and may be applied to hear disputes concerning the existence of a contractual obligation. The court found the arrangement to be a matter relating to a contract within the meaning of article 5(1).

248 Rudolf Gabriel, Case 96/00 (11 July 2002), paragraphs 48 and 49.

249 Rudolf Gabriel, Case 96/00 (11 July 2002), paragraph 54 and 56.

250 *Besix SA v. Wasserreinigungsbau Alfred Kretzschmar GmbH & Co. KG (WABAG) and Planungs- und Forschungsgesellschaft Dipl. Ing. W. Kretzschmar GmbH & KG (Plafog)*, case 256/00 (19 February 2002), paragraph 27 with references.

251 Rudolf Gabriel, Case 96/00 (11 July 2002), paragraph 58.

252 *Petra Engler v. Janus Versand GmbH*, Case 27/02 (20 January 2005), paragraph 29 and 32. See below concerning the tort forum.

253 *Petra Engler v. Janus Versand GmbH*, Case 27/02 (20 January 2005), paragraphs 36 to 38.

254 *Petra Engler v. Janus Versand GmbH*, Case 27/02 (20 January 2005), paragraph 49.

The mere fact that the professional vendor did not genuinely intend to award the prize announced to the addressee of his letter was found to be irrelevant in that respect.²⁵⁵

It is clear from the two mentioned cases, that the consumer forum can be invoked by the consumer in proceedings concerning civil enforcement of unfair competition law, insofar as a contract was concluded between a consumer and the Business. Article 5(1) may apply even if a contract has not been concluded provided that the unfair competition activity can be regarded as a matter relating to a contract. Under these circumstances, the consumer can sue in the courts for the place of performance of the obligation in question which is not unlikely to be in the consumer's forum.

It does, however, make a significant difference whether the forum is based on article 13 or 5(1), since the consumer is not likely to benefit from article 5 of the 1980 Rome Convention, which designates the consumer's substantive law, and which is worded similarly to article 13 of the 1968 Brussels Convention. It cannot be excluded that the contacts approach under such circumstances, keeping in mind the consumer's weak position, would be applied to designate the consumer's law. In Engler, the court emphasised that the business exploited a loophole to prevent the application of the consumer forum without drawing the attention of the customer to this.²⁵⁶ Another difference between the two jurisdiction rules is that the access for the parties to choose a forum is substantially wider under article 5 (1).²⁵⁷

4.2.1.6. *Tort*²⁵⁸

Article 5(3) of the 2000 Brussels Regulation, the 1968 Brussels Convention and the 1988 Lugano Convention provides that a person domiciled in a Member State / contracting state may be sued in matters relating to tort, delict or quasi-delict in another Member State / contracting state in the courts for the place where the harmful event occurred [or may occur].²⁵⁹ As a special jurisdiction, the plaintiff may opt to choose this forum, which is introduced with regard to the existence, in certain clearly defined situations, of a particularly close connecting factor between a dispute and the court which may be called upon to hear it, with a view to the

255 Petra Engler v. Janus Versand GmbH, Case 27/02 (20 January 2005), paragraph 59.

256 Petra Engler v. Janus Versand GmbH, Case 27/02 (20 January 2005), paragraph 54.

257 See 5.3.2.

258 See in general Wadlow, Christopher, *Enforcement of Intellectual Property in European and International Law*, Sweet & Maxwell, 1998, p. 90.

259 The text in brackets is only found in the 2000 Brussels Regulation, but the difference does only represent a codification of case law concerning the 1968 Brussels Convention. See for example *Verein für Konsumenteninformation vs. Karl Heinz Henkel*, ECJ Case 167/00 (1 October 2002). The case is examined below. See also Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 117ff.

efficacious conduct of the proceedings.²⁶⁰

4.2.1.6.1. Matters Relating to Tort, Delict or Quasi-Delict

The concept of 'matters relating to tort, delict or quasi-delict' is an autonomous concept that covers all actions which seek to establish the liability of a defendant and which is not 'a matter related a contract' as defined by article 5(1).²⁶¹ The concept is thus not be interpreted simply as referring to the national law of one or other of the states concerned. The expression 'matters relating to contract' within the meaning of article 5(1) does not cover a situation in which there is no obligation freely assumed by one party towards another.²⁶² This means that, for example, claims based upon rules on good faith in pre-contractual negotiations is a matter relating to tort, delict or quasi-delict within the meaning of article 5(3).²⁶³

Article 5(3) applies also to jurisdiction in matters relating to unfair commercial practices ('unfair competition').²⁶⁴ In the Karl Heinz Henkel case,²⁶⁵ it was established that a non-profit-making, Austrian-based consumer organisation, Verein für Konsumenteninformation, could use article 5(3) of the 1968 Brussels Convention to seek an injunction against a German national's business activity carried out from Germany on the Austrian market. The court established that a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals must be interpreted as a matter relating to tort, delict or quasi-delict within the meaning of article 5(3) of the 1968 Brussels Convention. This is made clear in the 2000 Brussels Regulation by the insertion of 'or may occur' in article 5(3). In its ruling, the court emphasised that the 2000 Brussels Regulation, while not applicable to the main proceedings, is such as to confirm the interpretation that article 5(3) of the 1968 Brussels Convention does not presuppose the existence of damage.

4.2.1.6.2. Distance Delicts

It was established by the European court of Justice in connection with the 1968

260 Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA, Case 21/76 (30 November 1976), paragraphs 10 and 11.

261 Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co. and others, Case 189/87 (27 September 1988), paragraphs 14 to 18.

262 Jakob Handte & Co. GmbH v. Traitements Mécano-chimiques des Surfaces SA, Case 26/91 (17 June 1992), paragraph 15.

263 Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS). Case 334/00 (17 September 2002). Paragraph 22 and 23 and 27 with references.

264 See Mankowski, Peter, Jurisdiction and Enforcement in the Information Society, Nielsen, Ruth, Jacobsen, Søren Sandfeld and Trzaskowski, Jan (editors), EU Electronic Commerce Law, DJØF Publishing, 2004, p. 124 at p. 153ff.

265 Verein für Konsumenteninformation vs. Karl Heinz Henkel, Case 167/00 (1 October 2002).

Brussels Convention that in situations where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical,²⁶⁶ the expression 'place where the harmful event occurred', in article 5(3) must be understood as being intended to cover both 'the place where the damage occurred' and 'the place of the event giving rise to the damage' (the two-headed 'Bier Doctrine').²⁶⁷ This means that the defendant may be sued in either place, at the option of the plaintiff.

The place of 'the event giving rise to the damage' does not necessarily coincide with the domicile of the person liable,²⁶⁸ and the 'place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where his assets are concentrated by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another contracting state.²⁶⁹

The tort forum cannot be applied in cases concerning indirect economic loss. The term 'place where the harmful event occurred' is not to be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere,²⁷⁰ and it does not cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another contracting state.²⁷¹ The court has established that article 5(3) cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets.²⁷² It does thus not matter whether the indirect economic loss concerns a plaintiff suing at his domicile for (direct) loss suffered (only) in another state or in situations where the plaintiff is suing in the courts of his domicile for harm indirectly arising from damages suffered by a third party in another state.

In the Fiona Shevill case,²⁷³ it was established that the Bier doctrine not only applies in the case of loss or damage relating to physical or pecuniary harm, but also to injury to the reputation and good name of a natural or legal person due to a

266 Inter alia with atmospheric or water pollution beyond the frontiers of a state.

267 Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA, Case 21/76 (30 November 1976). See especially paragraphs 14 to 19.

268 Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA, Case 21/76 (30 November 1976). See especially paragraphs 21, 24 and 25.

269 See Rudolf Kronhofer v. Marianne Maier and Others, Case 168/02 (10 June 2004), paragraph 18, 19 and 21.

270 See Antonio Marinari v. Lloyds Bank plc and Zubaidi Trading Company, Case 364/93 (19 September 1995), paragraph 14.

271 Antonio Marinari v. Lloyds Bank plc and Zubaidi Trading Company, Case 364/93 (9 September 1995), paragraph 21.

272 Dumez France SA and Tracoba SARL v. Hessische Landesbank and others, Case 220/88 (11 January 1990), paragraph 22.

273 See Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA., Case 68/93 (7 March 1995), paragraphs 22 to 24 with references.

defamatory publication. The court established in that case that the place of the event giving rise to the damage, in the case of a libel by a newspaper article distributed in several contracting states, can only be the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation.²⁷⁴ The court thus seems to attach crucial importance to the domicile of the natural or legal person responsible for the harmful act, without excluding the possibility that the place of the event giving rise to the damage can be different from that domicile.²⁷⁵

This observation suggests that the place of technical equipment and other facilities necessary for carrying out the harmful act should be disregarded. This is also in accordance with article 2(c) of the 2000 E-Commerce Directive which in the definition of 'established service provider' provides that the presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider. It can, however, not be excluded that the place of the event giving rise to the damage may be different from the domicile especially in situations where a private person uploads harmful material to the Internet from another place than his or hers domicile.

With regard to the first head of the Bier Doctrine, the court established in the Fiona Shevill case that the place where the damage occurred is the place where the event giving rise to the damage, entailing tortious, delictual or quasi-delictual liability, produced its harmful effects upon the victim. This place is notably not necessarily the domicile of the victim.²⁷⁶ In the case of an international libel through the press, the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, when the victim is known in those places.²⁷⁷ Applying these observations generally to harmful content on the Internet, it is natural to assume that the place where the damage occurred is where the information is being received and/or promoted to the extent the information is causing harm there. The court further established that the criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim of the defamation is not governed by the convention but by the substantive law determined by the national conflict of

274 The advocate general seem to focus on the place where the article was printed. See Opinion of Mr Advocate General Darmon delivered on 10 January 1995. Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA, Case 68/93, paragraph 11.

275 Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA., Case 68/93 (7 March 1995), paragraphs 24 to 26.

276 The advocate general also seems to focus on the place where the article was printed. See Opinion of Mr Advocate General Darmon delivered on 10 January 1995. Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA, Case 68/93, paragraph 45 with references.

277 Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA., Case 68/93 (7 March 1995), paragraphs 28 and 29.

laws rules of the court seized, provided that the effectiveness of the convention is not thereby impaired.²⁷⁸

The court confined in the Fiona Shevill case the Bier doctrine so as to establish that the court of the place where the publisher of the defamatory publication is established has jurisdiction to hear the action for damages for all the harm caused by the unlawful act, whereas the courts of each contracting state in which the defamatory publication was distributed and in which the victim claims to have suffered injury to her reputation have jurisdiction to rule on the injury to the victim's reputation caused in that state.

The court emphasised that the courts of each contracting state in which the victim claims to have suffered injury to her reputation are territorially the best place to assess the libel committed in that State and to determine the extent of the corresponding damage. Recognising the disadvantages of having different courts ruling on various aspects of the same dispute, the court reminded of the plaintiff's option of bringing his entire claim before the courts either of the defendant's domicile or of the place where the publisher of the defamatory publication is established.²⁷⁹

*The advocate general seems in his opinion on the Fiona Shevill case to attach importance to the risk of forum shopping and emphasises that the generosity of English courts could make English courts the natural choice of forum in such matters. The advocate general noted that the need to prevent any risk of forum shopping is particularly great when the subject matter of the dispute is an area in which the substantive law applying in the contracting states is not harmonised and gives rise to solutions which are markedly divergent between states which in particularly is the case of defamation laws. The advocate general also noted that the solution later adopted by the court confers competence on the courts which are best qualified to assess the damage arising in their locality.*²⁸⁰

It is not clear to what extent the Fiona Shevill ruling applies to other media and to other claims. The ruling offers no grounds for assuming that the situation should be treated differently if the libel was published on the Internet. It is more uncertain whether the limitation on the court, in the state in which the victim claims to have suffered injury to her reputation, only applies to libel.²⁸¹ It may be argued that courts of each contracting state in many other situations are territorially the best

278 See Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA., Case 68/93 (7 March 1995), paragraph 41. Because of the general application of the *lex loci delicti*, the designated law would usually but not necessarily be *lex fori*.

279 Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA., Case 68/93 (7 March 1995), paragraphs 25 and 30 to 32.

280 Opinion of Mr Advocate General Darmon delivered on 10 January 1995. Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA, Case 68/93, paragraphs 17, 19, 56 and 57.

281 As suggested in the court's conclusion (paragraph 33). The advocate general seem to focus on the nature of the claim as non-material or non-pecuniary damage.

place to assess the harmful act and the corresponding damage.²⁸² The special Human Rights features (freedom of expression) connected to libel (and defamation in general) are not mentioned in the ruling. The advocate general noted that the special nature of non-material or non-pecuniary damage is difficult to identify, assess and compensate. The advocate general further mentioned that similar damage is recognised in certain areas of intellectual property law, such as for example trademark law.²⁸³ Possible considerations concerning forum shopping or the protection against damages under common law would not suggest that the Shevill delimitation should not apply to other claims (harmonised or not).

It cannot be excluded that the court purposely kept this question open in order to retain the possibility to depart from the principles and in order to pursue sound administration of justice and efficacious conduct of proceedings. At the current stage, it must be assumed that the Fiona Shevill principles may be applied in other situations, but that a clear answer to the scope of the limitations on the second head of the Bier Doctrine cannot be derived from the case itself.

4.2.1.7. Civil Claims Under Criminal Proceedings

Under ancillary proceedings, it is possible to include civil claims under criminal proceedings. According to article 5(4) of the acts constituting the Brussels/Lugano System, a person may be sued, in civil claims for damages or restitution, in the court seized of criminal proceedings which are based on an act giving rise to criminal proceedings and provided that the court has jurisdiction under its own law to entertain civil proceedings. A civil claim can thus always be brought, whatever the domicile of the defendant, in the criminal court having jurisdiction to entertain the criminal proceedings even if the place where the court sits is not the same as where the harmful event occurred.²⁸⁴ This is of particular interest in connection to tort claims added under criminal proceedings in connection to the infringement of for example unfair competition law.

*It follows from article II of the protocol annexed to the 1968 Brussels Convention that persons domiciled in a contracting state who are being prosecuted in the criminal courts of another contracting state of which they are not nationals, for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person. The court seized of the matter may, however, order appearance in person, but a judgment given in such civil action where the defendant does not appear in court and without having had the opportunity to arrange for his defence need not be recognised or enforced in other contracting states.*²⁸⁵

282 See similarly Wadlow, Christopher, *Enforcement of Intellectual Property in European and International Law*, Sweet & Maxwell, 1998, p. 98.

283 Opinion of Mr Advocate General Darmon delivered on 10 January 1995. *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA*, Case 68/93, paragraph 9.

284 Jenard Report on Convention and Protocol, C59/1979, p. 26.

285 See similar in article 61 of the 2000 Brussels Regulation.

An 'offence which was not intentionally committed' is an independent concept which means any offence which does not require, either expressly or as appears from the nature of the offence defined, the existence of intent on the part of the accused to commit the punishable act or omission. The accused's right to be defended without appearing in person applies in all criminal proceedings concerning offences which were not intentionally committed, in which the accused's liability at civil law, arising from the elements of the offence for which he is being prosecuted, is in question or on which such liability might subsequently be based.²⁸⁶

As provided in the previous chapter,²⁸⁷ the requirements to jurisdiction in international criminal cases are relatively vague. This is not a problem in practice since there, in general, is a lack of international recognition of criminal judgments, except for situations covered by the 2005 Framework Decision on Financial Penalties. This forum for civil claims under criminal proceedings does provide an opportunity to get the outcome of the civil part of an ancillary procedure enforced in another state. It may be argued that the national jurisdiction in criminal law may not depart significantly from what can be expected from the tort forum as presented above.²⁸⁸

In the Krombach case,²⁸⁹ a German national was, before a French court, found guilty of violence resulting in involuntary manslaughter. The act had taken place in Germany, but the French courts declared that it had jurisdiction by virtue of the fact that the victim was a French national. The European Court of Justice established in connection with the enforcement in Germany of the civil compensation awarded to the bereaved, that the court of the state in which enforcement is sought cannot take account for the purposes of the public policy clause in article 27 of the 1968 Brussels Convention, of the fact that jurisdiction was based on the nationality of the victim of an offence.²⁹⁰ This makes it clear that the access to objection is limited, even though the (criminal) jurisdiction is based on a principle, which would be deemed exorbitant if used in civil proceedings.

4.2.1.8. Recognition and Enforcement²⁹¹

Chapter/title III of the relevant acts of the Brussels/Lugano System deals with recognition and enforcement of judgments given by a court or tribunal of a Member State / contracting state. For the purposes of the Brussels/Lugano System, a 'judgment' means any judgment given by a court or tribunal of a contracting state,

286 Criminal proceedings against Siegfried Ewald Rinkau, Case 157/80 (26 May 1981). See especially paragraphs 11, 16 and 21.

287 See 3.2.1.

288 See 4.2.1.6.

289 Dieter Krombach v. André Bamberski, Case 7/98 (28 March 2000).

290 Dieter Krombach v. André Bamberski, Case 7/98 (28 March 2000), paragraph 34.

291 See in general Lookofsky, Joseph and Hertz, Ketilbjørn, Transnational Litigation and Commercial Arbitration, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 697ff.

whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.²⁹²

The focus in this part is to discuss the principle of recognition and enforcement within the Brussels/Lugano System, but not on the more practical measures to be taken in order to achieve recognition and enforcement. The examination does not provide an exhaustive overview of possible objections, including in particular those relating to competing cases and the serving of documents.²⁹³

A judgment rendered in a Member State / contracting state is to be recognised in the other Member States / contracting states without any special procedure being required.²⁹⁴ A judgment given in a contracting state and enforceable in that state must be enforced in another contracting state when, on the application of any interested party, it has been declared enforceable there.²⁹⁵ The foreign judgment may under no circumstances be reviewed as to its substance.²⁹⁶

Recognition of a judgment may be refused if recognition is [manifestly] contrary to public policy in the state in which recognition is sought.²⁹⁷ There are other possible grounds for refusal than public policy.²⁹⁸ A judgment is not to be recognised if it was entered in conflict with the jurisdiction provisions set out in title/chapter II of the respective acts. In its examination of the grounds of jurisdiction, the court or authority applied to is bound by the findings of fact on which the court of the state of origin based its jurisdiction, and the court of the state in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of the state of origin.²⁹⁹

The application for a declaration of enforceability must be submitted to the court or competent authority in the state where enforcement is sought.³⁰⁰ Under the 2000 Brussels Regulation, the judgment must be declared enforceable immediately

292 Article 32 of the 2000 Brussels Regulation and article 25 of the 1968 Brussels Convention / 1988 Lugano Convention.

293 See in general chapter/title III of the relevant acts of the Brussels/Lugano System.

294 Article 33(1) of the 2000 Brussels Regulation and article 26(1) of the 1968 Brussels Convention / 1988 Lugano Convention.

295 Article 38 of the 2000 Brussels Regulation and article 31 of the 1968 Brussels Convention / 1988 Lugano Convention.

296 Articles 36 and 45(2) of the 2000 Brussels Regulation and articles 29 and 35 of the 1968 Brussels Convention / 1988 Lugano Convention.

297 Article 34(1)(1) of the 2000 Brussels Regulation and article 27(1)(1) of the 1968 Brussels Convention / 1988 Lugano Convention. The text in brackets relates only to the 2000 Brussels Regulation.

298 In particular 1) where the judgment is given in default of appearance, if the defendant was not properly served with the necessary documents, 2) if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought and 3) if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties.

299 Dieter Krombach v. André Bamberski, Case 7/98 (28 March 2000), paragraph 36.

300 Article 39 of the 2000 Brussels Regulation and article 32 of the 1968 Brussels Convention / 1988 Lugano Convention

on completion of certain formalities³⁰¹ and without any review. The party against whom enforcement is sought may not at this stage of the proceedings be entitled to make any submissions on the application.³⁰² Under the 1968 Brussels Convention and the 1988 Lugano Convention, the court applied to must give its decision without delay, and the application may be refused (only) for one of the reasons specified above under recognition.³⁰³

Under the 2000 Brussels Regulation, either party may appeal the decision on the application for a declaration of enforceability,³⁰⁴ and under the 1968 Brussels Convention and the 1988 Lugano Convention, the party against whom enforcement is sought may appeal against the decision provided enforcement is authorised.³⁰⁵ The court, with which an appeal is lodged, is to refuse or revoke a declaration of enforceability only on one of the grounds specified above under recognition.³⁰⁶

4.2.1.8.1. Public Policy

The European Court of Justice has established that article 27 of the 1968 Brussels Convention must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the convention and the clause on public policy may be relied on only in exceptional cases.³⁰⁷ The clause may notably not be used as a means of refusing recognition on the ground that the rendering court have made an international choice of law, which is different from the choice of law that the recognising court would have applied if it was seized to hear the case.³⁰⁸

The court of the state in which enforcement is sought cannot refuse recognition of a foreign judgment solely on the ground that it considers that national or Community law was misapplied in that decision unless it constitutes a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought.³⁰⁹ In a particular case, it was found by the European Court of Justice that preventing traders from certain business activities, on grounds of

301 See article 53 of the 2000 Brussels Regulation.

302 2000 Brussels Regulation, article 41.

303 2000 Brussels Regulation, article 34 with reference to articles 27 and 28.

304 2000 Brussels Regulation, article 43.

305 2000 Brussels Regulation, article 36.

306 2000 Brussels Regulation, article 45(1). See also articles 34 and 35 of the 2000 Brussels Regulation and articles 27 and 28 of the 1968 Brussels Convention and the 1988 Lugano Convention.

307 *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, Case 38/98 (11 May 2000), paragraph 26 with references. See also Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 703.

308 Jenard Report on Convention and Protocol, C 59 1979, p. 44. See also p. 20f. (on article 4).

309 *Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento*, Case 38/98 (11 May 2000), paragraph 33.

intellectual property right to body parts for cars, cannot be considered to be contrary to public policy.³¹⁰ The test of public policy may not be applied to the rules relating to jurisdiction, which means that the public policy of the state in which enforcement is sought cannot be raised as a bar to recognition or enforcement of a judgment given in another contracting state solely on the ground that the court of origin failed to comply with the rules of the convention which relate to jurisdiction.³¹¹

Public policy may, for example, be invoked if a judgment has been obtained by fraud.³¹² Recourse to the public policy clause is possible where the guarantees laid down in the legislation of the state of origin and in the convention itself have been insufficient to protect the defendant from a manifest breach of his right to defend himself before the court of origin, as recognised by the European Court of Human Rights.³¹³

Human rights and fundamental freedoms form an integral part of the general principles of law whose observance the European Court of Justice ensures. The court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.³¹⁴ The 1950 European Convention on Human Rights is of fundamental importance.³¹⁵ This convention comprises inter alia provisions of fair trial, which will not be elaborated on further in this thesis. A state is entitled to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right.³¹⁶ But also the provision on freedom of expression as discussed in chapter 2³¹⁷ may be applied as to refuse recognition on grounds of public policy.

It was established by the European Court of Justice that the contracting states remain free in principle to determine according to their own conception what public policy requires, subject to review by the European Court of Justice.³¹⁸ Recourse to the public policy clause can be envisaged only where recognition or enforcement of the foreign judgment would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought, inasmuch

310 Régie nationale des usines Renault SA v. Maxicar SpA and Orazio Formento, Case 38/98 (11 May 2000), paragraph 34.

311 Dieter Krombach v. André Bamberski, Case 7/98 (28 March 2000), paragraph 32.

312 Schlosser Report on Convention and Protocol, C 59 1979, p. 128, paragraph 192.

313 Dieter Krombach v. André Bamberski, Case 7/98 (28 March 2000), paragraph 44.

314 Opinion of the Court 2/94 (28 March 1996) on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. European Court reports 1996 Page I-01759.

315 See Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary, Case 222/84 (15 May 1986), paragraph 18 with reference to declaration of 5 April 1997 (Official Journal, C 103, p.1). See also article 6(2) of the Treaty of the European Union.

316 Dieter Krombach v. André Bamberski, Case 7/98 (28 March 2000), paragraph 40.

317 See 2.7.

318 Dieter Krombach v. André Bamberski, Case 7/98 (28 March 2000), paragraphs 22 and 23.

as it infringes a fundamental principle. In order to observe the prohibition of any review of the foreign judgment as to its substance, the infringement must constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought.³¹⁹

4.3. Conclusion

It is clear from the examination above that the possibilities in traditional cross-border law enforcement is much better in civil and commercial matters than in criminal and administrative matters. This is mainly due to willingness to apply foreign law in the Business's home court and the system of mutual recognition of judgments inherent in the Brussels/Lugano System.

By suing the Business in its home court, there are no problems with enforcement of the judgment, but it requires that that court is willing to apply foreign law in the dispute. This is most likely to happen in cases relating to tort and consumer contracts, whereas other contracts, under normal circumstances, will be treated under the law of the state in which the Business is established. In order to apply foreign law, the case must be linked to a foreign jurisdiction. That can be the case if the Business is actively pursuing marketing activities in other states and is entering contracts with users in those states. The most important choice of law rules in this context is the choice of *lex loci delicti* in tort and the law of the consumer in certain consumer contracts. As regards other contracts, the starting point is that the law of the Business is applied. This starting point may, however, be departed from if the contract is closer connected to another law.

If the Business is sued in a foreign court, enforcement is possible if the court is part of the Brussels/Lugano System or the state in which the Business is established recognises foreign judgment under national law. The possibility of denying recognition, including relying on public policy concerns, is rather limited under the Brussels/Lugano System. The Brussels/Lugano System provides the plaintiff with the possibility, in certain situations, to sue the Business in the plaintiff's home court and thus take advantage of the easier access to justice by suing 'at home'. The Business may be sued in a foreign court in particular in connection with tort cases and cases concerning contracts, including consumer contracts. Cross-border law enforcement requires that the foreign court also applies foreign law, as accounted for immediately above, which is most likely to happen in cases concerning tort and consumer contracts. It may also happen in situations where the Business is sued in the state where the obligation in question is to be performed, provided that specific circumstances support the departure from the main rule which makes the law of the Business applicable.

The system of jurisdiction also means that even though the law of the Business is applied by the foreign court, the Business may have the disadvantage of

319 Dieter Krombach v. André Bamberski, Case 7/98 (28 March 2000), paragraph 37.

defending itself at a foreign court, including the risk involved in a wrong interpretation of the substantive law of the state in which the Business is established.

Another forum which may be important to the Business is the forum in ancillary proceedings, where civil claims may be included under criminal proceedings. It is possible that the Business is being sued under the broad palette of extraterritorial jurisdictions accepted under international law, as discussed in the previous chapter. Under such proceedings, civil claims may be added and the Brussels/Lugano System provides easy access to enforcement, in the state of the Business, of the civil part of the judgment.

5. Risk Mitigation

It is clear from the previous chapters that activities on the Internet entail the risk of being met with cross-border law enforcement. The most likely sanctions in traditional cross-border law enforcement are damages in tort, contractual sanctions, injunctions and fines. This is mainly due to the recognition and enforcement of judgments under the Brussels/Lugano System and the 2005 Framework Decision on Financial Penalties. It is assumed that alternative law enforcement can be carried out without the involvement of the state in which the Business is established.

At this point, the possibilities of traditional cross-border law enforcement have been discussed under the assumption that the Business did not take any measures to mitigate the risk of cross-border law enforcement, including in particular the application of geographical delimitation and choice of forum and applicable law. In this chapter, it is examined what the Business can achieve, in terms of risk mitigation, by applying geographical delimitation of its website activities and/or entering agreements on forum and applicable law. In connection to geographical delimitation, it is also discussed whether Community legislation hinders the Business's access to discriminate on the basis of the User's nationality or place of domicile.

Immediately below, there is an analysis of factors, relevant to establishing jurisdiction in a foreign state. This analysis provides a base for determining which factors the Business may focus on to geographically delimit its Internet activities.

5.1. Directing a Website

The purpose of this part is to determine which factors are relevant when establishing jurisdiction in a foreign state. These factors can be used by the Business to adjust its website in order to delimit the risk of cross-border law enforcement. A 'forseeability-test' may not always provide legal certainty, but it may provide an intuitive sense of when a court will assert jurisdiction over a dispute.¹

5.1.1. Jurisdictional Basis

In order to establish what the Business can do to mitigate the risk of cross-border law enforcement, it is necessary to determine what triggers the situations where

¹ Geist, Michael A., Is there a There There? Toward Greater Certainty for Internet Jurisdiction, Berkeley Technology Journal, No. 16, 2002, p. 1345 at II.

cross-border law enforcement is possible. As mentioned in chapter 3,² international jurisdiction can be based on the principle of territoriality, objective territoriality principle in particular ('effects jurisdiction') which is relevant in this context since the Business neither has establishment in foreign territories nor 'citizenship' in other states. The jurisdiction comprises a sovereign state's access to both prescribe, adjudicate and enforce, however, without compromising the sovereignty of other states. As established in the previous two chapters, traditional cross-border law enforcement can take place in situations where foreign judgments are recognised and enforced in the state where the Business is established, or in situations where that state applies foreign law under national procedure.

The application of foreign law is most likely to happen within tort and consumer contracts, whereas it is not likely under public law enforcement. The recognition and enforcement of foreign judgments is also not likely to happen within public law enforcement, save situations covered by the 2005 Framework Decision on Financial Penalties and in cases between the Scandinavian States. In private law enforcement recognition and enforcement of foreign judgments, where foreign law is applied is likely to happen in tort and consumer contracts. It should be noted that tort cases may not only be based on the tort forum of the Brussels/Lugano System, but may also be based on the often wider criminal jurisdiction in connection to ancillary procedures.

When discussing the risk for the Business of being sued before a foreign court, it is helpful to make a distinction between 1) contracts, where the connection between the Business and the law enforcer is based on a contractual relationship and 2) outside of contracts, where the connection between those parties is based on actual or possible harm which occurs on the market of the law enforcer. The latter situation may concern harm on several markets and includes both public law enforcement and private law enforcement. A particular business practice may involve the risk of being sued both in connection with a contract and outside of a contract. The nature of the law enforcement must be determined on the basis of the law suit, i.e. whether the law suit relates to a contract between the parties or not.

When dealing with cross-border law enforcement in connection to a contract, the activity on a specific market may be relevant in determining the contractual nature of a website. This falls under substantive law, which is not dealt with in this thesis. As dealt with in the previous chapter, arguments which support deviation from the presumption rule in the 1980 Rome Convention may for example be found by assessing the activity on a foreign market. Therefore, the activity on a foreign market is relevant in connection with contracts in general. In consumer contracts, the activity on the market is of interest in order to determine whether an activity was directed towards the consumer. If an activity was directed towards the state of the consumer, the specific consumer provisions of the 1980 Rome Convention and of the Brussels/Lugano System is likely to apply.

2 See 3.2.1.

In order to be met with cross-border law enforcement in situations outside of a contract, there must be either actual or possible harm on a market. Since there is no harmonisation of choice of law in tort, the actual or possible harm is to be determined by the national law of the market in question. This thesis does not deal with substantive law as to whether a certain activity entails actual or possible harm. The focus in this thesis is on the risk of cross-border law enforcement, which means that it in this situation is important to focus on when an activity can be said to take place on a market which again means that there exists a risk of doing harm on that market.

The Brussels/Lugano System makes it possible to sue in the courts of the place where the harmful event occur or may occur. The criteria for assessing whether the event in question is harmful and the evidence required of the existence and extent of the harm alleged by the victim is governed by the substantive law determined by the national conflict of laws rules of the court seized. It cannot be ruled out that a foreign court, due to the homeward-trend, may be more likely to designate its own substantive law. In any event, the court will apply its own choice of law rules which means that the business cannot solely rely on the knowledge of the choice of law rules in the state in which it is established.

The question on where an activity on the Internet occurs is dealt with in the previous chapter in relation to tort and consumer contracts. In consumer contracts the question is relevant in connection with determining whether the Business pursues commercial or professional activities in the state of the consumer's domicile or, by any means, directs such activities to that state (2000 Brussels Regulation). In the 1968 Brussels Convention, the 1988 Lugano Convention and the 1980 Rome Convention, the question is whether the contract was preceded by advertising in the state of the consumer's domicile.

In connection to tort, it is important for the choice of forum that the activity has a direct effect on the market (the place where the damage occurred),³ whereas the question on choice of law is not yet harmonised. The focus is on the place where the event giving rise to the damage produced its harmful effects upon the victim, which is not necessarily the domicile of the victim. This would mean that the place where harm is produced is where the potentially harmful information is being received and/or promoted or where the damage becomes apparent. Based on the discussion in the previous chapter, it seems reasonable to assume that the main focus in tort must be on whether and to what extent users from a certain state access the website or are likely to access the website. It may reasonably be argued that an activity of some substance has to be carried out on the market in question, or that the activity in question has deliberately been directed towards that state.

The focus on advertising in connection to consumer contracts differs from the approach in tort.⁴ First of all because it has to be determined in the light of a

3 See 4.2.1.6.

4 See Mankowski, Peter, Jurisdiction and Enforcement in the Information Society, Nielsen, Ruth,

particular contract already concluded. The purpose is thus to determine whether the Business directed commercial activities which lead to the conclusion of a contract or whether the contract was preceded by advertising in the state in question. The difference between the wording of those acts seems to entail no material difference as long as a website can be regarded as advertising.⁵ As mentioned in the previous chapter, the website must be purposefully directed at, at least, the state in question.⁶ In this context, the question is what it takes for a website to constitute advertising or commercial activity which was directed to a particular market in connection with a particular contract. The consumer contract in itself may indicate that the website was directed towards the state in which the consumer is domiciled, but the conclusion of the contract itself is not sufficient, if it is clear that the website was in fact not directed towards the state where the consumer is domiciled.

It seems obvious that the different kinds of jurisdictional bases requires some kind of activity or possible influence on a market in the state where cross-border law enforcement is likely to originate. Due to the generality of the wording of relevant provision and in the lack of substantial jurisprudence, it is difficult to establish what it exactly takes before an activity carried out through a website has sufficient impact on a particular market. The criteria is likely to depend upon the nature of the claim, the factual circumstances and to some extent what result is more fair.

Below, it is discussed, based on case law from different states, which factors may be relevant when determining whether an activity on a website is directed towards a particular market or state.

5.1.2. Selected Case Law

There is only a limited amount of case law from the European Court on Justice which deals with where a website activity is directed. The purpose of this part is to discuss case law from different jurisdictions in order to examine the approach used by various courts when determining where a website is directed. It is of particular interest to identify specific factors to which importance has been attached by the courts. The case law has been chosen in an explorative manner and is notably not intended to provide an exhaustive overview of case law on the question. The examination has, except for one Danish case, been limited to case law available in

Jacobsen, Søren Sandfeld and Trzaskowski, Jan (editors), *EU Electronic Commerce Law*, DJØF Publishing, 2004, p. 124 at p. 135f.

5 Mankowski, Peter, *Jurisdiction and Enforcement in the Information Society*, Nielsen, Ruth, Jacobsen, Søren Sandfeld and Trzaskowski, Jan (editors), *EU Electronic Commerce Law*, DJØF Publishing, 2004, p. 124 at p. 135.

6 The Giuliano-Lagarde report uses the example of advertising in a German publication versus an American publication which is also sold in Germany. The first situation is comprised whereas the latter requires that the advertisement appear in special editions intended for the European countries. Giuliano-Lagarde Report, p. 24.

English, which is the reason why there is an over-representation of case law from common law states.

5.1.2.1. *The European Court of Justice*

5.1.2.1.1. **Herbert Karner Industrie v. Troostwijk**

The advocate general raised the question of directing a website in the case of *Herbert Karner Industrie v. Troostwijk*,⁷ but this end was not taken up by the European Court of Justice. The advocate general noted that an advertisement published on the Internet, of course, is not confined to only one Member State.⁸ The advocate general suggested to refer the question on the possibility to differentiate advertisement on the Internet to the national court.⁹

The 2000 E-Commerce Directive was not in force in Austria at the relevant time (May 2001), and transposition did not occur until 1 January 2002. However, the Advocate General noted that even if it is not possible to vary the publication of advertisements on the Internet according to the Member State concerned, then the only way to comply with the national rule would be to refrain from posting the advertisements on the Internet which the Advocate General found to be consistent with the country of origin principle.¹⁰

5.1.2.1.2. **Criminal Proceedings Against Bodil Lindqvist**

In the context of personal data, the European Court of Justice has dealt with the publication of personal data on a website.¹¹ The case concerned inter alia the understanding of 'transfer of data to a third country' as provided by article 25 of the 1995 Data Protection Directive.¹² Despite the concrete context of this case,¹³ the reasoning by the court is of general interest.

The court noted that information on the Internet can be consulted by an indefinite number of people living in many places at almost any time,¹⁴ but found that in order to obtain the information on the website in question, an Internet user

7 Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH, Case 71/02 (25 March 2004).

8 It was argued by Troostwijk that the Internet does not permit advertisements to be limited to given regions. See *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*. Opinion of Mr Advocate General Alber delivered on 8 April 2003, Case 71/02, paragraphs 21 and 22.

9 See *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*. Opinion of Mr Advocate General Alber delivered on 8 April 2003, Case 71/02, paragraphs 21 and 22, paragraph 59.

10 *Herbert Karner Industrie-Auktionen GmbH v. Troostwijk GmbH*. Opinion of Mr Advocate General Alber delivered on 8 April 2003, Case 71/02. Paragraph 98.

11 Criminal proceedings against Bodil Lindqvist, Case 101/01 (6 November 2003).

12 Directive 95/46 (24 October 1995) on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

13 The transfer of data within the meaning of a particular directive.

14 Criminal proceedings against Bodil Lindqvist, Case 101/01 (6 November 2003), paragraph 58.

would have to personally carry out the necessary actions to consult those pages. This means that the website did not contain the technical means to send the information automatically to people who did not intentionally seek access to that website.¹⁵

The court argued that if the directive were interpreted to mean that there is transfer of data to a third country every time that personal data are loaded onto a website, that transfer would necessarily be a transfer to all the third countries where there are the technical means needed to access the Internet which pursuant to article 25(4) of the directive would mean that as long as just one third country would not ensure adequate protection, Member States would be obliged to prevent any personal data from being placed on the Internet.¹⁶ This last argument has probably had significant weight.

5.1.2.2. National Courts in the European Union

5.1.2.2.1. LICRA v. Yahoo! Inc

In the French Yahoo! case, which is further dealt with below,¹⁷ the County Court of Paris dismissed the argument raised by US-based Yahoo!, that the court was not competent to make a ruling in the dispute.¹⁸ The court recognised that the website in question, www.yahoo.com, was directed principally at users based in the United States, with regards to the items posted for sale, the methods of payment envisaged, the terms of delivery, the language and the currency used. The court noted, however, that the auctioning of objects representing symbols of Nazi ideology may be of interest to any person and that the simple act of displaying such objects in France constituted a violation of the French Penal Code.

The court found that this display caused damage in France to the plaintiff who was found justified in demanding the cessation and reparation thereof. The court emphasised that Yahoo! was aware that it was addressing French parties because it transmitted advertising banners in French to users who could be located to make a connection from France. Finally the court noted that any possible difficulties in executing the court's decision in the territory of the US cannot by themselves justify a plea of incompetence. Yahoo! also argued that its servers were installed in the United States.

It should for good measure be stressed that the base for jurisdiction in this case

15 Criminal proceedings against Bodil Lindqvist, Case 101/01 (6 November 2003), paragraph 60.

16 Criminal proceedings against Bodil Lindqvist, Case 101/01 (6 November 2003), paragraph 69.

17 See 5.2.1. and Kang, Sungjin, Yahoo!'s Legal Battle in France and in the USA, *Legal Issues of Economic Integration* No. 29, 2002, p. 195.

18 The League Against Racism and Antisemitism (LICRA) and the French Union of Jewish Students v. Yahoo! Inc, order of 22 May 2000. See interim Court Order 00/05308 (20 November 2000), The County Court of Paris, p. 3f. Based on English translation posted at www.cdt.org/speech/international/001120yahoofrance.pdf. See also Spang-Hanssen, Henrik, *Cyberspace & International Law on Jurisdiction*, DJØF Publishing, 2004, p. 184ff.

was founded solely on national, French procedural law. As discussed below,¹⁹ this case gave rise to subsequent proceedings in the US.

5.1.2.2.2. Viasat and Canal Digital Denmark v. Another

The question of jurisdiction was discussed in a Danish case,²⁰ concerning the issuance of an injunction against a Colombian resident's website, www.piratdk.com, containing cryptographic keys to decrypt television signals. The website was written in Danish, but probably placed on servers in Switzerland or Russia. The case was rejected on the ground that the Danish tort forum did not provide jurisdiction in cases concerning injunction. The 1968 Brussels Convention did not apply since Columbia is not a contracting state.

5.1.2.2.3. Euromarket Designs Inc v. Peters & Another

In an English trademark case,²¹ an American company which held a UK registered trademark consisting of the words 'Crate & Barrel' took action in connection to an advertisement in a UK magazine and through a website 'www.crateandbarrel-ie.com', by a business in Dublin, Ireland, with the same name. The defendant argued that its advertisement did not constitute use of the mark 'Crate & Barrel' in the United Kingdom, and that it, alternatively, was not 'in the course of UK trade'. The judge did not find that the defendant's advertisement in the UK magazine constituted trade in the UK in the sense of customers buying goods or services for consumption there.²² The same conclusion was reached in connection with the website, where the court attached importance to the fact that the opening page had a reference to the physical building with four floors and that a person who visited the website would see the letters 'ie', indicating an Irish origin, either in www.crateandbarrel-ie.com or www.createandbarrel.ie.²³

The judge concluded that there was no reason why anyone in the UK should regard the website as directed at him.²⁴ The judge noted that an older version of the defendant's website quoted prices in USD, but attached importance to the fact that

19 See 5.1.2.3.3.

20 Viasat A/S and Canal Digital Danmark A/S v. Another, Ugeskrift for Retsvæsen 2002, p. 405 (Danish Supreme Court decision).

21 Euromarket Designs Inc v. Peters & Another, HC (1999), No 04494 (25 July 2000), High Court (Chancery Division), Mr Justice Jacob, summary judgment. See also Thunken, Alexander, Multi-State Advertising Over the Internet and the Private International Law of Unfair Competition, *International and Comparative Law Quarterly*, October 2002, p. 909 at p. 9 at footnotes 86 to 88 and Bainbridge, David, Trademark Infringement, The Internet, and Jurisdiction, *JILT* 2003(1).

22 Euromarket Designs Inc v. Peters & Another, HC (1999), No 04494 (25 July 2000), High Court (Chancery Division), paragraph 19.

23 Euromarket Designs Inc v. Peters & Another, HC (1999), No 04494 (25 July 2000), High Court (Chancery Division), paragraphs 21 and 22.

24 Euromarket Designs Inc v. Peters & Another, HC (1999), No 04494 (25 July 2000), High Court (Chancery Division), paragraph 22

it was only due to a template which could only work in USD.²⁵ The judge compared the website to a situation where a user would focus a super-telescope into the site concerned, but recognised that other websites, such as that of Amazon.com, have actively gone out to seek world-wide trade, not just by use of the name on the Internet but by advertising its business there, and offering and operating a real service of supply of books to the UK.²⁶ The defendants was found to have had done none of that.

It should be emphasised that this case is a summary judgment concerning the construction of a specific provision in national law, in a specific area which is excluded from the scope of this thesis. It has been argued that the case 'indicates the necessity of finding reasonable indicia in order to determine the country which is targeted by the advertisement in question, be it by use of a trademark or by means of (un)fair competition'.²⁷ It has probably played an important role that neither of the parties had any substantial commercial activity in the UK.²⁸

5.1.2.2.4. 1-800 Flowers Inc v. Phonenames LTD

In another UK trademark case, 1-800 Flowers Inc v. Phonenames LTD,²⁹ Phonenames LTD opposed the trademark registration of '800-FLOWERS' by US-based 1-800-Flowers Inc. The case dealt with whether a US-based business's website constituted use in the UK. In this case, the judges found, based on the evidence, that there were no actual use of the mark in the UK, and rejected that a telephone call from the UK to the US telephone number necessarily involves a use of the mark in the UK. It was also rejected that the evidence concerning the website was sufficient to justify the conclusion that accessing the website amounts to use of the mark at the point of access. It was emphasised that the evidence did not disclose the extent to which the website had in fact been accessed from the UK, and that the US-based business never had a place of business in the UK, and that the services which it provides are performed outside the UK, and, so far as the evidence goes, the only piece of advertising directed specifically at the UK was one advertisement in an independent newspaper.³⁰

25 Euromarket Designs Inc v. Peters & Another, HC (1999), No 04494 (25 July 2000), High Court (Chancery Division), paragraph 25.

26 Euromarket Designs Inc v. Peters & Another, HC (1999), No 04494 (25 July 2000), High Court (Chancery Division), paragraph 24.

27 Thunken, Alexander, Multi-State Advertising Over the Internet and the Private International Law of Unfair Competition, *International and Comparative Law Quarterly*, October 2002, p. 909 at p. 9.

28 Euromarket Designs Inc v. Peters & Another, HC (1999), No 04494 (25 July 2000), High Court (Chancery Division), paragraph 9.

29 1-800 Flowers Inc v. Phonenames LTD, UK Supreme Court of Judicature, Court of Appeal (Civil Division), on appeal from the High Court (Chancery Division, Mr Justice Jacob), Lord Justice Peter Gibson, Lord Justice Buxton and Lord Justice Jonathan Parker, Case No: A3 2000 0052 CHANCF, Neutral Citation Number: [2001] EWCA Civ 721, 17 May 2001.
www.hrothgar.co.uk/YAWS/rebs/flowers.htm.

30 1-800 Flowers Inc v. Phonenames LTD, UK Supreme Court of Judicature, Court of Appeal (Civil

It was emphasised that the services, to which the mark related, were the receiving and transfer of orders for flowers and floral products, and that, at the date of registration, those services were performed in the applicant's switching centre in the US and to a lesser extent through the website, equally administered in the US. For that reason the services to which the mark related were not found to be located in the United Kingdom.³¹ In the original, appealed case, the judge stated that 'the mere fact that websites can be accessed anywhere in the world does not mean, for trademark purposes, that the law should regard them as being used everywhere in the world. It all depends upon the circumstances, particularly the intention of the website owner and what the reader will understand if he accesses the site'. The judge noted that in other fields of law, publication on a website may well amount to a universal publication.³²

There was not attached importance to the fact that flowers had actually been delivered in the United Kingdom as the end-result of the applicant's dealing with orders. It was emphasised that knowledge about the service, in the absence of substantive advertising in the United Kingdom, would have arisen from 'overspill' advertising contained in US publications circulating in the United Kingdom or from personal knowledge on the part of people who had lived in or visited the US, or from recommendations to others by such people.³³

Lord Justice Buxton elaborated in general on the concept of 'use in the United Kingdom' by means of a website.³⁴ The judge noted that the implications of Internet use for issues of jurisdiction are clearly wide-ranging, and that the essence of the problem is to fit the factual circumstances of Internet use into the substantive rules of law applying to the many and very different legal issues that the Internet affects. The judge thus rejected that there will be one uniform rule, specific to the Internet, that can be applied in all cases of Internet use. The judge rejected that for instance, 'publication' of statements in a particular jurisdiction by downloading from the Internet according to the rules of the law of defamation or of misrepresentation was of at least strong analogical relevance to whether a trademark downloaded from the Internet had been 'used' in the jurisdiction to which it was downloaded.³⁵ The judge emphasised that caution should be used when for example comparing 'use of a trademark' and 'infringement of a

Division), paragraph 100. See also paragraphs 128-130 and paragraph 141.

31 1-800 Flowers Inc v. Phonenames LTD, UK Supreme Court of Judicature, Court of Appeal (Civil Division), paragraphs 128 and 129.

32 1-800 Flowers Inc v. Phonenames LTD, UK Supreme Court of Judicature, Court of Appeal (Civil Division), paragraph 41.

33 1-800 Flowers Inc v. Phonenames LTD, UK Supreme Court of Judicature, Court of Appeal (Civil Division), paragraph 130.

34 See 1-800 Flowers Inc v. Phonenames LTD, UK Supreme Court of Judicature, Court of Appeal (Civil Division), paragraphs 136-138.

35 1-800 Flowers Inc v. Phonenames LTD, UK Supreme Court of Judicature, Court of Appeal (Civil Division), paragraph 136.

trademark'.³⁶

Paragraph 137: 'There is something inherently unrealistic in saying that A "uses" his mark in the United Kingdom when all that he does is to place the mark on the Internet, from a location outside the United Kingdom, and simply wait in the hope that someone from the United Kingdom will download it and thereby create use on the part of A. By contrast, I can see that it might be more easily arguable that if A places on the Internet a mark that is confusingly similar to a mark protected in another jurisdiction, he may do so at his peril that someone from that other jurisdiction may download it; though that approach conjured up in argument before us the potentially disturbing prospect that a shop in Arizona or Brazil that happens to bear the same name as a trademarked store in England or Australia will have to act with caution in answering telephone calls from those latter jurisdictions'.³⁷

The judge found that the idea of 'use' in certain areas would require some active step that goes beyond providing facilities which enables users to bring the mark into the area, and noted that 'of course, if persons in the United Kingdom seek the mark on the Internet in response to direct encouragement or advertisement by the owner of the mark, the position may be different; but in such a case the advertisement or encouragement in itself is likely to suffice to establish the necessary use'.³⁸

5.1.2.3. United States³⁹

5.1.2.3.1. Zippo Manufacturing Company v. Zippo Dot Com

The most important US-ruling on this matter, *Zippo Manufacturing Company v. Zippo Dot Com*,⁴⁰ concerned a domain-name dispute, where Pennsylvania-based Zippo Manufacturing Company filed a complaint against California-based Zippo Dot Com alleging trademark dilution, infringement, and false designation for the defendants use of *zippo.com*, *zippo.net* and *zipponews.com*. Zippo Dot Com moved to dismiss for lack of personal jurisdiction and improper forum.

Zippo Dot Com's contacts with Pennsylvania had occurred almost exclusively over the Internet. Advertising for Zippo Dot Com's service to Pennsylvania residents involved posting information about its service on its website which was

36 1-800 Flowers Inc v. Phonenames LTD, UK Supreme Court of Judicature, Court of Appeal (Civil Division), paragraphs 136 and 137.

37 1-800 Flowers Inc v. Phonenames LTD, UK Supreme Court of Judicature, Court of Appeal (Civil Division), paragraph 137.

38 1-800 Flowers Inc v. Phonenames LTD, UK Supreme Court of Judicature, Court of Appeal (Civil Division), paragraph 138.

39 See in general on US law on jurisdiction Spang-Hanssen, Henrik, *Cyberspace & International Law on Jurisdiction*, DJØF Publishing, 2004, and Østergaard, Kim, *Elektronisk Handel og International Proces- og Privatret*, Jurist- og Økonomforbundets Forlag, 2003.

40 *Zippo Manufacturing Company v. Zippo Dot Com Inc* United States District Court for the Western District of Pennsylvania, 952 F. Supp. 1119; 1997 U.S. Dist. LEXIS 1701; 42 U.S.P.Q.2D (BNA) 1062.

accessible to Pennsylvania residents via the Internet. Zippo Dot Com had approximately 140,000 paying subscribers worldwide, hereof approximately two percent (3,000) residing in Pennsylvania. Zippo Dot Com had entered into agreements with seven Internet access providers in Pennsylvania to permit their subscribers to access Zippo Dot Com's news service.

An overview of US constitutional law on long arm jurisdiction as provided in the Zippo Ruling.⁴¹

Jurisdiction under US federal law is based on the law of the state of the court seized which may be exercised within constitutional limitations. The constitutional limitations on the exercise of personal jurisdiction differ depending upon whether a court seeks to exercise general or specific jurisdiction over a non-resident defendant. General jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for non-forum related activities when the defendant has engaged in 'systematic and continuous' activities in the forum state.

In the absence of general jurisdiction, specific jurisdiction permits a court to exercise personal jurisdiction over a non-resident defendant for forum-related activities where the 'relationship between the defendant and the forum falls within the 'minimum contacts' framework' and its progeny. The Zippo case concerned specific personal jurisdiction. In order for the exercise of specific personal jurisdiction over a non-resident defendant to be appropriate, three requirements must be satisfied. I.e. 1) the defendant must have sufficient 'minimum contacts' with the forum state, 2) the claim asserted against the defendant must arise out of those contacts, and 3) the exercise of jurisdiction must be reasonable.

The minimum contacts analysis concerns 'whether the defendant purposefully established' contacts with the forum state, entailing that defendants who reach out beyond one state and create continuing relationships and obligations with the citizens of another state are subject to regulation and sanctions in the other State for consequences of their actions. It should, however, be foreseeable that the conduct and connection with the forum state are such that he should reasonably expect to be haled into court there. Jurisdiction is proper where contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State.

Exercise of jurisdiction is reasonable if it does not offend traditional notions of fair play and substantial justice. When determining the reasonableness of a particular forum, the court must consider the burden on the defendant in light of other factors including: 2) the forum state's interest in adjudicating the dispute, 2) the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's right to choose the forum, 3) the interstate judicial system's interest in obtaining the most efficient resolution of controversies and 4) the shared interest of the several states in furthering fundamental substantive social policies.

It has been established that jurisdiction cannot be avoided merely because the defendant does not physically enter the forum state, since it is an inescapable fact of

41 Zippo Manufacturing Company v. Zippo Dot Com Inc United States District Court for the Western District of Pennsylvania, 952 F. Supp. 1119; 1997 U.S. Dist. LEXIS 1701; 42 U.S.P.Q.2D (BNA) 1062, see III-A with references (references omitted in this text). See also Bainbridge, David, Trademark Infringement, The Internet, and Jurisdiction, JILT 2003(1), under 2 and Debussere, Frederic, International Jurisdiction over E-Consumer Contracts in the European Union: Quid Novi Sub Sole?, International Journal of Law and Information Technology, Vol. 10 No. 3, 2002, p. 344 at 245ff with references. See also Geist, Michael A., Is there a There There? Toward Greater Certainty for Internet Jurisdiction, Berkeley Technology Journal, No. 16, 2002, p. 1345 at III.

modern commercial life that a substantial amount of commercial business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. It was found that it is proper to exercise jurisdiction when an entity intentionally reaches beyond its boundaries to conduct business with foreign residents.

The court found that, based on a review of the available cases and materials, that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. The court found that a website could be assessed in accordance with a sliding scale, where at one end the defendant clearly does business over the Internet, i.e. if the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant simply posts information on an Internet website, which is accessible to users in foreign jurisdictions. Such a passive website does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. In between those situations are (interactive) websites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the website.

The court concluded that Zippo Dot Com's electronic interaction with Pennsylvania residents constituted the purposeful availment of doing business in Pennsylvania. The court found that Zippo Dot Com had done more than creating an interactive website, through which it exchanged information with Pennsylvania residents, and that Zippo Dot Com repeatedly and consciously chose to process Pennsylvania residents' applications and to assign them passwords, presumably in order to profit from those transactions. The court emphasised that Zippo Dot Com contracted with approximately 3,000 individuals and seven Internet access providers in Pennsylvania, but noted that there need not be numerous forum-related activities, since it is clear from case law that the test on 'substantial connection' focus on the 'nature and quality' of the contacts with the forum and not the quantity of those contacts.

It was emphasised that Zippo Dot Com knew that the result of these contracts would be the transmission of electronic messages into Pennsylvania, and that the transmission of these files was entirely within its control since it was under no obligation to sell its services to Pennsylvania residents. If a corporation determines that the risk of being subject to personal jurisdiction in a particular forum is too great, it can choose to sever its connection to the state.

The exercise of jurisdiction was found to be reasonable since Pennsylvania had a strong interest in adjudicating disputes involving the alleged infringement of trademarks owned by resident corporations. The court found that this assumption combined with regard to the plaintiff's choice to seek relief in Pennsylvania

outweighed the burden on the defendant, especially on ground of its consciously conduct of business in Pennsylvania in order to pursue profits. On these grounds, the court found that personal jurisdiction was appropriately exercised.

5.1.2.3.2. **Gator.com v. L.L. Bean**

Another US case, *Gator.com v. L.L. Bean*,⁴² dealt with Gator.com's pop-up software which offered coupons for one of L.L. Bean's competitors, Eddie Bauer, via a pop-up window, when a user with the Gator-program installed, would visit L.L. Bean's website. L.L. Bean, who was selling clothing and outdoor equipment, was established in Maine, and maintained stores in Maine, Delaware, New Hampshire, Oregon, and Virginia. L.L. Bean was selling over one billion dollars worth of merchandise annually to consumers in 150 different countries, hereof a large percentage through mail order and Internet business. L.L. Bean sold for millions of dollars worth of products in California per year and maintained relationships with numerous California vendors. L.L. Bean was not authorised to do business in California, had no agent for service of process in California, and is not required to pay taxes in California.

L.L. Bean's counsel mailed Gator.com a cease-and-desist letter requesting that Gator stop its pop-up windows. Gator.com responded by filing a declaratory judgment action, in California, requesting a judgment that the Gator program 'does not infringe, or dilute, directly or contributorily, any trademark held by L.L. Bean and does not constitute unfair competition, a deceptive or unfair trade or sales practice, false advertising, fraud, or any other violation of either federal or state law'.

California permits the exercise of personal jurisdiction to the full extent permitted by due process, which requires that there are minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The court found there to be general jurisdiction, which requires the contacts with the forum state must be of a sort that approximate physical presence. The court noted that factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there. The court focused on the 'economic reality' of the defendants' activities rather than on a mechanical checklist.

The court noted that in applying the 'substantial' or 'continuous and systematic' contacts test, courts have focused primarily on some kind of deliberate 'presence' in the forum state, including physical facilities, bank accounts, agents, registration, or incorporation. In addition, courts have looked at whether the company has

42 *Gator.com Corp v. L.L. Bean Inc*, United States Court of Appeals for the Ninth Circuit, 341 F.3d 1072; 2003 U.S. App. LEXIS 18115; 2003 Cal. Daily Op. Service 7986 (2 December 2002). With references.

engaged in active solicitation toward and participation in the state's markets (the economic reality). Recognising that L.L. Bean had only few of the factors traditionally associated with physical presence, the court found that there was general jurisdiction in the light of L.L. Bean's extensive marketing and sales in California, its extensive contacts with California vendors, and the fact that, as alleged by Gator, its website was clearly and deliberately structured to operate as a sophisticated virtual store in California.

The court noted that even if the only contacts L.L. Bean had with California was through its virtual store, general jurisdiction would be consistent with the 'sliding scale' test⁴³ because L.L. Bean's website was highly interactive and very extensive. The court noted that an online store can operate as the functional equivalent of a physical store when the nature of the commercial activity is of a substantial enough nature such as it 'approximates physical presence'. The court emphasised that as with traditional business contacts, the most reliable indicator of the nature and extent of Internet contact with the forum state is the amount of sales generated in the state by or through the website.

The court found it reasonable to assert general jurisdiction over L.L. Bean while noting that businesses who structure their activities to take advantage of the opportunities in electronic commerce must reasonably anticipate that those activities, potentially, will subject them to courts in the areas they have targeted.

5.1.2.3.3. Yahoo! Inc v. LICRA

As mentioned above, Yahoo! filed a counter-suit before an American court in response to the French ruling.⁴⁴ Yahoo! claimed that it lacked the technological means to block French citizens from accessing the Yahoo.com auction site to view materials which violated the French order. Yahoo! argued that such a ban would infringe impermissibly upon its rights under the First Amendment to the United States Constitution.⁴⁵ Accordingly, Yahoo! filed a complaint seeking a declaratory judgment that the French court's orders were neither cognisable nor enforceable under the laws of the United States.

In its procedural overview, the court noted that Yahoo! services ending in the suffix, '.com', without an associated country code as a prefix or extension use the English language and target users who are residents of, utilise servers based in and operate under the laws of the United States. Other Yahoo! subsidiary corporations operate regional Yahoo! sites and services in twenty other nations. Each regional

43 See 5.1.2.3.1.

44 Yahoo! Inc v. La Ligue Contre le Racisme et l'Antisemitisme et al, United States Court for the Northern District of California, San Jose Division, 169 F. Supp. 2d 1181; 2001 U.S. Dist. LEXIS 18378; 30 Media L. Rep. 1001 (7 November 2001).

45 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.

websites contains the host nation's unique two-letter code as either a prefix or a suffix in its URL (for example www.yahoo.fr or www.fr.yahoo.com). Yahoo!'s regional sites used the local region's primary language, targeted the local citizen, and operated under local laws.

In its overview, the court firstly recognised that the case in question presented novel and important issues, concerning issues of policy, politics, and culture, arising from the global reach of the Internet, and which are beyond the purview of one nation's judiciary. The court found it critical to define at the outset what was and was not at stake in the proceeding.

This case is not about the moral acceptability of promoting the symbols or propaganda of Nazism. Most would agree that such acts are profoundly offensive. By any reasonable standard of morality, the Nazis were responsible for one of the worst displays of inhumanity in recorded history. This Court is acutely mindful of the emotional pain reminders of the Nazi era cause to Holocaust survivors and deeply respectful of the motivations of the French Republic in enacting the underlying statutes and of the defendant organisations in seeking relief under those statutes. Vigilance is the key to preventing atrocities such as the Holocaust from occurring again.

Nor is this case about the right of France or any other nation to determine its own law and social policies. A basic function of a sovereign state is to determine by law what forms of speech and conduct are acceptable within its borders. In this instance, as a nation whose citizens suffered the effects of Nazism in ways that are incomprehensible to most Americans, France clearly has the right to enact and enforce laws such as those relied upon by the French Court here.

What is at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press. If the government or another party in one of these sovereign nations were to seek enforcement of such laws against Yahoo! or another U.S.-based Internet service provider, what principles should guide the court's analysis?

The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognises that in so doing, it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.¹⁴⁶

46 Yahoo! Inc v. La Ligue Contre le Racisme et l'Antisemitisme et al, United States Court for the Northern District of California, San Jose Division, 169 F. Supp. 2d 1181; 2001 U.S. Dist. LEXIS 18378; 30 Media

The court found that enforcement of the French order by a United States court would be inconsistent with the First Amendment, the factual question of whether Yahoo! possesses the technology to comply with the order was found to be immaterial, since it would still involve an impermissible restriction on speech even if Yahoo! did possess such technology.

The court found that the case in question was not an attempt to re-litigate or disturb the French court's application of French law or its orders with respect to Yahoo!'s conduct in France. The purpose of the action was solely to determine whether a United States court may enforce the French order without running afoul of the First Amendment. For that reason, the court found it immaterial whether Yahoo! could technically comply with the French order.

The court emphasised that no legal judgment has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to a state, honours the judicial decrees of foreign nations is a matter of choice, governed by 'the comity of nations' which is neither a matter of absolute obligation, nor of mere courtesy and good will, upon the other. It was noted that United States courts generally recognise foreign judgments and decrees unless enforcement would be prejudicial or contrary to the country's interests which entails that courts are not required to give effect to foreign judicial proceedings grounded on policies which do violence to its own fundamental interests.

The court found that the French order's content and viewpoint-based regulation of the website clearly would be inconsistent with the First Amendment, but noted that the case was uniquely challenging since the Internet allows one to speak in more than one place at the same time. Although France has the sovereign right to regulate what speech is permissible in France, the court emphasised that it may not enforce a foreign order that violates the protections of the US Constitution by chilling protected speech that occurs simultaneously within US borders. The reason for limiting comity in this area was found to be sound. In the lack of international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the principle of comity was found to be outweighed by the Court's obligation to uphold the First Amendment.

5.1.2.3.3.1. *Yahoo! Inc v. LICRA (Appeal)*

The French defendants moved to dismiss on the basis that the US court lacked personal jurisdiction over them. That motion was denied by the court, and appealed by the defendants.⁴⁷ In the appeal, the court found that if Yahoo! violated

L. Rep. 1001 (7 November 2001), Part II (Overview). Footnotes omitted.

47 *Yahoo! Inc v. La Ligue Contre le Racisme et l'Antisemitisme and l'Union des Etudiant Juifs de France*, United States Court of Appeals for the Ninth Circuit, 379 F.3d 1120; 2004 U.S. App. LEXIS 17869; 32 Media L. Rep. 2185 (2 December 2002).

the speech laws of another nation, it must wait for the foreign litigants to come to the United States to enforce the judgment before its First Amendment claim may be heard by a US court. The French judgment and fines could only be collected in the United States since the French court had prohibited collection from Yahoo!'s French subsidiary and Yahoo! had no other assets in France.

The court emphasised that Yahoo! obtained commercial advantage from the fact that users located in France were able to access its website. The court noted that the company displayed advertising banners in French to those users whom it identified as French, and that Yahoo! could not expect both to benefit from the fact that its content may be viewed around the world and to be shielded from the resulting costs. The court emphasised that France was within its rights, as a sovereign nation, to enact hate speech laws and the defendants were within their rights to bring suit in France against Yahoo! for violation of French speech law. The only adverse consequence experienced by Yahoo! was the need to wait for the defendants to come to the US to seek enforcement, It was not found to be wrongful for the French organisations to place Yahoo! in such position. A dissenting judge found that the defendants directed their (legal) actions toward Yahoo! in California sufficiently to confer in personam jurisdiction. The judge attached importance to the significant, and daily accruing, fines.

5.1.2.4. Australia

5.1.2.4.1. Dow Jones & Company Inc v. Gutnick

The Australian case *Dow Jones & Company Inc v. Gutnick*⁴⁸ concerned an article which contained allegations against Mr Gutnick, who were said to have engaged in manipulation of share prices and had associated with an American money launderer and tax evader. The article was posted inter alia on the website of US-based Dow Jones, and which was available worldwide by subscription. 1.700 subscribers were resident in Australia. The Australian High Court found that the Supreme Court of Victoria had sufficient base (place of the tort) for claiming jurisdiction in the tort case initiated by Mr. Gutnick, and which was confined to the damages in Victoria.

The court noted that the special features of the Internet present peculiar difficulties for the legal regulation of its content and, specifically, for the exclusion of access in defined jurisdictions and that such difficulties may have a bearing on the question of whether a particular jurisdiction has an advantage in regulating content published and accessed on the Internet. But the court emphasised that this

48 *Dow Jones & Company Inc v. Gutnick*, Australian High Court, [2002] HCA 56 (10 December 2002), www.4law.co.il/582.htm. See also Garnett, Richard, Case Notes [on] *Dow Jones & Company Inc v. Gutnick*, *Melbourne Journal of International Law*, Volume 4, July 2003, Number 1, p. 196 with references.

does not mean that the Internet is, or should be, a law-free zone.⁴⁹ The high court rejected that the publication of the online article occurred at the servers maintained in the state of New Jersey, and noted that 'a publisher, particularly one carrying on the business of publishing, does not act to put matter on the Internet in order for it to reach a small target'. The court also noted that 'it may well be that "firewalls" to deny access to the unintended or non-subscribing reader are at present perhaps imperfect ... Publishers are not obliged to publish on the Internet ... If the potential reach is uncontrollable then the greater the need to exercise care in publication'.⁵⁰

The court found that a publisher should understand and accept the risk of publishing in a multiplicity of jurisdictions and that the 'fact that publication might occur everywhere does not mean that it occurs nowhere'.⁵¹ The court emphasised that the most important event, so far as defamation is concerned, is the infliction of the damage, and that occurs at the place (or the places) where the defamation is comprehended. The court rejected the idea that statements made on the Internet should be less 'localised' than statements made in any other media.⁵²

Each publication does under Australian law give rise to separate causes of action and it is established by case law that a single publication rule, as known in the US, can only be introduced throughout Australia by statute.⁵³ The court did not find that the forum was clearly inappropriate, noting that the plaintiff had confined his claim to the damage suffered in Victoria as a consequence of the publication that occurred in that State.

The court established that the place of the wrong needs to be ascertained in a principled fashion, based on an analysis of the relevant legal issues in view of the rights, interests and legitimate expectations of the parties. The proper way to localise the tort is 'when the tort is complete, is to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?'. The court rejected to adopt the place of uploading as choice of applicable law and stressed that it is not an excessive burden to ask a publisher of potentially defamatory material to be aware of defamation laws of the place where the possibly defamed person resides.⁵⁴

5.1.2.4.2. Ward Group Pty Ltd v. Brodie & Stone Plc

In this case,⁵⁵ Australian-based Ward Group, the plaintiff, argued that UK-based

49 Dow Jones & Company Inc v. Gutnick, paragraph 87.

50 Dow Jones & Company Inc v. Gutnick, paragraphs 181 to 186.

51 Dow Jones & Company Inc v. Gutnick, paragraph 192.

52 Dow Jones & Company Inc v. Gutnick, paragraph 184.

53 Dow Jones & Company Inc v. Gutnick, paragraph 197 with reference to Australian Broadcasting Corporation v. Waterhouse, (1991) 25 NSWLR 519 at 537.

54 Dow Jones & Company Inc v. Gutnick, paragraph 150 and 151 with references.

55 Ward Group Pty Ltd v. Brodie & Stone Plc. [2005] FCA 471. See also Butt, John and Kerr, Philip, Trade Mark Infringement on the Internet, FindLaw Australia, May 2005.

Brodi & Stone was liable for selling products, similar creams and lotions under the name 'Restoria', to retailers, who advertised and sold the products on the Internet. The application of the Ward Group was dismissed, and the judge attached importance to the impression that the advertising of the UK Restoria products, together with numerous other products, for sale on the Internet by the website proprietors was not specifically targeted or directed at customers in Australia, but rather targeted at potential purchasers anywhere in the world at large.⁵⁶ The only evidenced sales of the UK Restoria products in Australia was evidence adduced by the Ward Group's solicitors ('trap orders').

It was noted that the website displayed the price in British pounds with a US dollar amount in brackets, and that a drop-down menu concerning shipping destination contained a country box containing a list of various countries, including Australia.⁵⁷ The judge did not find those circumstances to indicate a specific intention to market the goods to consumers in Australia. The circumstances indicated no more than that the website proprietors expected that there may be potential consumers in Australia (and elsewhere), that might be interested in purchasing any of the products advertised on the websites.⁵⁸

The judge also attached importance to the arguments that because Restoria products were available from a large number of retail outlets in Australia and on the Ward Group's websites, which rendered it unlikely that Australian consumers would seek out or become aware of the UK websites. Purchasing from those websites would make little economic sense due to higher prices and higher postage costs.⁵⁹

The judge seems to have attached importance, on the trademark question, to the fact that the website was uploaded in the UK and downloaded by the purchaser in Australia,⁶⁰ and noted that the only specific representations made in Australia were the representations made in the course of the trap purchases.⁶¹ It was noted that if a statement is directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff, there is no difficulty in saying that the statement was, in substance, made at the place to which it was directed, whether or not it is there acted upon. When statements on the Internet are made to the world at large, there is some difficulty in regarding them as having been made by a website in a particular jurisdiction, whereas statement directed at persons in a particular jurisdiction should be treated as having been made and received in that jurisdiction.⁶²

56 Ward Group Pty Ltd v. Brodie & Stone Plc., paragraph 6.

57 Ward Group Pty Ltd v. Brodie & Stone Plc., paragraphs 22 and 23.

58 Ward Group Pty Ltd v. Brodie & Stone Plc., paragraph 37.

59 Ward Group Pty Ltd v. Brodie & Stone Plc., paragraphs 27 and 28.

60 Ward Group Pty Ltd v. Brodie & Stone Plc., paragraphs 20 and 21.

61 Ward Group Pty Ltd v. Brodie & Stone Plc., paragraph 33.

62 Ward Group Pty Ltd v. Brodie & Stone Plc., paragraph 38 to 40 with references.

*In summary, the judge stated that use of a trademark on the Internet, uploaded on a website outside of Australia, without more, is not a use by the website proprietor of the trademark in each jurisdiction where the mark is downloaded. However, as explained above, if there is evidence that the use was specifically intended to be made in, or directed or targeted at, a particular jurisdiction, then there is likely to be a use in that jurisdiction when the mark is downloaded.*⁶³

5.1.3. Connecting Factors

All of the above-mentioned cases deal with the particular problems relating to where online activities take place, or where a website can be said to be directed (or targeted).⁶⁴ Precaution should be taken when considering the cases, since they deal with different areas of law, under different conditions and in particular under different jurisdictions. The examination of cases does not provide an exhaustive overview of case law in the area. It should be emphasised that the above-mentioned cases also reflect the interaction by substantial law and procedural law in the court's pursuance of justice. For that reason, it may be a dangerous task to try to derive a particular, general meaning. However, as the purpose is to determine the risk for the Business of being met with legal requirements under foreign jurisdiction, a deduction of relevant factors seem reasonable to carry out, as long as the outcome is read with caution.

It is recognised in all the cases that the Internet is problematic in the context of jurisdiction, and that information on the Internet, in principle, is available wherever there is access to that network. All of the cases seem to adopt an approach which attach importance to the intentions behind the website activity in combination with other factors which may indicate where the activity in question is directed, or to use the US term, where the business has availed itself to particular jurisdictions. It was noted that businesses which leave their websites open for viewing in all states take the risk of being sued before the courts of each country in which their site can be consulted.⁶⁵

In a commentary⁶⁶ to the above-mentioned Ward Group case, it was argued that 'although the decision does not specify the criteria for determining when a foreign-operated website is specifically targeted or directed at customers in Australia, it suggests that Australian courts are willing to accept the principles of recent UK and US decisions that assess a number of factors, including 1) whether the website operator is actively engaged in other forms of advertising or marketing in the jurisdiction (such as television or newspaper advertising), 2) the number of sales via the website to customers

63 Ward Group Pty Ltd v. Brodie & Stone Plc., paragraph 43.

64 See also Geist, Michael A., Is there a There There? Toward Greater Certainty for Internet Jurisdiction, Berkeley Technology Journal, No. 16, 2002, p. 1345 at IV. It is suggested that a targeting test should focus on three factors: contracts, technology and actual or implied knowledge.

65 Vasiljeva, Ksenija, 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online, European Law Journal, Vol. 10, No. 1, January 2004, p. 123 at p. 132 with references.

66 Butt, John and Kerr, Philip, Trade Mark Infringement on the Internet, FindLaw Australia, May 2005.

in the jurisdiction is not merely random or fortuitous, 3) the website intentionally functions to accept purchases in the currency of the jurisdiction or is specially enabled to process and deliver orders from and to the jurisdiction and 4) other factors, such as the offer of local after-sales support, including toll-free numbers that may be readily used by residents in the jurisdiction'.

There exists no check-list on connecting factors,⁶⁷ but the Nordic Consumer Ombudsmen have compiled a list of connecting factors to be considered when determining whether the national legislation of the Nordic countries is applicable, i.e. if the marketing may be deemed to be directed at that market. An overall assessment is to be carried out, but including in particular the following factors: 1) which languages, currencies and other national characteristics are used, 2) the extent to which the operation or the service in question is otherwise marketed in the market in question, 3) the extent to which there is a connection between the marketing on the Internet and other marketing activities in the market in question and 4) the extent to which the business accepts the conclusion of contracts with consumers belonging to the Nordic country in question.⁶⁸

When it has to be determined where a website is directed, it seems appropriate to adopt an approach which takes into consideration the overall impression of the website, including in particular the commercial activity in the jurisdiction in question and the (assumed) intention of the business. The overall impression of a website may be determined by examining a number of connecting factors,⁶⁹ which may include 1) access to the website, 2) magnitude and nature of business activity, 3) the presentation and relevance of the website, 4) marketing measures and 5) the place of business and technical infrastructure. As provided in the Gator case, it seems reasonable to focus on the economical reality of the Business's activity rather than a mechanical check-list.

The mentioned factors provide an indication of relevant factors to examine when one has to determine the connection to a particular state of an activity carried out through a website. It should be emphasised, as suggested by Lord Justice Buxton, that different law suits may require different degrees of connection. In tort cases for example, it seems reasonable to expect that the risk of cross-border law enforcement is directly proportional to the amount of harm which occurs in the state in question. In connection to a contract, the circumstances leading to the conclusion of the contract and the obligations under the contract are more important. A similar reasoning seems to be found in the Gutnick case, where the court localised the tort by examining, ex post, the series of events constituting the

67 Vasiljeva, Ksenija, 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online, European Law Journal, Volume 10 (January 2004), Issue 1, p. 123 at page 132.

68 E-commerce and marketing on the Internet, position statement of the Nordic Consumer Ombudsmen on e-commerce and marketing on the Internet, October 2002.

69 See similarly Trzaskowski, Jan, Forbrugeraftaler og Reklamerings på Internettet – Internationale Privat- og Procesretlige Aspekter, Ugeskrift for Retsvæsen, 1998, p. 285.

tort. In the US cases, the courts deal generally with the distinction between general and specific jurisdiction.

5.1.3.1. Access to the Website

All of the above-mentioned cases recognise that information on a website in principle is available worldwide. The Lindqvist case showed that availability in the particular context was not sufficient to constitute transfer of personal data. It should be emphasised that any other result would render it virtually impossible to post personal data on a website. It seems like all the cases indicate that mere access is not sufficient for an activity to be of relevance for a particular jurisdiction. This accounts in particular for the effect of (unforeseeable) spill-overs as mentioned in the 1-800 Flower case.

In the Yahoo! case, the French court recognised that Yahoo!'s auction site was not principally directed at French web surfers, but the court attached importance to the fact that Yahoo! was aware that French surfers were accessing the site.⁷⁰ In the Gutnick case, it was noted that a publishing-business in particular does not act to put matter on the Internet in order for it to reach a small target, and that if the potential reach is uncontrollable then the greater the need to exercise care in publication. In both the Gutnick case and the Gator case, the respective judges emphasised that risk of reaching different jurisdictions should, at least in principle, be put on the publisher. This should be viewed in the particular context, where the businesses also had substantial commercial activity in the areas in question.

The access to the Business's website must be a factor of fundamental importance. If users in a particular jurisdiction do not have access to the website, it is difficult to argue that a website is directed towards that state or that the activity in general is of relevance for that jurisdiction. Some of the cases deal with the question of geographical delimitation. In particular, the Yahoo! case seems to go a step further to assume jurisdiction if the business does not put reasonable (technical) means of geographical delimitation into use. That question in general, and the Yahoo! case in particular, is further dealt with below in connection with technical delimitation. In the Troostwijk case, the Advocate General found a website to be available in all states where there is access, but he opened for possibilities in technical delimitation as a matter for the national court to decide. In a previously proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, it was suggested that activities should not be regarded as being directed to a state if could be demonstrated that reasonable steps was taken to avoid concluding contracts with consumers habitually resident in the state.⁷¹

70 See Penfold, Carolyn, Nazis, Porn and Politics: Asserting Control Over Internet Content, JILT 2001(2), under 4.3.4.

71 Svantesson, Dan Jerker B., Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet, The John Marshall Journal of Computer & Information Law, Fall 2004, p. 101 at p.

5.1.3.2. *Magnitude and Nature of Business Activity*

In particular, the amount and nature of the commercial activity in the state in question seem to be important. In the context of trademarks, it has been laid down that the existence and degree of commercial activity in the place where the trademark is registered is of importance.⁷² In the mentioned cases under US law, the court has attached importance to the amount of commercial transactions in the targeted state.

In the Gutnick case, it was not so much the amount of business, but rather that Dow Jones for commercial reasons chose to serve subscribers in Australia. A similar reasoning can be identified in the US case law, where, for example, the court in the Zippo case emphasised that Zippo knew that the result of the contracts with subscribers in the particular state would lead to transmission of electronic messages into that state. In that case, it was noted that numerous forum-related activities are not necessary, since the test on 'substantial connection' focus on the 'nature and quality' of the contacts with the forum and not the quantity of those contacts.

In general, it can be said that the commercial activity in a particular market reflects the relevance for the Business of that particular market. As mentioned in the Gator-case, the most reliable indicator of the nature and extent of Internet contact with the forum state is the amount of sales generated in the state by or through the website. It does not necessarily matter whether the commercial activity derives from the website or other commercial activities. The website must, however, be linked to the commercial activities in the market in question. If the Business chooses to enter contracts with users in a particular market, it must inevitable be an indication of interest in the market in question.

Often, the Business will be aware of the physical delivery address which may provide an assumption that the activity is directed towards a particular state. This information is not necessarily available when the product is downloaded by the Purchaser.⁷³ Information about the issuing location of the User's credit card may also provide information about the location, but this approach does not, as stated in the Gutnick case, afford a universally reliable means of ascertaining the geographic location of the user.⁷⁴ If the Business engages in the selling of products which are delivered online, it may be argued that the Business should all the more be careful to obtain information of the geographical location of the User.

3.

72 Bainbridge, David, Trademark Infringement, The Internet, and Jurisdiction, JILT 2003(1), under 5.

73 Vasiljeva, Ksenija, 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online, European Law Journal, Volume 10 (January 2004), Issue 1, p. 123 at page 132.

74 See Dow Jones & Company Inc v. Gutnick, paragraphs 83 to 87.

5.1.3.3. *The Presentation and Relevance*

The presentation of the website, including choice of top-level-domain, language and currency may indicate where a website is directed. The website may also be designed in accordance with national trade mark schemes. The same counts for trade terms which for example may state prices in local currencies or carrying charges for the shipment of goods to a particular market. This was the case in the Ward Group case, where the possibility of choosing Australia as place of delivery was also emphasised along with indicating prices in UK and US currency, but notably not in Australian dollars. None of those factors lead to departure from the overall impression that the website was not directed towards Australia. In the Ward Group case, importance was attached to the relevance of the website, by considering the economic sense, for the purchaser, in buying from the particular website. It has been argued that certain international currencies, such as USD and the Euro, should not be used as a single denominator for jurisdiction.⁷⁵

In the Gator case, the court attached importance to the fact that L.L. Bean's website was clearly and deliberately structured to operate as a sophisticated virtual store in California. The court noted that the nature of the commercial activity was of a substantial enough nature such as it approximates physical presence. The amount of commercial transactions has probably also played a significant role in that connection.

In the Yahoo! cases, both the French and the American courts attached importance to the fact that advertisement on the website was presented in the local language (French), despite the website in general was presented in English. In the Euromarket case, the judge attached importance to the fact that the domain name of the Crate and Barrel contained the letters 'ie' which, in connection with other factors, lead to the activity being only related to Ireland. It has been argued that top-level-domains are used to signify a physical-world location.⁷⁶ In the US Yahoo! case, the court noted that Yahoo! had divided its activities into separate jurisdictions through the use of national prefixes and suffixes. However, both the French and the American courts found the 'American' activities to be directed towards France.

5.1.3.4. *Marketing Measures*

In the two English trademark cases, the courts focused on the amount of marketing activities, the businesses had carried out in the market, where they claimed use of the trademark. In the Euromarket case, the judge found, under the particular circumstances, that the advertisement in a UK did not constitute use of the

75 See Spang-Hanssen, Henrik, *Cyberspace & International Law on Jurisdiction*, DJØF Publishing, 2004, p. 363.

76 Burnstein, Matthew, *A Global Network in a Compartmentalised Legal Environment, Internet Which Court Decides? Which Law Applies?*, Law and Electronic Commerce, Volume 5, Kluwer Law International, 1998, p. 23 at p. 24.

trademark in UK. Similarly in 1-800 Flowers case, the judge did not find that a single piece of advertisement in an independent newspaper was sufficient to constitute use in that state. The judge recognised that the position could be different if users would seek the mark on the Internet as a consequence of marketing activities in the state in question. In the Gator case, the judge emphasised the relevance of whether the company has engaged in active solicitation toward and participation in the state's markets.

5.1.3.5. *Place of Business and Technical Infrastructure*

The place of business, incorporation and technical equipment is of particular interest in connection to law enforcement, since a state as a starting point has powers to prescribe, adjudicate and enforce within its own territory. It is common for the cases dealt with above and the test set-up of this thesis, that they deal with entities without a physical establishment in the targeted market.

Yahoo! had a subsidiary company in France, but the actions related to the US entity. Enforcement of the French order could not be carried out against the French company. Subsidiary companies are normally independent entities which as a starting point cannot be held liable for activities carried out by a parent company. It cannot, however, be excluded that under national law, it will be allowed to pierce the corporate veil.⁷⁷ This was not allowed under French law in the Yahoo! case.

If a business establishes itself in a particular market, it may be taken as a factor indicating that that business's activities are intended to be carried out on that market. It is on the other hand clear from the cases, that lack of establishment is not tantamount to lack of jurisdiction in that place. Under US law and in order to ascertain general jurisdiction, there must be contacts approximating physical presence. The court noted in the Gator case that factors to be taken into consideration include physical facilities, bank accounts, agents, registration, or incorporation. In that case, the court attached importance *inter alia* to the business's extensive contacts with California vendors. The requirement for specific jurisdiction under US law is less stringent than general jurisdiction, and will be a sufficient base for cross-border law enforcement as dealt with in this thesis, since the claim will relate to activities related to the Business's website.

In the 2000 E-Commerce Directive, it is emphasised that the presence and use of the technical means and technologies required to provide the service (for example servers) do not, in themselves, constitute an establishment of the provider.⁷⁸ This directive has only effect within the Internal Market, and does not in general exclude a state from considering the place of technical equipment when determining where a website activity is directed. This could in particular be of

77 See in general Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 354ff.

78 2000 E-Commerce Directive, recital 19.

relevance when for example an US company has placed servers in Europe in order for European-based users to get faster access to the website activities.

In the 1-800 Flowers case, the judge noted that the services related to the trademark was carried out at the switching centre in the US and to a lesser extent through the website, equally administered in the US. The judge thus seems to focus on the place where the business's activities are carried out, rather than whether the particular market is targeted. The judge noted, however, that it all depends upon the circumstances, particularly the intention of the website owner and what the reader will understand if he accesses the site.

5.2. Geographical Delimitation

The Internet is a borderless environment.⁷⁹ This means that it, as a starting point, is possible to access information on a website from each and every connected computer, independent of where in the world that computer might be situated.⁸⁰ Geographical delimitation in this thesis covers the possibility of excluding users from certain states. The focus will mainly be on technical delimitation, which is geographical delimitation carried out through technological means as elaborated on below.⁸¹ There are no generally accepted standards for specifying where a website is targeted, and as established above,⁸² it seems common to assess this question in the light of an overall impression of the website. Accepting this approach, it is difficult to provide clear-cut answers to the effectiveness as a means of avoiding particular markets.

It seems reasonable to assume that there is some kind of direct proportionality between user's access to a website and cross-border law enforcement from the state of the users. By employing technical measures, it is possible to limit the legal risk by targeting only particular states.⁸³ It has on the other hand been argued that the only way to secure the Internet by technological means may be to build a parallel public international network which focus on existing sovereignties.⁸⁴ In connection to the Yahoo! case, it was noted that 1) the tribunal demonstrated the principal of

79 See in general Svantesson, Dan Jerker B., *The Characteristics Making Internet Communication Challenge Traditional Models of Regulation - What Every International Jurist Should Know About the Internet*, *International Journal of Law and Technology*, Vol 13, No. 1, Oxford University Press, 2005, p. 44ff.

80 See Maunsbach, Ulf, *Some Reflexions Concerning Jurisdiction in Cases on Cross-Border Trademark Infringements Through the Internet*, *Scandinavian Studies in Law*, Vol. 47 ('IT Law'), Stockholm 2004, p. 493 at p. 496.

81 See in general Svantesson, Dan Jerker B., *Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet*, *The John Marshall Journal of Computer & Information Law*, Fall 2004, p. 101.

82 See 5.1.3.

83 Manolopoulos, Andreas, *Raising 'Cyber-Borders': The Interaction Between Law and Technology*, *International Journal of Law and Information Technology*, Vol. 11, No. 1, 2003, p. 40 at p. 57.

84 Spang-Hanssen, Henrik, *Cyberspace & International Law on Jurisdiction*, DJØF Publishing, 2004, p. 531.

how technology may be used to make law effective and 2) that although the tribunal's solution was not able to filter approximately 20% of targeted users, it did reflect the truism that no law is 100% efficient.⁸⁵

In the case of Twentieth Century Fox Film Corporation v. iCraveTV,⁸⁶ it was found that a requirement of typing a Canadian zip-code was not sufficient to avoid infringing US law in connection to the streaming of copyrighted programs. The typing of the zip-code was combined with the requirement of clicking on an 'In Canada' icon (instead of clicking the 'Not in Canada' icon) and agreeing to terms of use including another confirmation of the user being located in Canada. The activity was directed towards Canadian users, but there was nothing barring US users from typing in a Canadian zip-code. It has been emphasised that iCraveTV's Canadian zip-code was posted on the site.⁸⁷ The injunction could probably not be enforced in Canada,⁸⁸ and it should be emphasised that the case concerned copyright which protects concerns other than those involved with unfair competition law.

Other means such as stating that the website is directed towards certain states, may also be applied by the Business.⁸⁹ This approach resembles the technical delimitation, where the purpose is to bar access either to the website in general or certain functions/information in particular.⁹⁰ The main difference lies in the manner in which the exclusion is carried out. Statements, excluding users from particular jurisdiction, is likely to be a relevant factor to be considered, but the weight will depend on the effectiveness of the measure⁹¹ and the reality of the business, including in particular whether the Business enters contracts with users in those jurisdictions.⁹² It should for good measure be mentioned that problems

85 The legal implications of the Yahoo! Inc nazi memorabilia dispute: an interview with Professor Yves Pouillet, January/March 2001, www.juriscom.net/en/uni/doc/yahoo/pouillet.htm.

86 2000 U.S. Dist. LEXIS 11670; 53 U.S.P.Q.2D (BNA) 1831; Copy. L. Rep. (CCH) P28,030 (8 February 2000). See also Geist, Michael A., Is there a There There? Toward Greater Certainty for Internet Jurisdiction, Berkeley Technology Journal, No. 16, 2002, p. 1345 at I-B.

87 Geist, Michael A., Is there a There There? Toward Greater Certainty for Internet Jurisdiction, Berkeley Technology Journal, No. 16, 2002, p. 1345 at I-B.

88 See Spang-Hanssen, Henrik, Cyberspace & International Law on Jurisdiction, DJØF Publishing, 2004, p. 478ff.

89 See in general on disclaimers / terms of use, Svantesson, Dan Jerker B., Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet, The John Marshall Journal of Computer & Information Law, Fall 2004, p. 101 at p. 15ff.

90 See Bainbridge, David, Trademark Infringement, The Internet, and Jurisdiction, JILT 2003(1), under 5. It is mentioned that a trader, who advertises his goods on a website, should make it clear if for example sale and delivery is only intended for the United Kingdom. See also Svantesson, Dan Jerker B., Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet, The John Marshall Journal of Computer & Information Law, Fall 2004, p. 101, p. 16ff.

91 See Kohl, Uta, The Rule of Law, Jurisdiction and the Internet, international Journal of Law and Information Technology, vol. 12, no. 3, p. 367-376 at p. 371.

92 See Mankowski, Peter, Jurisdiction and Enforcement in the Information Society, Nielsen, Ruth, Jacobsen, Søren Sandfeld and Trzaskowski, Jan (editors), EU Electronic Commerce Law, DJØF Publishing, 2004, p. 124 at p. 147f. with references. See similarly Trzaskowski, Jan, Forbrugeraftaler og Reklamerings på Internettet – Internationale Privat- og Procesretlige Aspekter, Ugeskrift for Retsvæsen, 1998, p. 285 at p. 290. See also Svantesson, Dan Jerker B., Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet, The John Marshall Journal of Computer & Information

may arise if for example a disclaimer is posted in English and French law requires such disclaimers to be drafted in French in order to be legally binding upon the User.⁹³

5.2.1. Technical Delimitation

If the Business successfully prevents users from a certain state to get access to the website, it is, all else being equal, difficult to argue that harm has been committed in that state. Even though the delimitation does not prevent access by all users from a particular state, the Business may argue that its activities are not intentionally directed towards the market in question. The delimitation may concern access to the entire website or only certain parts hereof, such as specific product information, certain offers or the contracting mechanism.

The County Court of Paris ordered in May 2000,⁹⁴ that US-based Yahoo! Inc should take all necessary measures to dissuade and make impossible any access, by French users, via yahoo.com to their auction service for Nazi merchandise.⁹⁵ Yahoo! argued that there was no technical solution which would enable it to comply fully with the terms of the court order. A panel of experts was appointed to examine the various technical solutions that could be implemented by Yahoo! in order to comply with that order. Based on this expert statement, the County Court of Paris ordered, in November 2000,⁹⁶ Yahoo! to comply with the injunctions contained in the order of 22 May 2000 subject to a penalty of 100.000 Francs per day of delay after a three month period.

In this case, the French court based its decision on the experts' report which indirectly recognised that there is no technical solution which would enable Yahoo! to comply fully with the terms of the court order, but notably concluded that Yahoo! would be likely to achieve a filtering success rate approaching 90% of all French users. The experts noted that Yahoo! already was practising geographical identification which enabled Yahoo! to display French advertising banners in French on its auctions site. The consultants stressed that there was no evidence to suggest that the conclusions in the report would stand in the future, since service and access providers are becoming more international, and surfers

Law, Fall 2004, p. 101 at p. 20 with references.

93 See Vasiljeva, Ksenija, 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online, *European Law Journal*, Volume 10 (January 2004), Issue 1, p. 123, at page 132.

94 Order of 22nd May 2000. See interim Court Order 00/05308 (20 November 2000), The County Court of Paris. Based on English translation posted at www.cdt.org/speech/international/001120yahoofrance.pdf.

95 Yahoo! Inc was also ordered to issue to all Internet surfers a warning informing them of the risks involved in continuing to view such sites and to submit for deliberation by all interested parties the measures that it proposes to take.

96 Interim Court Order 00/05308 (20 November 2000), The County Court of Paris. Based on English translation posted at www.cdt.org/speech/international/001120yahoofrance.pdf.

are increasingly intent on protecting their rights to privacy.⁹⁷

It was argued in 1999 that it is difficult or impossible to obtain information about the identity and jurisdictions of both senders and receivers of information because of the architecture of the Internet. And 'as a result, real space laws do not readily translate into the context of cyberspace'.⁹⁸ 'With the architecture of today's Internet, senders are ignorant of the recipient's jurisdiction and type, recipients are ignorant of an item's type, and intermediaries are ignorant of both. It is easy to see, then, why, with today's Internet architecture, governments are having a hard time mandating access controls. Any party on whom responsibility might be placed has insufficient information to carry out that responsibility.'⁹⁹

In the Gutnick case,¹⁰⁰ it was noted that by posting information on a website, the publisher makes the content available to anyone, and that the nature of the World Wide Web makes it impossible to ensure with complete effectiveness the isolation of any geographic area on the Earth's surface from access to a particular website. The court also noted both difficulties with proxies and anonymising technologies and concluded that the nature of Internet technology itself makes it virtually impossible, or prohibitively difficult, cumbersome and costly, to prevent the content of a given website from being accessed in specific legal jurisdictions when an Internet user in such jurisdictions seeks to do so.¹⁰¹

5.2.1.1. The Architecture of the Internet

The Internet is not a single network, but a collection of interconnected networks that use a common set of protocols - a shared architecture. Those interconnected networks are owned by both private and public parties, but nobody owns the Internet as such. The architecture of the Internet can be defined as a) the Internet's technical protocols (for example, TCP/IP), b) its standards and standard applications (for example, browsers or a digital certificate standard), and c) its entrenched structures of governance and social patterns of usage that themselves are not easily changed.¹⁰² It falls outside the scope of this thesis to provide a thorough presentation of the technology behind the Internet. Some of its main features must, however, be identified in order to properly understand a discussion on how the architecture of the Internet may entail consequences for the law in general and the Business in particular.

97 Order of 22nd May 2000. See interim Court Order 00/05308 (20 November 2000), The County Court of Paris. Based on English translation posted at www.cdt.org/speech/international/001120yahoofrance.pdf.

98 Lessig, Lawrence and Resnick, Paul, Zoning Speech on the Internet, Michigan Law Review, November 1999, p. 395 at p. 396.

99 Lessig, Lawrence and Resnick, Paul, Zoning Speech on the Internet, Michigan Law Review, November 1999, p. 395 at p. 429.

100 See 5.1.2.4.1.

101 See paragraphs 83 to 87.

102 Lessig, Lawrence and Resnick, Paul, Zoning Speech on the Internet, Michigan Law Review, November 1999, p. 395 at p. 397.

Communication media can be analysed on three levels: infrastructural, logical, and content.¹⁰³ Speakers' corner in Hyde Park may constitute an infrastructure, the English language may be the logical level and the content is whatever said. The Internet can be subdivided into these levels by analysing the hardware (wires, servers, router etc.), the communication protocol (TCP/IP) and the applications (for example World Wide Web). A more simple approach which will be sufficient for most discussions on technology law, is the division between the content layer (information and how it is presented) and the communication/transport layer (whatever enables the communication). It is not necessary for the purpose of this thesis to elaborate further on communication models.

It is sufficient to establish that the Internet is a medium which can be used for the exchange, including in particular dissemination, of information (data). As provided above, it is clear, from a legal perspective, that information on the Internet can be directed towards certain states despite the fact that it is indeed the User who makes the request to access a particular website.

5.2.1.1.1. Protocols and the Domain Name System

Protocols form a fundamental part of electronic communication - in the same way languages do for communication between human beings. The Internet is a packet switched network which entails that the transferred message is broken into small chunks (packets) which are transmitted independently between the sender and receiver. The function of the Internet Protocol (IP) is to send these packets. Another protocol, the Transmission Control Protocol (TCP), is used to detect and recover from errors occurring in the exchange of packets. TCP ensures that the different packets arrive intact and are re-assembled at the destination. IP is the most basic layer of the Internet and it is mostly used together with TCP,¹⁰⁴ but other protocol, such as User Datagram Protocol (UDP) which is not using error-correction, may be used. Computers that are hooked up to the Internet has an IP number which ensures that data sent from one computer reaches only the computer to which it is intended. Not all computers have their own IP address. Many private users 'borrow' an IP address from their Internet service provider whenever they connect to the Internet.

An IP address is a 32-bit number which provides over 4 billion individual addresses. An IP address is usually represented by four decimal numbers which ranges from 0 to 255 separated by dots.¹⁰⁵ In 1999 the deployment of a newer IP

103 See in general, Lessig, Lawrence, *The Future of Ideas*, Random House Trade, 2001, p. 23ff.

104 There is extensive information source on these technologies on the World Wide Web. See for example: McCrea, Philip, Smart, Bob and Andrews, Mark, *Blocking Content on the Internet: a Technical Perspective* prepared for the National Office for the Information Economy. CSIRO Mathematical and Information Sciences, June 1998, p. 12ff.

105 For example '92.0.34.163' which is the IP address of ICANN, and which may be typed directly into a webbrowser.

protocol¹⁰⁶ began, which provides for IP addresses of a 128-bit number which ensures that there will be IP addresses enough for the future. An IP address cannot be bought, but one can for a recurrent fee obtain a right to the use of an address in accordance with applicable policies. The Internet Corporation For Assigned Names and Numbers (ICANN),¹⁰⁷ which is an internationally organised, non-profit corporation, has the responsibility for Internet Protocol (IP) address space allocation. There are also four regional Internet registries.¹⁰⁸

ICANN is also responsible for managing and coordinating the Domain Name System which is a system that links strings of letters (domain names) to IP addresses. The DNS enables the use of domain names which for example makes it possible to visit ICANN's website by typing 'www.icann.org' instead of the website's IP-number, '192.0.34.65'. A domain name is linked to only one IP address, whereas several domain names can be assigned to the same IP address. A domain name is linked to a specific Top Level Domain (TLD),¹⁰⁹ in this case the '.org' TLD, which is an unrestricted TLD intended to serve the non-commercial community.¹¹⁰

The DNS consists of 13 computers (root servers) which contain IP addresses of all the TLD registries. The content of these computers are recurrently distributed (mirrored) to thousands of computers ('Domain Name Resolvers'). The domain name resolvers are used to translate (resolve) domain names into the corresponding IP addresses when a domain name to communicate with a computer on the Internet. The resolvers are usually located with Internet Service Providers or institutional networks.

The World Wide Web, which is the type of communication which is dealt with in this thesis, can be defined by its protocol. The World Wide Web utilises the Hyper Text Transfer Protocol (HTTP) for the communication between a web-server and the user's web-browser.¹¹¹ The content, which is communicated from the web-server to the web-browser is arranged in accordance with standards put forward in HyperText Markup Language (HTML). HTML is a non-proprietary language for publishing hypertext on the World Wide Web.¹¹² HTML uses tags such as and to define the layout of a text. The mentioned tags tell the web-browser to present the text between the two tags in bold letters. An extended

106 Ipv6 which is an addition to the older Ipv4 which was deployed on 1 January 1983 and still is the most commonly used version.

107 www.icann.org.

108 APNIC (Asia/Pacific Region), ARIN (North America and Sub-Sahara Africa), LACNIC (Latin America and some Caribbean Islands) and RIPE NCC (Europe, the Middle East, Central Asia, and African countries located north of the equator).

109 There are 10 global TLDs (.aero, .biz, .com, .coop, .info, .museum, .name, .net, .org and .pro) and 244 country-specific TLDs.

110 See in general the FAQ at www.icann.org.

111 For example Mozilla Firefox or Microsoft Internet Explorer.

112 See in general the World Wide Web Consortium (W3C), www.w3c.org.

version of HTML, XHTML,¹¹³ is under development.

An example of a simple HTML document:

```
<HTML>
  <HEAD>
    <TITLE>Website example</TITLE>
  </HEAD>
  <BODY>
    <P>This is as piece of <B>bold</B> text presented in a
      paragraph.</P>
  </BODY>
</HTML>
```

As of interest for this thesis, the World Wide Web works in the way that the Business is uploading its website (HTML documents/files) to a web-server which is visited by the User. A visit to the website is initiated by the User typing the URL¹¹⁴ of the website (for example 'http://www.icann.org/index.html'). An electronic request is sent from the web-browser to the web-server and a copy of the file ('index.html') is sent to the user if he is entitled to access the file. Normally, web-pages are public and everybody have full access to the page. Since the request is accompanied by, among other information, the host address (IP number which may translate into a domain name),¹¹⁵ it is possible to define, based on IP numbers, who are allowed to access which files on the web-server. The Internet is basically a delivery mechanism, and the World Wide Web is a service delivered over the Internet.

5.2.1.2. IP Mapping and Geographical Targeting

There are techniques for determining the geographic location of Internet hosts (geo-location technologies).¹¹⁶ Such techniques are widely used to customise advertising on the Internet. The purpose of this part is to discuss the Business's possibilities of identifying the User's nationality or domicile. Insofar as it is possible for the business to establish where the User is residing, the Business may either limit access to certain content, provide specific content or completely deny access. A number of businesses¹¹⁷ are providing services which are claimed to

113 Extensible HyperText Markup Language which incorporates XML standards. Information about XML can also be found at www.w3c.org.

114 Uniform Resource Locator, i.e. the entire Internet address of the Internet resource accessible via the World Wide Web. The URL includes the transfer protocol and the exact location of a file on the webserver (using for example directory name and filename, including extension).

115 This information is used for transmitting the requested web-page. The information is found in the request-header which is part of HTTP.

116 See in general Svantesson, Dan Jerker B., *Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet*, *The John Marshall Journal of Computer & Information Law*, Fall 2004, p. 101.

117 For example Quova (www.quova.com), NetGeo (www.netgeo.com), Digital Envoy

identify the country of a user with an accuracy of up to 99.9 percent.¹¹⁸ Most of the providers of these services emphasise that their technologies can be used for compliance to territorial regulation.¹¹⁹ A number of these businesses actually made submissions to the panel of experts in the above-mentioned Yahoo! case, informing that they in fact have technical means to enable Yahoo! to fulfil the obligations placed upon it by the French court.¹²⁰

It is not the purpose of this chapter to provide a thorough technical description of these systems, but some technical insight is necessary for understanding the limitations inherent in these systems. It should also be mentioned that the technologies has not been tested in the context of this thesis, and the discussion is thus kept on a theoretical level based on the sources referred to.

The Internet Protocol attaches the sender's IP address and the recipient's IP address to each data packet transmitted which enables the recipient of a data packet to determine the sender's IP address. This means that the Business usually will be aware of, or able to obtain information on, the User's IP address. But neither the IP address nor the corresponding domain name reveals the geographical details of the computer or user behind it. There are a number of approaches to determine the geographical location of the User. For the most part several techniques are deployed to build a database which are linking IP addresses not only to a specific country, but in many instances to a specific city.¹²¹

The DNS system gives access providers, sites, etc. the ability to associate their reference address with their geographical location in the form of latitude and longitude coordinates. Based on this information, the exact location can be found, but it is not mandatory to provide this information.¹²² There are a number of so-called Whois-databases,¹²³ which contain various information, including

(www.digitalenvoy.net) and IP2Location (www.ip2location.com). See also Geist, Michael A., Is there a There There? Toward Greater Certainty for Internet Jurisdiction, Berkeley Technology Journal, No. 16, 2002, p. 1345 at IV-B-2.

118 See www.quova.com/company/quova-factsheet.shtml, where it is stated that Quova's country-level accuracy was measured at 99.9% and US state-level accuracy at 94.0% and 93.9% by PricewaterhouseCoopers.

119 See in particular The Challenge for Online Compliance and Territory Rights Management. www.quova.com/solutions/application_compliance.pdf

120 Order of 22nd May 2000. See interim Court Order 00/05308 (20 November 2000), The County Court of Paris. Based on English translation posted at www.cdt.org/speech/international/001120yahoofrance.pdf.

121 Such an approach is also suggested in Lessig, Lawrence and Resnick, Paul, Zoning Speech on the Internet, Michigan Law Review, November 1999, p. 395 at p. 408. It is noted that such an 'IP map' might sufficiently segregate restrictive jurisdictions from non-restrictive ones. See also Svantesson, Dan Jerker B., Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet, The John Marshall Journal of Computer & Information Law, Fall 2004, p. 101 at p. 6ff.

122 Order of 22nd May 2000. See interim Court Order 00/05308 (20 November 2000), The County Court of Paris. Based on English translation posted at www.cdt.org/speech/international/001120yahoofrance.pdf.

123 See for example www.ripe.net/db/about.html and www.internic.net/whois.html which covers the following top level domains: .aero, .arpa, .biz, .com, .coop, .edu, .info, .int, .museum, .net, and .org. See also www.zonedit.com/whois.htm.

information about the registrant, administrator, billing contact and nameservers. There are a number of problems with Whois-based approaches. The information recorded in the Whois database may be inaccurate and there may be inconsistencies between multiple servers that contain records corresponding to an IP address block. Also, a large (and geographically dispersed) block of IP addresses may be allocated to a single entity and the Whois database may contain just a single entry for the entire block.¹²⁴

Information may also be achieved by performing a traceroute¹²⁵ from a source to the target IP address and infer location information from the DNS names of routers along the path, but a router name may not always contain location information.¹²⁶ Probably the most effective approach to obtain geographical information is the geocluster approach which takes advantage of the fact that IP addresses are provided in clusters. By knowing the location corresponding to a few hosts in a cluster, the location of the entire cluster can be deduced.¹²⁷ In the Yahoo! case, the experts estimated, based on information from the French association of access providers, that 80 percent of the addresses assigned dynamically by the members of that association are identified as French, and that over 70 percent of the IP addresses of all surfers residing in French territory can be identified as being French.¹²⁸

The United States Patent and Trademark Office has issued a patent to Digital Envoy¹²⁹ on systems and methods for determining collecting and using geographic locations of Internet users.¹³⁰ In summary, the process and methodology outlined in the patent include:¹³¹

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- 124 Padmanabhan, Venkata N. and Subramanian, Lakshminarayanan, An Investigation of Geographic Mapping Techniques for Internet Hosts. Proceedings of the ACM SIGCOMM 2001 Conference on Applications, Technologies, Architectures, and Protocols for Computer Communication, San Diego, CA, August 2001.
- 125 See for example Svantesson, Dan Jerker B., The Characteristics Making Internet Communication Challenge Traditional Models of Regulation - What Every International Jurist Should Know About the Internet, *International Journal of Law and Technology*, Vol 13, No. 1, Oxford University Press, 2005, p. 47f.
- 126 Padmanabhan, Venkata N. and Subramanian, Lakshminarayanan, An Investigation of Geographic Mapping Techniques for Internet Hosts. Proceedings of the ACM SIGCOMM 2001 Conference on Applications, Technologies, Architectures, and Protocols for Computer Communication, San Diego, CA, August 2001.
- 127 Padmanabhan, Venkata N. and Subramanian, Lakshminarayanan, An Investigation of Geographic Mapping Techniques for Internet Hosts. Proceedings of the ACM SIGCOMM 2001 Conference on Applications, Technologies, Architectures, and Protocols for Computer Communication, San Diego, CA, August 2001.
- 128 Order of 22nd May 2000. See interim Court Order 00/05308 (20 November 2000), The County Court of Paris. Based on English translation posted at www.cdt.org/speech/international/001120yahooofrance.pdf. See also Spang-Hanssen, Henrik, *Cyberspace & International Law on Jurisdiction*, DJØF Publishing, 2004, p. 186ff. with reference to discussions following-up on the experts' report.
- 129 www.digitalenvoy.net
- 130 United States Patent 6,757,740 (29 June 2004). (<http://patft.uspto.gov>)
- 131 Geo IP Targeting Using Network Tools. www.hostpronto.com/article/37/3

- Determine if the host is online, using PING and/or other TCP/IP methods.
- Determine the ownership of the host name by performing an nslookup on the IP address, host name or domain name.
- Determine the route taken in delivering packets to the user.
- Assign a confidence level, achieved by using one (or many) methods.¹³²

Abstract from the patent:

'A method of determining a geographic location of an Internet user involves determining if the host is online, determining ownership of the host name, and then determining the route taken in delivering packets to the user. Based on the detected route, the method proceeds with determining the geographic route based on the host locations and then assigning a confidence level to the assigned location. A system collects the geographic information and allows web sites or other entities to request the geographic location of their visitors.

The database of geographic locations may be stored in a central location or, alternatively, may be at least partially located at the web site. With this information, web sites can target content, advertising, or route traffic depending upon the geographic locations of their visitors. Through web site requests for geographic information, a central database tracks an Internet user's traffic on the Internet whereby a profile can be generated. In addition to this profile, the central database can store visitor's preferences as to what content should be delivered to an IP address, the available interface, and the network speed associated with that IP address.'

There are a number of limitations in the use of geo-targeting, including situations where the place of the user cannot be determined on the basis of the IP address. Probably the most significant limitation is connected to the fact that a number of users are connecting to the Internet from a multinational access provider. This can be a multinational company or an Internet Service Provider. The experts in the Yahoo! case estimated that 20 percent of the French user's could not be identified as French on this behalf. The problem occurs when the international access provider (company or Internet service provider) is connecting to the Internet from a country which is different from that of the User. In that case, the user will appear to come from the country where the access provider is connecting to the Internet.

*Many Internet clients lie behind proxies and/or firewalls that separate the corporate or ISP network from the rest of the Internet. In such a setting, the proxy or firewall typically connects to external Internet hosts, such as Web servers, on behalf of the client hosts. The IP address of the client hosts remains hidden from the external network. As such there is no direct way to map from IP address to location for such clients. Algorithms can be used to identify proxies and firewalls by comparing real addresses to the IP-number - if it shows that users scattered over a large geographical area, it indicates that the IP address is used by a proxy or a firewall which provide the not worthless information that the IP address cannot be mapped to a specific geographical area.*¹³³

132 Multiple checks, WHOIS, statistical confidence levels, artificial intelligence methods.

133 Padmanabhan, Venkata N. and Subramanian, Lakshminarayanan, An Investigation of Geographic

The US-based Internet service provider American Online (AOL),¹³⁴ which is also providing Internet access for users established in Europe, is using a closed network and a centralised cluster of proxies at one location in Virginia, USA. Therefore all AOL users appear to come from that state,¹³⁵ even though they are connected by for example the French establishment of AOL. Other exceptions stem from the use of so-called anonymizers, which purpose is to replace the user's real IP address by another address.¹³⁶ By using such services, the user will appear to be using the IP address of the anonymizer site and it is thus not possible to determine neither the IP address nor the geographical location of the user.

5.2.1.3. Obtaining Geographical Information From the User

In the French Yahoo! case, the experts considered that it would be desirable to ask surfers whose IP address is ambiguous to make a declaration of nationality. The experts did not find that it could be reasonably claimed that such an approach would have a negative impact on the performance and response time of the server hosting the Yahoo! auctions service.¹³⁷ The experts concluded that with the combination of geographical identification of the IP address and such a declaration of nationality, it would be possible to achieve a filtering success rate approaching 90 percent, but it has been argued that the identification of the country of the user can be determined with 95% accuracy.¹³⁸

It should be noted that after determining the nationality or place of establishment, this information can be stored in a so-called cookie on the User's computer, which can be identified by the server at every visit, so that the User does not have to declare his nationality at every visit. It is also possible and may be desirable to ask the User to verify his nationality at every visit. It is possible to display the nationality that the computer believes that the User have, and provide the opportunity to change this information. This limits the action required by the User to those situations where wrong information has been collected or changes has taken place. This approach should in principle make it possible to get the right geographical information for all users at all visits, provided that the User will provide the right information.

Mapping Techniques for Internet Hosts. Proceedings of the ACM SIGCOMM 2001 Conference on Applications, Technologies, Architectures, and Protocols for Computer Communication, San Diego, CA, August 2001. See point 2.1.

134 www.aol.com.

135 Padmanabhan, Venkata N. and Subramanian, Lakshminarayanan, An Investigation of Geographic Mapping Techniques for Internet Hosts. Proceedings of the ACM SIGCOMM 2001 Conference on Applications, Technologies, Architectures, and Protocols for Computer Communication, San Diego, CA, August 2001. See point 2.1 and 6.3.

136 See for example www.anonymizer.com.

137 Order of 22nd May 2000. See interim Court Order 00/05308 (20 November 2000), The County Court of Paris. Based on English translation posted at www.cdt.org/speech/international/001120yahoofrance.pdf.

138 See Spang-Hanssen, Henrik, *Cyberspace & International Law on Jurisdiction*, DJØF Publishing, 2004, p. 333.

The experts' report in the Yahoo! case noted that the geographical declaration approach entails some risks in connection to users lying about their nationality and that some users consider such questions to be an invasion of privacy.¹³⁹ The problem with wrongful information is a real problem which to some extent can be tackled by denying the User access to possible benefits deriving from a contractual relations established on wrongful geographical information.¹⁴⁰

The privacy issues seem to be the most mentioned concern in relation to geographical targeting. It is argued that 'such IP mapping will raise privacy concerns because it can be used for all kind of content, would enable a form of discrimination and make the Internet a fundamentally regulable space which again could facilitate a more general regulation of behavior in cyberspace'.¹⁴¹ The fear of making the Internet a regulable space cannot be regarded as a valid argument. On the contrary, the idea of making the Internet regulable seems to be in accordance with fundamental principles of jurisdiction and sovereignty of states within international law. It cannot be derived from international law that anybody has the right to disseminate or make available information from one state to another, where such information is deemed illegal. There may be some real concerns on discrimination within the Internal Market which is dealt with below.¹⁴²

It follows from the UN Universal Declaration of Human Rights that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.¹⁴³ Article 8 of the 1950 European Human Rights Convention provides that 1) Everyone has the right to respect for his private and family life, his home and his correspondence, and 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The mentioned privacy concerns do also appear to be more political than legal. The mentioned conventions does not prevent a business from requiring information concerning the nationality or country of domicile. In particular not when it is done in order not to avoid interference with the legal order of other jurisdictions. It falls outside the scope of this thesis to elaborate in further details

139 Interim Court Order 00/05308 (20 November 2000), The County Court of Paris. Based on English translation posted at www.cdt.org/speech/international/001120yahooofrance.pdf.

140 For example the use of the consumer forum. See Mankowski, Peter, Jurisdiction and Enforcement in the Information Society, Nielsen, Ruth, Jacobsen, Søren Sandfeld and Trzaskowski, Jan (editors), EU Electronic Commerce Law, DJØF Publishing, 2004, p. 124 at p. 149 ('He who comes to justice, must come with clean hands').

141 Lessig, Lawrence and Resnick, Paul, Zoning Speech on the Internet, Michigan Law Review, November 1999, p. 395 at p. 408 and 423f.

142 See 5.2.2.

143 Article 12. See also article 17 in the United Nations' International Covenant on Civil and Political Rights.

on privacy issues, but it seems clear that the processing of such information is legal under EU legislation since geographical targeting in order to avoid interfering with foreign law must be considered a legitimate interests in processing insensitive personal data.¹⁴⁴ To the extent it is contrary to fundamental principle of non-discrimination in the EU, the legitimacy of such processing will disappear in connection to discriminate between users from different Member States.¹⁴⁵

5.2.1.3.1. Location, Domicile or Nationality?

The technology behind geographical targeting, as discussed above, is providing the geographical location of the server which is used by the User to connect to the Internet. From this information, it can be deducted to some extent where the user is located when he connects to the Internet, based on the assumption that those places will be within the same state. As mentioned above, such an approach can be combined with information provided by the User. The question is, however, what information the Business needs to obtain from the User in order to mitigate or eliminate the risk of having foreign law enforced on it. The relevant information about the User may be his actual location, domicile (or habitual residence) and nationality which in many cases will point towards only one state.

As discussed above, courts are most likely to attach importance to the Business's intentions to reach a particular market. For that reason, the domicile and the actual location of the User seem to be of particular interest, since those contacts connect the User to a particular market. The actual location is likely to represent a more loose connection to a particular market than the domicile, whereas the nationality, in principle, does not provide a contact to a particular market. The nationality connects the User to a particular state, which may be relevant in connection with exercising jurisdiction under the passive personality principle.¹⁴⁶ The nationality of the User may thus be of interest in connection to jurisdiction, but under the scope of this thesis, the contact to the market seem to be the most relevant parameter. The contact to the market may be either generally (outside of contract) or specifically in relation to a particular contract.

When dealing with tort, the focus is on the place where the harmful event

144 The area is harmonised in the European Union by directive 95/46 (24 October 1995) on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The directive only deals with the processing of information relating to an identified or identifiable natural person. In many cases this requirement will not be satisfied, but when the person is identifiable the rules in the directive must be complied with. Information about nationality are under normal conditions not particularly sensitive and article 7(1)(f) of the mentioned directive provides that (normal, insensitive) personal data may be processed if it is necessary for the purposes of legitimate interests pursued, except where such interests are overridden by certain interests for fundamental rights and freedoms of the data subject. It should for good measure be noted that also other requirements in the directive apply to such processing of personal data.

145 See 5.2.2.

146 See 3.2.1.

occurred or may occur. As established in the previous chapter,¹⁴⁷ harmful content on the Internet may be assumed to do damage where the information is being received and/or promoted. When it comes to choice of law, the usual approach is the *lex loci delicti commissi*, which for unfair competition is the market which is affected by the unfair practices (*lex injuria*).¹⁴⁸ The criteria in connection to public law enforcement does not differ substantially from the situation in tort. The most important bases for extraterritorial jurisdiction is the objective territoriality principle ('effects jurisdiction') and the principle of passive nationality. The effects jurisdiction may require some activity on the particular market since the principles require a genuine link between the crime and the forum state.¹⁴⁹

The main threats of cross-border law enforcement in connection to contracts are related to certain consumer contracts and to those situations where the rendering court finds reasons to depart the presumption rule designating the law of the seller.¹⁵⁰ If the law enforcement is carried out in connection to a contract, the plaintiff's domicile (Brussels/Lugano System) / habitual residence (1980 Rome Convention) is of interest. the connecting factor in international procedural law is usually the domicile or residence of the parties.¹⁵¹ As regards jurisdiction, the place of performance is of interest since the Business may be sued there, and the Business will need information about where the User is located when selling goods and services. The presumption rule of the 1980 Rome Convention is, however, still favouring the law of the state in which the Business is established.

In connection with certain consumer contracts, as defined in the 1968 Brussels Convention, the 1988 Lugano Convention and the 1980 Rome Convention, the consumer must also take the necessary steps for concluding the contract in the state where he has his domicile.¹⁵² For that reason information about the actual location of the User may be used to allow for consumers to enter contracts if they are not located in the state where they are domiciled / have their habitual residence. It should be noted that the wording of the requirements in the 2000 Brussels Regulation was altered, which does not, in principle, affect the choice of law as established by the 1980 Rome Convention.

In general, the Business wants to avoid pursuing activities on specific markets. A market may be characterised by the group of legal and natural persons that is interested in the Business's activities. It seems that the domicile or habitual residence is the most important information to obtain, followed by the actual location of the User.

147 See 4.2.1.6.2.

148 See 4.1.2.

149 See for example Brownlie, Ian, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 305 with references.

150 'The party who is to effect the performance which is characteristic of the contract'. Article 5(2) of the 1980 Rome Convention.

151 See Jenard Report, p. 15. See also article 2 of the acts constituting the Brussels/Lugano System

152 See 4.1.1.2 and 4.2.1.5.

There is no definition of habitual residence in the 1980 Rome Convention or in the accompanying Giuliano-Lagarde Report. As regards legal persons, it is noted that the focus is on the principal place of business. The habitual residence is used in connection to contracts, including consumer contracts. The question is, however, whether the court is to apply its own law to determine the habitual residence or the law applicable to the contract. Since choice of law rules are a matter of national law, it is likely that the court will apply the law of the forum to determine the habitual residence.

It was discussed in connection with the 1968 Brussels Convention whether domicile or habitual residence should be applied.¹⁵³ The term 'domicile' for natural persons is not further defined in the acts constituting the Brussels/Lugano System. The use of habitual residence instead of domicile was rejected in the 1968 Brussels Convention because the term 'habitual' was found to be open to conflicting interpretations, since the laws of some of the Member States provide that an entry in the population registers is conclusive proof of habitual residence. It was noted that the concept of domicile, while not without drawbacks, does introduce the idea of a more fixed and stable place of establishment on the part of the defendant than does the concept of habitual residence.¹⁵⁴

The inclusion of both concepts was rejected in order to avoid an increase in the number of competent courts. The approach adopted is to specify which law to be applied in determining the domicile. It follows from the acts constituting the Brussels/Lugano System that in order to determine whether a party is domiciled in the contracting state whose courts are seized of a matter, the court shall apply its internal law. If a party is not domiciled in the state whose courts are seized of the matter, then, in order to determine whether the party is domiciled in another contracting state, the court shall apply the law of that State.¹⁵⁵ It is apparent that a person may have more than one domicile depending on which court is hearing the case.¹⁵⁶

In circumstances dealt with under this thesis, the habitual residence and domicile of the Business will be the same. Only in connection to certain consumer contracts, the domicile / habitual residence of the consumer is of importance. In practice, those concepts are likely to lead to the same result which means that the choice of law is likely to follow the choice of forum where the consumer forum is applied. It is noteworthy that the validity of the contract under those circumstances has to be determined by the law of the consumer and the court of that state will be likely to apply its national concept of habitual residence.

As regards legal persons, it follows from article 53 of the 1968 Brussels Convention and the 1988 Lugano Convention, that the seat of a company or other legal person or association of natural or legal persons shall be treated as its domicile. It follows from this provision that in order to determine that seat, the court shall apply its rules of private international law. In the 2000 Brussels Regulation, article 60(1), it is clarified that a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: a) statutory seat, or b) central administration, or c) principal place of business. This

153 Jenard Report, p. 15ff.

154 Jenard Report, p. 16.

155 Article 52 of the 1968 Brussels Convention and the 1988 Lugano Convention, and article 59 of the 2000 Brussels Regulation.

156 Jenard Report, p. 17.

means that the plaintiff can choose to sue the Business in either of these places under the main rule of the defendant's home court. In the situations dealt with in this thesis all these connecting factors will point to the same court, i.e. the court in the state in which the Business is established.

5.2.2. Geographical Delimitation in the Internal Market

The focus in this part is on whether it is compatible with the rules of the Internal Market for the Business to adopt measures which discriminate between users from different Member States.¹⁵⁷ The discrimination may concern access to the Business's website in general or access to certain features such as in particular the buying of offered products. It was suggested by the Economic and Social Committee that businesses should be able to restrict their marketing activities to certain countries by actively informing consumers.¹⁵⁸ It has, on the other hand, been noted that restricting marketing activities on a website to certain countries is a clear discrimination between consumers according to their place of residence which is inconsistent with the principles of common market and free movement of goods and services.¹⁵⁹

The focus in this context is the Business's access to discriminate in order to avoid cross-border law enforcement or as a consequence of strategic business-decisions. It should be emphasised that this thesis does not deal with competition law, under which such discrimination under certain circumstances can constitute breach of the EC Treaty provisions on that matter.¹⁶⁰ This thesis does not deal with more arbitrary discrimination such as that based on for example race.

It seems to be generally accepted that all forms of racial discrimination should be eliminated. It follows from the widely adopted¹⁶¹ 1965 Convention on Racial Discrimination,¹⁶² that states are to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation.¹⁶³ Racial discrimination is defined as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic

157 See in general Cruz, Julio Baquero, Free Movement and Private Autonomy, European Law Review, volume 24, no. 6, December 1999, p. 603.

158 Opinion of the Economic and Social Committee on the 'Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', OJ C 117 (26 April 2000), p. 10.

159 Vasiljeva, Ksenija, 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online, European Law Journal, Volume 10 (January 2004), Issue 1, p. 123 at page 132.

160 See in general Oliver, Peter, Free Movement of Goods in the European Union, Fourth Edition, Sweet and Maxwell, 2003, paragraph 4.26.

161 See www.unhcr.ch/pdf/report.pdf.

162 United Nations' International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965).

163 Article 2(d).

origin...¹⁶⁴ Racial discrimination is more vaguely regulated in the 1950 Convention on Human Rights.¹⁶⁵

5.2.2.1. *Discrimination on Grounds of Nationality*

In the van Gend en Loos case¹⁶⁶ the European Court of Justice established that article 25¹⁶⁷ of the EC Treaty must be interpreted as producing direct effects and creating individual rights which national courts must protect. The court derived the direct effect in the legal relationship between Member States and their subjects from the nature of the prohibition which contains a clear and unconditional prohibition, and from the spirit, the general scheme and the wording of the treaty. Hence the court established that independently of national legislation, Community law both imposes obligations and confer rights on individuals - not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

It follows from article 12 of the EC Treaty that within the scope of application of the EC Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. In Walrave and Koch,¹⁶⁸ it was established that the prohibition in article 49 with reference to article 12 does not apply only to the action of public authorities. It was emphasised that working conditions are governed sometimes by law and sometimes by agreements and other acts concluded or adopted by private persons, and that limiting the prohibitions in article 49 to acts of a public authority would risk creating inequality in their application.¹⁶⁹

The free movement of services is of particular interest in this context since it involves not only the freedom of the provider to offer and supply services to recipients in a Member State, but also the freedom to receive or to benefit as recipient from the services offered by a supplier established in another Member

164 Article 1(1). It is provided in article 1(3) that the convention is not to affect legal provisions concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

165 See also article 14 of the 1950 Convention on Human Rights and Sebok, Endre, The Hunt for Race Discrimination in the European Court.

166 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, case 26-62 (5 February 1963).

167 EC Treaty article 25: 'Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature'.

168 B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo. Case 36-74 (12 December 1974). See also J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten, intervenier: Raad van de Balies van de Europese Gemeenschap, case 309/99 (19 February 2002), paragraph 120 with references.

169 Paragraph 19.

State without being hampered by restrictions.¹⁷⁰ It has been argued that geographical delimitation imposed by a private business constitutes a restriction under article 49.¹⁷¹ To the extent that is true, it should be noted that such private party may rely on the possible justifications of such restrictions to the free movement of services.¹⁷²

The question on direct effect was further elaborated in the *Jean Reyners* case¹⁷³ concerning the direct effect of the provisions on freedom of establishment in a case where a Dutch national was refused admission to the Belgian bar solely on the lack of Belgian nationality. The European Court of Justice emphasised that the rule on equal treatment of nationals is a fundamental legal provision of the community (EC Treaty, article 12), which is to be implemented through article 43 in the area in question. The court established that article 43, by its essence, is capable of being directly invoked by nationals of all the other Member States.¹⁷⁴

In the *Angonese* case,¹⁷⁵ it was established that article 39 of the EC Treaty (free movement for workers) with reference to article 12 precludes an employer from taking discriminatory measures¹⁷⁶ in a recruitment competition. It has been argued that this judgment cannot be transferred analogously to the free movement of goods and services,¹⁷⁷ and it was noted that the area of labour contracts may be treated differently than other activities since that area of private activities normally falls outside the provisions on competition law.¹⁷⁸ In *Walrave and Koch*,¹⁷⁹ the court concluded that the first paragraph of article 49, in any event in so far as it refers to the abolition of any discrimination based on nationality, creates

170 Piergiorgio Gambelli and Others, case 243/01 (6 November 2003), paragraph 55 with reference to *Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna*. Case 294/97 (26 October 1999), paragraph 33 and 34 and to *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*. Joined cases 286/82 and 26/83 (31 January 1984), paragraph 16.

171 Nielsen, Ruth, *E-handelsret*, 2. udgave, DJØF, 2004, p. 100.

172 See *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman*, *Royal club liégeois SA v. Jean-Marc Bosman* and others and *Union des associations européennes de football (UEFA) v. Jean-Marc Bosman*. Case 415/93 (15 December 1995), paragraph 86.

173 *Jean Reyners v. Belgian State*, case 2-74 (21 June 1974).

174 The court rejected that the fact that the council has failed to issue directives provided for by articles 44 and 47 or the fact that certain of the directives actually issued have not fully attained the objective of non-discrimination required by article 43, should lead to another result.

175 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, case 281/98 (6 June 2000). See paragraphs 35 and 46.

176 A requirement to provide evidence of linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State.

177 Oliver, Peter, *Free Movement of Goods in the European Union*, Fourth Edition, Sweet and Maxwell, 2003, paragraph 4.38.

178 Cruz, Julio Baquero, *Free Movement and Private Autonomy*, *European Law Review*, volume 24, no. 6, December 1999, p. 603, at p. 619.

179 *B.N.O. Walrave and L.J.N. Koch v. Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo*. Case 36-74 (12 December 1974). See also *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, interveners: *Raad van de Balies van de Europese Gemeenschap*, case 309/99 (19 February 2002), paragraph 120 with references.

individual rights which national courts must protect.¹⁸⁰ The decision is not likely to mean that all private contractual relationships are at risk of being subjected to free movement rules.¹⁸¹

The European Court of Justice has in another context established that it is impossible in any circumstances for agreements between individuals to derogate from the mandatory provisions of the treaty on the free movement of goods.¹⁸² This case concerns an area which does not fall outside the area of competition law. It seems thus that both businesses and private persons are obliged to observe the provisions of the EC Treaty in contractual relations. It seems hard to find arguments supporting that this should not also be true for private persons activities which are carried out outside a contractual relationship. The private actions must still be able to hinder the free movement of goods and services and fall outside the possible justifications of such hindrance.

There is no clear case law from the European Court of Justice establishing whether a Business is liable under the provisions on the free movement of goods and services in connections to geographical delimitation.¹⁸³ It seems difficult to reject the argument that the Business genuinely seeks to avoid infringing legislation of another Member State and cross-border law enforcement. The risk of having to litigate in a foreign court and possibly with the application of foreign law is a real burden, in particular on a smaller business. It has been argued, in the context of consumer contracts, that the risk of being sued in the country of a potential consumer's domicile under the Brussels/Lugano System, and the impossibility of departing from this rule during the time of conclusion of the contract suggests that it should be possible for businesses to confine its activities to certain jurisdictions.¹⁸⁴ This reasoning can also be pursued in the light of the tort forum and the risk of being met with requirements under foreign law. Other arguments such as security of payment (collecting costs) may also be invoked by the Business.

It may be argued that the country of origin principle in the 2000 E-Commerce Directive is taking away some of the power of that argument.¹⁸⁵ This would in particular be true to the extent that the country of origin principle truly ensures that the Business only has to comply with national law. This is not the case for contractual obligations in consumer contracts, but may be true in relation to actions in tort,¹⁸⁶ and in relation to public law enforcement. It is, however, difficult to ignore the wide-ranging consequences of

180 Paragraph 34.

181 Schepel, Harm, The Enforcement of EC Law in Contractual Relations: Case Studies in How Not to 'Constitutionalize' Private Law, *European Review of Private Law*, 5-2000, p. 661 at p. 666.

182 Dansk Supermarked A/S v. A/S Imerco. Case 58/80 (22 January 1981).

183 Oliver, Peter, Free Movement of Goods in the European Union, Fourth Edition, Sweet and Maxwell, 2003, paragraph 4.40. See similarly Nielsen, Ruth, *E-handelsret*, 2. udgave, DJØF, 2004, p. 98.

184 Vasiljeva, Ksenija, 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online, *European Law Journal*, Volume 10 (January 2004), Issue 1, p. 123, at page 134.

185 See 2.5.3.

*denying the Business a right to confine its commercial activities to a certain geographical area.*¹⁸⁷

Article 12 of the EC Treaty contains a clear and unconditional prohibition which is likely to have direct effect. The Business is thus, in principle, obliged not to discriminate on grounds of domicile or nationality. This seems to apply even if the area in question is covered by the area of competition law. It may, however, make a difference, whether the activity is carried out across borders. The safeguard against discrimination seem to be all the more relevant if for example a physical store would refuse certain customers on grounds of nationality.

*Free movement of goods concerns not only traders but also individuals. It requires, particularly in frontier areas, that consumers resident in one Member State may travel freely to the territory of another Member State to shop under the same conditions as the local population. That freedom for consumers is compromised if they are deprived of access to advertising available in the country where purchases are made.*¹⁸⁸

In the case, *Familiapress v. Heinrich Bauer Verlag*,¹⁸⁹ which dealt with the free movement of goods, the European Court of Justice established that a national prohibition, on the sale of periodicals containing prize competitions, must not hinder the marketing of newspapers which, albeit containing prize games, puzzles or competitions, do not give readers residing in the Member State concerned the opportunity to win a prize.¹⁹⁰ By this approach, the European Court of Justice seems to encourage discrimination based on domicile in order to comply with the legal order of the state where the newspapers are distributed/marketed, i.e. denying access to certain features of the product.

It follows from article 21 of the draft service directive¹⁹¹ that Member States are to ensure that the recipient of a service is not made subject to discriminatory requirements based on his nationality or place of residence and that the general conditions of access to a service which are made available to the public at large by the service provider, do not contain such discriminatory provisions. In the proposal it is noted that if an internal area without frontiers is to be effectively achieved, Community citizens must not be prevented from benefiting from a service which is

186 See 4.1.3.

187 It seems to be a question which falls more naturally under competition law.

188 *GB-INNO-BM v. Confédération du commerce luxembourgeois*. Case 362/88 (7 March 1990), paragraph 8.

189 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case 368/95 (26 June 1997).

190 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v. Heinrich Bauer Verlag*, Case 368/95 (26 June 1997), paragraph 34.

191 See Proposal for a Directive of the European Parliament and of the Council on services in the internal market, Working document of the Luxembourg Presidency, containing clarifications to the Commission's proposal, Interinstitutional File: 2004/2001 (COD) (10 January 2005).

technically accessible on the market.¹⁹² Article 21(2) provides, however, for possible differences in the conditions of access where those differences are directly justified by objective criteria, such as additional costs effectively incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, or extra risks linked to rules differing from those of the Member State of origin.¹⁹³

5.3. Choice of Forum and Applicable Law

The second risk mitigation technique which is dealt with in this thesis is choice of forum and applicable law. The User is assumed to have access to the Business's website, and the question dealt with concerns to what extent the Business may mitigate or eliminate the risk of cross-border law enforcement by entering an agreement on choice of forum and/or applicable law.

Parties to a contract may as a starting point choose both forum and applicable law (parties' autonomy). This is clear from both the 1980 Rome Convention and the acts constituting the Brussels/Lugano System. So far in this thesis, it was assumed that the Business and the User did not make an agreement on applicable law and jurisdiction. It should be noted that the party autonomy is a concept within private law which allow private parties to designate the proper forum and applicable law. Such an agreement will, as a starting point, only have effect upon the User who is subject to the terms presented by the Business. It will in particular not bind other parties, including in particular competitors, private organisations and public authorities insofar as they are not acting as users of the website.

Contractual delimitation can be assessed at two levels of interaction between the Business and the User. A traditional approach would be to enter such agreements in connection to the selling of goods or services which then concerns the choice of law and forum between the parties in connection to the purchase. Another approach would be to enter a contract concerning the use of the Business's website ('terms of use') which does not necessarily involve a purchase by the User.¹⁹⁴ Thereby the parties may agree on forum and applicable law in disputes between the parties in relation to the content and use of the website.¹⁹⁵

The use of such agreements raises questions on 1) to what extent they may be entered, 2) the consequences of entering such an agreement and 3) how much it

192 Proposal for a Directive of the European Parliament and of the Council on services in the internal market, recital 50.

193 See Proposal for a Directive of the European Parliament and of the Council on services in the internal market, recital 50.

194 See Vasiljeva, Ksenija, 1968 Brussels Convention and EU Council Regulation No 44/2001: Jurisdiction in Consumer Contracts Concluded Online, *European Law Journal*, Volume 10 (January 2004), Issue 1, p. 123, at page 132 which provides that 'The most obvious way for the company to avoid the danger of being sued in the courts of all Member States would be to place a kind of disclaimer to their website'.

195 The terms of use may also contain substantive provisions whereby the User may waive certain rights to for example claiming damages. Such substantive terms are not dealt with in this thesis.

takes before such an agreement is entered. It is of particular interest in connection to electronic commerce to what extent the posting of terms of use on a website may constitute an agreement between the Business and the User.

The focus in this thesis is to what extent it is possible to avoid the application of a foreign law or forum. The analysis is thus concentrated on whether the Business can enter an agreement which entails that the forum and the law of the Business is to apply. It cannot be excluded that it, under certain circumstances, would be a better solution to apply another forum or law than that of the Business. This is, however, not dealt with in this thesis. Agreements on choice of law and forum may be entered either before or after a conflict occurs. In the lights of the proactive/preventive approach in this thesis, only pre-conflict agreements are dealt with.¹⁹⁶

5.3.1. In Writing

A new provision was introduced to the Brussels/Lugano System in the 2000 Brussels Regulation which provides that 'any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing"'.¹⁹⁷ This provision, which also covers clauses in contracts concluded by electronic means, was introduced to take account of the development of new communication techniques, and in order to ensure that an agreement on forum should not be invalidated because it is concluded in a form that is not written on paper but accessible on a screen.¹⁹⁸ As mentioned in the previous chapter, the 1968 Brussels Convention and probably also the 1988 Lugano Convention is likely to be interpreted in the light of the 2000 Brussels Regulation, in the absence of reasons for interpreting two (corresponding) provisions differently.¹⁹⁹

A similar approach could also be expected in relation to the 1980 Rome Convention and the 1955 Hague Convention, since the 2000 E-Commerce Directive²⁰⁰ imposes on Member States to ensure that their legal system allows contracts to be concluded by electronic means, and that Member States in particular must ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means. In connection with the amendment introduced in the 2000 Brussels Regulation, it was noted that the change or clarification was also directed to the objectives pursued by the proposal for the

196 Post-conflict-agreements may, however, in real life be a helpful part of managing arisen conflicts.

197 Article 23(2).

198 Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(1999) 348 (15 July 1999), p. 18.

199 See *Verein für Konsumenteninformation v. Karl Heinz Henkel*. Case 167/00 (1 October 2002), paragraph 49 as discussed under 4.2.1.

200 Article 9(1).

2000 E-Commerce Directive.²⁰¹

Further support for such an approach towards electronic contracting can be found in the principle of equal treatment of electronic contracts in the 1996 UNCITRAL Model Law on Electronic Commerce.²⁰² The model law adopts the 'functional equivalent approach', which focuses on the purposes and functions of traditional paper-based requirement with a view to determining how those purposes or functions can be satisfied by electronic means.²⁰³ According to this principle, information must not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message or solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.²⁰⁴

It is a fundamental principle in the model law that data messages should not be discriminated against, i.e., that there should be no disparity of treatment between data messages and paper documents.²⁰⁵ Article 6(1) provides that where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.²⁰⁶ Article 11 further provides that in the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages, and that contracts must not be denied validity or enforceability on the sole ground that a data message was used. In the commentary to the model law, it is emphasised that the principles may be useful at an international level as a tool for interpreting international instruments such as conventions.²⁰⁷

It should be mentioned that article 5 bis of the 1996 UNCITRAL Model Law on Electronic Commerce which deals with incorporation by reference, provides that information are not to be denied legal effect, validity or enforceability solely on the grounds that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message.²⁰⁸ It should be emphasised that the model law has no formal legal binding effect and my thus mainly serve as inspiration on how to deal with the subject in question. The mentioned provision deals with situations

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- 201 Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(1999) 348 (15 July 1999), p. 18, with reference to the Commission proposal for a Council Directive on certain legal aspects of electronic commerce in the internal market, COM(1998) 586 (5 February 1990).
- 202 1996 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment. General Assembly Resolution 51/162 (16 December 1996). See also UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001, Resolution 56/80 adopted by the General Assembly.
- 203 Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), paragraph 16.
- 204 Article 5 and 5 bis. Article 5 bis was adopted by the Commission at its thirty-first session, in June 1998.
- 205 Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), paragraph 46.
- 206 This principle applies according to article 6(2) whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being in writing.
- 207 Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), paragraph 5.
- 208 1996 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment. General Assembly Resolution 51/162 (16 December 1996).

*where certain terms and conditions, although not stated in full but merely referred to in a data message, might need to be recognised as having the same degree of legal effectiveness as if they had been fully stated in the text of that data message.*²⁰⁹

Both the 2000 E-Commerce Directive and the 1996 UNCITRAL Model Law on Electronic Commerce adopt an approach which does not ensure the validity of contracts entered electronically. These acts pursue solely the objective of ensuring that contracts are not invalid because it is concluded by electronic means. So even though an agreement conferring jurisdiction or designating the applicable law is made electronically, such clause must still be incorporated in a way which meets the requirements in the respective acts on choice of forum and applicable law.

The discussion on the legal validity of contracts entered electronically will not be pursued further in this thesis. The European Court of Justice has not dealt with this question and it falls outside the scope to elaborate on national law and jurisprudence in this context. It seems reasonable, however, to assume that contracts, including agreement on choice of law and forum, may be concluded electronically, but that the validity to a large extent will depend on at least the presentation of the clauses and the nature and expression of consent. The focus in the following part deals with the requirements laid down in the relevant international acts concerning choice of law and forum. To the extent that the validity of a contract is to be determined in accordance with national law, article 9 (1) of the 2000 E-Commerce Directive should be borne in mind.

5.3.2. Choice of Forum

The choice of applicable law must be determined in accordance with the national choice of law rules of the state in which the court is located. Due to the homeward-trend,²¹⁰ the risk of applying a law which is foreign to the Business may be greater when the Business is being sued in a foreign court of law, and the costs and inconvenience is also likely to be higher when litigating before a foreign court. For those reasons the Business may be interested in entering a choice of forum agreement with the User.

This analysis includes not only the Brussels/Lugano System, but also the 1958 New York Convention on arbitration awards which has a much wider geographical scope of application than the Brussels/Lugano System.²¹¹ The 1958 New York Convention deals with recognition and enforcement of arbitration awards. A draft Hague convention²¹² is intended to lay down rules for recognition and enforcement

209 See Guide to Enactment, paragraph 46-1.

210 See 4.1.1.

211 See in general Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 784ff.

212 See Preliminary Draft Convention on Exclusive Choice of Court Agreements, draft report drawn up by

for judgment in international cases in civil or commercial matters, where an exclusive choice of court agreements was concluded. It may take a long time before such a convention is finalised, adopted and ratified by a significant number of states. A presentation of the principles in the draft Hague judgments convention has been included because it may provide the outline of an emerging, global convention on choice of forum and recognition of judgments rendered pursuant to such a clause.

5.3.2.1. *The Brussels/Lugano System*

It follows from article 17(1) of the 1968 Brussels Convention and the 1988 Lugano Convention that if the parties, one or more of whom are domiciled in a contracting state, have agreed that a court or the courts of a contracting state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. In the corresponding article in the 2000 Brussels Regulation,²¹³ it is provided that the jurisdiction is exclusive unless the parties have agreed otherwise. This enables the parties to agree that the jurisdiction is not exclusive.²¹⁴

*Article 17 also applies to an agreement conferring jurisdiction made between a person domiciled in a contracting state and a person not domiciled in a contracting state, if the agreement confers jurisdiction on the courts of a contracting state.*²¹⁵

*For good measure, it should be mentioned that agreements conferring jurisdiction shall have no legal force if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of article 16 of the 1968 Brussels Convention and 1988 Lugano Convention (article 22 of the 2000 Brussels Regulation).*²¹⁶ These exclusive jurisdictions are, however, not dealt with in this thesis.

A choice of forum clause under article 17 must be either a) in writing or evidenced in writing, b) in a form which accords with practices which the parties have established between themselves, or c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or

Masato Dogauchi and Trevor C. Hartley, Preliminary Document No 26, December 2004, www.hcch.net. See also Comments on the Preliminary Draft Convention on Exclusive Choice of Court Agreements received by the Permanent Bureau, Preliminary Document 29, May 2005.

213 2000 Brussels Regulation, article 23(1).

214 This additional flexibility is warranted by the need to respect the autonomous will of the parties. See proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(1999) 348 (15 July 1999), p. 18.

215 Jenard Report, p. 37f.

216 Article 17(4) of the 1968 Brussels Convention and 1988 Lugano Convention, and article 23(4) of the 2000 Brussels Regulation.

commerce concerned.²¹⁷ The requirements must be strictly interpreted in so far as that article excludes both jurisdiction as determined by the general principle of the defendant's courts laid down in article 2 and the special jurisdictions provided for in articles 5 and 6.²¹⁸

Article 17(1)(c) was introduced by the 1978 Accession Convention²¹⁹ in order to take account of the specific practices and requirements of international trade, but without departing the need for consensus between the parties to a jurisdiction clause. Despite the relaxation of the formal requirements in article 17(1)(c), it must still be proven that a consensus existed on the inclusion in the contract of the general conditions of trade and the particular provisions.²²⁰ Consensus on the part of the contracting parties as to a jurisdiction clause is presumed to exist where commercial practices in the relevant branch of international trade or commerce exist in this regard of which the parties are or ought to have been aware.

A jurisdiction clause may be entered silently, by for example not reacting to a commercial letter of confirmation containing a pre-printed reference to the courts having jurisdiction, provided that such conduct is consistent with a practice in force in the area of international trade or commerce in which the parties in question are operating and the parties are or ought to have been aware of that practice.²²¹ Actual or presumptive awareness of such practice on the part of the parties to a contract is made out where, in particular, they had previously had commercial or trade relations between themselves or with other parties operating in the sector in question or where, in that sector, a particular course of conduct is sufficiently well known because it is generally and regularly followed when a particular type of contract is concluded, with the result that it may be regarded as being a consolidated practice.²²²

The existence of a practice is not to be determined by reference to the law of one of the contracting parties, and should not be determined in relation to international trade or commerce in general, but to the branch of trade or commerce in which the parties to the contract are operating. A usage exists in the branch of trade or commerce in question where in particular a certain course of conduct is generally and regularly followed by operators in that branch when concluding

217 See in general Mankowski, Peter, *Jurisdiction and Enforcement in the Information Society*, Nielsen, Ruth, Jacobsen, Søren Sandfeld and Trzaskowski, Jan (editors), *EU Electronic Commerce Law*, DJØF Publishing, 2004, p. 124 at p. 132ff.

218 *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*. Case 106/95 (20 February 1997), paragraph 14 with references.

219 Convention of 9 October 1978 on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1).

220 Schlosser Report, p. 125.

221 See *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, Case 106/95 (20 February 1997), paragraphs 16-20. See also *Trasporti Castelletti SpA v. Hugo Trumpy SpA*, Case 159/97 (16 March 1999), paragraphs 18 to 20.

222 See *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, Case 106/95 (20 February 1997), paragraph 24.

contracts of a particular type.²²³ Such a course of conduct needs not to be established in specific countries or in all contracting states.

The fact that a practice is generally and regularly observed by operators in the countries which play a prominent role in the branch of international trade or commerce in question can be evidence which helps to prove that a usage exists.²²⁴ Despite the reference to usage in international trade or commerce contained in article 17 of the 1968 Brussels Convention, real consent by the parties is always one of the objectives of that provision, justified by the concern to protect the weaker contracting party by ensuring that jurisdiction clauses incorporated in a contract by one party alone do not go unnoticed.²²⁵

The concept of 'agreement conferring jurisdiction' is an independent concept.²²⁶ Article 17 is based on recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to settle disputes falling within the scope of the convention, and it must be construed in a manner consistent with the wishes of the parties.²²⁷ The choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down by article 17, and any further review of the validity of the clause and of the intention of the party which inserted it must be excluded.²²⁸

A jurisdiction clause is governed by the provisions of the convention, whereas the substantive provisions of the main contract in which that clause is incorporated are governed by the *lex causae* determined by the law applicable in accordance with private international law of the state of the court having jurisdiction.²²⁹ It is for the national court to interpret the clause conferring jurisdiction invoked before it,²³⁰ and that court must firstly examine the clause conferring jurisdiction, and hereafter, provided it has jurisdiction, examine the existence of an agreement between the parties.²³¹

The usages referred to in article 17(1)(c) cannot be nullified by national

223 *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, Case 106/95 (20 February 1997), paragraph 23.

224 *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*. Case 159/97 (16 March 1999), paragraph 27.

225 *Erich Gasser GmbH v. MISAT Srl*. Case 116/02 (9 December 2003), paragraph 50. See also *Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL*, Case 106/95 (20 February 1997), paragraph 17 and *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*, Case 159/97 (16 March 1999), paragraph 19.

226 *Powell Duffryn plc v. Wolfgang Petereit*. Case 214/89 (10 March 1992), paragraphs 13 and 14.

227 *Coreck Maritime GmbH v. Handelsveem BV and Others*, Case 387/98 (9 November 2000), paragraph 14 with references.

228 *Elefanten Schuh GmbH v. Pierre Jacqmain*, Case 150/80 (24 June 1981), paragraphs 25 and 26 and *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*, Case 159/97 (16 March 1999), paragraph 49 and 51.

229 *Francesco Benincasa v. Dentalkit Srl.*, Case 269/95 (3 July 1997), paragraph 25.

230 *Powell Duffryn plc v. Wolfgang Petereit*, Case 214/89 (10 March 1992), paragraph 36.

231 *Coreck Maritime GmbH v. Handelsveem BV and Others*, Case 387/98 (9 November 2000), paragraph 13 with references.

statutory provisions which require compliance with additional conditions as to form.²³² It is in keeping with the spirit of certainty that the national court seized should be able readily to decide whether it has jurisdiction on the basis of the rules of the convention/regulation, without having to consider the substance of the case.²³³ A jurisdiction clause needs not to be formulated in such a way that the competent court can be determined on its wording alone. But the clause must then state objective factors which are sufficiently precise to enable the court seized to ascertain whether it has jurisdiction.²³⁴

It has been established that the mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not of itself satisfy the requirements of article 17(1)(a), since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction.²³⁵ If a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing is fulfilled only if the contract is signed by both parties and it contains an express reference to those general conditions.²³⁶

An express reference to a clause conferring jurisdiction which is presented in for example an offer, is valid only if in the case of an express reference, which can be checked by a party exercising reasonable care, and only if it is established that the general conditions, including the clause conferring jurisdiction, have in fact been communicated to the other contracting party with the offer to which reference is made.²³⁷ A confirmation in writing of the contract by the vendor, accompanied by the text of his general conditions, is without effect, as regards any clause conferring jurisdiction which it might contain, unless the purchaser agrees to it in writing,²³⁸ whereas subsequent notification of general conditions containing such a clause is not capable of altering the terms agreed between the parties, except if those conditions are expressly accepted in writing by the purchaser.²³⁹

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- 232 *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*, Case 159/97 (16 March 1999), paragraph 38.
 - 233 *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*, Case 159/97 (16 March 1999), paragraph 48 with references.
 - 234 *Coreck Maritime GmbH v. Handelsveem BV and Others*, Case 387/98 (9 November 2000), paragraph 15.
 - 235 *Estasis Salotti di Colzani Aimo et Gianmario Colzani v. Rüwa Polstereimaschinen GmbH*, Case 24/76 (14 December 1976), paragraph 9.
 - 236 *Estasis Salotti di Colzani Aimo et Gianmario Colzani v. Rüwa Polstereimaschinen GmbH*, Case 24-76 (14 December 1976), paragraph 10.
 - 237 *Estasis Salotti di Colzani Aimo et Gianmario Colzani v. Rüwa Polstereimaschinen GmbH*, Case 24-76 (14 December 1976), paragraph 12.
 - 238 *Galleries Segoura SPRL v. Société Rahim Bonakdarian*, Case 25/76 (14 December 1976), paragraph 8.
 - 239 *Galleries Segoura SPRL v. Société Rahim Bonakdarian*, Case 25/76 (14 December 1976), paragraph 10.

It follows from article 17(5)²⁴⁰ of the 1968 Brussels Convention and 1988 Lugano Convention that if an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention. This provision, which is not found in the 2000 Brussels Regulation, deals with jurisdiction clauses which give one of the parties a wider choice of courts than the other party. The common intention to confer an advantage on one of the parties must therefore be clear from the terms of the jurisdiction clause or from all the evidence to be found therein or from the circumstances in which the contract was concluded. The designation of a court or the courts of the contracting state in which one of the parties is domiciled is not sufficient in itself.²⁴¹

As mentioned above,²⁴² it has been emphasised in article 23(2) of the 2000 Brussels Regulation that any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing, and that both 1968 Brussels Convention and the 1988 Lugano Convention is likely to be constructed in the light of the regulation. It is important to bear in mind that the provision on choice of forum is to be constructed independently of national law.

It is clear that the clause must be incorporated in a way that it can be proven that a consensus existed on the inclusion in the contract. Terms and conditions, including choice of forum clauses, to a contract entered via a website may be presented in different ways. It is difficult on the basis of the current case law to determine how much it takes before it can be proven that a clause conferring jurisdiction has in fact been included by the parties. If the terms are not clearly presented, an express reference has to be made, and the Business must ensure that the User in fact consents to the agreement. This applies both to choice of forum in connection with contracts and in connection with the use of a website.

Jurisdiction can also be derived from submission, if the defendant makes an appearance before a court of a contracting state / Member State and the appearance is not entered solely to contest the jurisdiction.²⁴³ That article applies even where the parties have by agreement designated a court which is to have jurisdiction.²⁴⁴ The focus in this thesis is, however, on what the business can do to mitigate cross-border law enforcement before the conflict occurs. Where a defendant domiciled in one Member State / contracting state is sued in a court of another contracting state and does not make an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of the Convention.²⁴⁵ If the defendant fails to make an appearance, it is not equivalent to a submission to the jurisdiction, and the court must

240 Originally article 17(3). See Jenard Report, p. 38.

241 Rudolf Anterist v. Crédit Lyonnais, Case 22/85 (24 June 1986), paragraphs 14 to 16.

242 See 5.3.1.

243 See article 18 of the 1968 Brussels Convention and 1988 Lugano Convention and article 24 of the 2000 Brussels Regulation which concerns jurisdiction implied from submission.

244 Elefant Schuh GmbH v. Pierre Jacqmain, Case 150/80 (24 June 1981), paragraph 11.

245 Article 20 of the 1968 Brussels Convention and the 1988 Lugano Convention, and article 26 of the 2000 Brussels Regulation.

itself ensure that the plaintiff proves that the court has international jurisdiction ²⁴⁶

5.3.2.1.1. Place of Performance

An indirect approach for the Business to mitigate the risk of being sued in a foreign court is to specify that the delivery of the goods or service is to take place in the state where the Business is established. As accounted for in the previous chapter,²⁴⁷ a person may in matters relating to a contract be sued in the courts for the place of performance of the obligation in question. By agreeing that delivery of the Business's obligation in a contract is to take place in the state where the Business is established, the Business can avoid that the User can take advantage of the performance forum deriving from the Business's obligation in the contract.

The European Court of Justice has established that if the place of performance of a contractual obligation was specified by the parties in a clause, which is valid according to the national law applicable to the contract, a court has jurisdiction under the performance forum in article 5(1), irrespective of whether the formal conditions provided for under article 17 have been observed.²⁴⁸ It has subsequently been established by the court that the parties are not entitled to designate, with the sole aim of specifying the courts having jurisdiction, a place of performance having no real connection with the reality of the contract.²⁴⁹ If the sole purpose of determining the place of performance is the determination of the place of the courts having jurisdiction, such an agreement is governed by article 17 and is therefore subject to the specific requirements as to form.²⁵⁰

Defining the place of performance must thus not be a circumvention of the requirements laid down in article 17, and there must be a real connection between the designated place of performance and the reality of the contract. The court designated by virtue of article 5(1) must necessarily be the court which has the closest connection with the dispute,²⁵¹ and this approach does notably not provide an exclusive jurisdiction like article 17.²⁵²

5.3.2.1.2. Consumer Contracts

The access to enter an agreement on choice of forum is limited in connection to the

²⁴⁶ Jenard Report, p. 39.

²⁴⁷ See 4.2.1.4.

²⁴⁸ Siegfried Zelger v. Sebastiano Salinitri, Case 56/79 (17 January 1980), paragraph 6 (see also paragraph 5).

²⁴⁹ Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL, Case 106/95 (20 February 1997), paragraph 31.

²⁵⁰ Mainschiffahrts-Genossenschaft eG (MSG) v. Les Gravières Rhénanes SARL, Case 106/95 (20 February 1997), paragraphs 33 and 34.

²⁵¹ See Custom Made Commercial Ltd v. Stawa Metallbau GmbH, Case 288/92 (29 June 1994), paragraph 21.

²⁵² See Siegfried Zelger v. Sebastiano Salinitri, Case 56/79 (17 January 1980), paragraphs 3 and 4.

specific provisions on certain consumer contracts as discussed in the previous chapter.²⁵³ These provisions may be departed from only by an agreement: 1) which is entered into after the dispute has arisen, or 2) which allows the consumer to bring proceedings in courts other than those indicated in the section on certain consumer contracts, or 3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State / contracting state, and which confers jurisdiction on the courts of that state, provided that such an agreement is not contrary to the law of that state.²⁵⁴ Only the second condition applies to the situation dealt with in this thesis. There is no benefit for the Business to provide the consumer with more places to sue the Business.

5.3.2.2. *The 1958 New York Convention*

At a more global level the 1958 New York Convention²⁵⁵ is also of interest for European businesses. This convention provides a widely adopted system for recognition of arbitral awards. The 1958 New York Convention is interesting because of the large number of contracting states (135 states)²⁵⁶ and because each contracting state according to article III recognises arbitral awards as specified in the convention.²⁵⁷

Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that 1) the subject matter of the difference is not capable of settlement by arbitration under the law of that country or 2) The recognition or enforcement of the award would be contrary to the public policy of that country.²⁵⁸ A contracting state may in connection to the ratification of the convention declare that recognition and enforcement of arbitral awards is subject to reciprocity, so that the convention apply only to awards from another contracting state.²⁵⁹

Each contracting state must according to article II(1) recognise a written arbitration clause in legal relationships concerning a subject matter capable of settlement by arbitration. The term 'agreement in writing' includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.²⁶⁰ Electronic agreements on choice of forum

253 See 4.2.1.5.

254 Article 15 of the 1968 Brussels Convention and the 1988 Lugano Convention, and article 17 of the 2000 Brussels Regulation.

255 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (10 June 1958).

256 See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXII/treaty1.asp>

257 See in general Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 784ff.

258 1958 New York Convention, article V(2).

259 1958 New York Convention, article I (3).

260 1958 New York Convention, article II(2).

is not expressly dealt with, but there are no reasons why such agreements should not be binding upon the parties.²⁶¹

5.3.2.3. Draft Hague Judgments Convention

A convention on recognition of clauses on choice of jurisdiction seems to be emerging out of a previously more ambitious project under the Hague Convention.²⁶² The intention is only to mention this draft convention and its principles here, but further elaboration will not be carried out.

The objective of the draft convention is to make exclusive choice of court agreements as effective as possible in the context of international business in order to do for choice of court agreements what the 1958 New York Convention has done for arbitration agreements.²⁶³ It follows from article 1 of the draft convention that it is intended to apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters. Among other exclusions from scope, the draft convention is not to apply to exclusive choice of court agreements to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party.²⁶⁴

Article 9(1) of the draft Hague Convention provides that a judgment given by a court of a contracting state designated in an exclusive choice of court agreement shall be recognised and enforced in other contracting states in accordance with the rules of the convention. It follows from article 3 of the draft convention that an exclusive choice of court agreement must be entered into or evidenced 1) in writing, or 2) by any other means of communication which renders information accessible so as to be usable for subsequent reference. An exclusive choice of court agreement that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the exclusive choice of court agreement cannot be contested solely on the ground that the contract is not valid.²⁶⁵

It is provided in article 3(a) that for the purpose of the convention, an 'exclusive choice of court agreement' is an agreement that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one contracting state or one or more specific courts in one contracting state to the exclusion of the jurisdiction of any other courts. A choice of court agreement which designates the courts of one contracting state or one or more specific courts in one contracting state shall be deemed to be exclusive unless the parties

261 See 5.3.1.

262 See Preliminary Draft Convention on Exclusive Choice of Court Agreements, draft report drawn up by Masato Dogauchi and Trevor C. Hartley, Preliminary Document No 26, December 2004, www.hcch.net.

263 Draft report drawn up by Masato Dogauchi and Trevor C. Hartley, Preliminary Document No 26 of December 2004, http://hcch.e-vision.nl/upload/wop/jdgm_pd26e.pdf, p. 7.

264 Draft Hague Convention, article 2(1)(a).

265 Draft Hague Convention, article 3(d).

have expressly provided otherwise.²⁶⁶ Article 9 of the draft convention provides an exhaustive list of grounds on which recognition or enforcement may be refused.²⁶⁷

5.3.3. Choice of Applicable Law

The starting point in the 1980 Rome Convention is that a contract is to be governed by the law chosen by the parties. This principle is recognised in the private international law of most states.²⁶⁸ It follows from article 3(1) of the 1980 Rome Convention that the choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.²⁶⁹ A choice of law clause needs not to be expressly stated in the contract, since the choice may also be demonstrated by the circumstances of the case with reasonable certainty. This can for example be in situations where a previous course of dealing between the parties has been governed by a particular law, where a choice of forum certainly show that the parties intend a particular law to apply, or references to particular section in national law may show that the parties have deliberately chosen that law to govern the entire contract. There must, however, be no doubt that it was the parties' intention that the contract should be governed by that particular law, and the examination is still subject to other terms of the contract and the circumstances of the case.²⁷⁰

The examples mentioned in the Giuliano-Lagarde Report seem to indicate that the circumstances that could replace an express choice of law clause, are mainly circumstances connected to an existing business relation or the negotiations of the particular contract. The report also emphasises that the intentions of the parties are crucial. The court is not permitted to presume a choice of law that is made where the parties had no clear intention of making such a choice.²⁷¹ Such situation is to be determined in accordance with article 4, as dealt with in the previous chapter,²⁷² and which applies 'to the extent that the law applicable to the contract has not been chosen in accordance with article 3'.

In the contracts dealt with in this thesis, which do not involve previous business relationships between the parties and where there is no real negotiations between the parties, the alternative to an express clause seem to be limited, if existing at all. In contracts entered electronically via website, the different parts of the contract may consist of several steps. This means that an electronic contract is not

266 Draft Hague Convention, article 3(b).

267 Preliminary Draft Convention on Exclusive Choice of Court Agreements, draft report drawn up by Masato Dogauchi and Trevor C. Hartley, Preliminary Document No 26, December 2004, http://hcch.e-vision.nl/upload/wop/jdgm_pd26e.pdf.

268 Giuliano-Lagarde Report, p. 15.

269 See in general Lookofsky, Joseph and Hertz, Ketilbjørn, *Transnational Litigation and Commercial Arbitration*, second edition, Juris Publishing and DJØF Publications Copenhagen, 2004, p. 399ff.

270 Giuliano-Lagarde Report, p. 15.

271 Giuliano-Lagarde Report, p. 17.

272 See 4.1.1.

necessarily a single document. The formulation ensures that choice of law clauses presented in earlier steps is to be taken into consideration when determining the parties choice of law.²⁷³

The parties to a contract may select the law applicable to either parts of or the whole contract. It follows from article 3(4) that the existence and validity of the consent of the parties as to the choice of the applicable law is to be determined in accordance with the provisions on material and formal validity and on incapacity (articles 8, 9 and 11).²⁷⁴ Article 8(1) provides that the existence and validity of a contract, or of any term of a contract, must be determined by the law which would govern it under the convention if the contract or term was valid. This provision applies also to the existence and validity of the parties' consent as to choice of the applicable law. This is also clear from the use of the word 'term' which emphasises that it also covers situations in which there is a dispute concerning the validity of a contract term, such as a choice of law clause.²⁷⁵

A party may according to article 8(2) rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the applicable law. This rule concerns only the existence and not to the validity of a consent, and is designed *inter alia* to solve problems concerned with the binding effect of silence by one party.²⁷⁶ It can thus not be ruled out that the law of the User may be invoked to challenge whether the User did in fact consent to the choice of law clause. This may in particular raise problems in connection to different approaches to an electronically expressed consent to contracts and consumer contracts which fall outside of the scope of certain consumer contracts as dealt with below. As mentioned above, article 9(1) of the 2000 E-Commerce Directive provides that Member States must ensure that their legal system allows contracts to be concluded by electronic means.

There are certain limitations when it comes to choice of law in certain consumer contracts, as defined in the previous chapter. Article 5(2) of the 1980 Rome Convention provides that a choice of law made by the parties in such a contract must not have the result of depriving the consumer of the protection afforded to him by the mandatory rules²⁷⁷ of the law of the country in which he has his habitual residence. The reference is not to international mandatory rules, as concerned in article 7, and the provision embodies the principle that a choice of law in a consumer contract cannot deprive the consumer of the protection afforded to him by the law of the country in which he has his habitual residence.²⁷⁸ The

273 See 4.1.1.1.

274 See 4.1.1.

275 Giuliano-Lagarde Report, p. 28.

276 Giuliano-Lagarde Report, p. 28.

277 Rules which cannot be deviated from by contract.

278 Giuliano-Lagarde Report, p. 23.

formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.²⁷⁹

The parties to a contract may also enter an agreement on choice of law in accordance with article 3 after the conclusion of the contract, but without prejudicing the formal validity of the contract or adversely affect the rights of third parties.²⁸⁰ Even where the parties have entered an agreement on choice of law, such choice does not prejudice the application of mandatory rules of the law of a state, where all the other elements relevant to the situation at the time of the choice are connected with.²⁸¹ This thesis does not deal with agreements on choice of law entered after the conclusion of the contract, and all relevant factors in the situations dealt with will not be connected to only one state.

The 1980 Rome Convention does not, like the Brussels/Lugano System, intend to lay down all requirements for a choice of law clause. It provides some requirements which are to be interpreted in conjunction with the law applicable to the contract. The access for the European Court of Justice to interpret the 1980 Rome Convention is not likely to change that, but it may be asked to elaborate on what it takes for a choice of law to be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.

The 1955 Hague Convention has also as its starting point that a sale is to be governed by the domestic law of the country designated by the contracting parties. It follows from article 2 that such designation must be contained in an express clause, or unambiguously result from the provisions of the contract, and that conditions affecting the consent of the parties to the law declared applicable shall be determined by such law.

5.3.4. The 1993 Directive on Unfair Contract Terms

Clauses on choice of forum and applicable law may also fall under the 1993 Directive on Unfair Contract Terms,²⁸² which deals with consumer contracts. These provisions apply to consumer contracts as defined in the directive itself which is not a definition identical to the definition of certain consumer contracts within the Brussels/Lugano System or the 1980 Rome Convention. Article 5 of the directive provides that where terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language, and that the interpretation most favourable to the consumer shall prevail if there doubt about the meaning of a term.

A contractual term which has not been individually negotiated is to be regarded as unfair if, contrary to the requirement of good faith, it causes a significant

279 1980 Rome Convention, article 9(5).

280 1980 Rome Convention, article 3(2). See also Giuliano-Lagarde Report, p. 18.

281 1980 Rome Convention, article 3(3). See also Giuliano-Lagarde Report, p. 18.

282 Directive 93/13 (5 April 1993) on unfair terms in consumer contracts.

imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.²⁸³ Unfair terms used in a contract, concluded with a consumer, by a seller or supplier shall not be binding on the consumer, but the contract shall continue to bind the parties if it is capable of continuing in existence without the unfair terms.²⁸⁴

The annex of the directive contains an indicative and non-exhaustive list of the terms which may be regarded as unfair, and includes under *litra q*, terms which have the object or effect of excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract. This applies *inter alia* to clauses in consumer contracts conferring jurisdiction to the Business's home court.²⁸⁵ The protection afforded in the directive entails that the national court is able to determine of its own motion whether a term of a contract before it is unfair when the court is making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts.²⁸⁶

As provided above, article 17 of the 1968 Brussels Convention is intended to lay down itself the formal requirements which agreements conferring jurisdiction must meet, and contracting states are not free to lay down formal requirements other than those contained in the convention.²⁸⁷ A conflict between the protection afforded by the 1993 Directive on Unfair Contract Terms and the autonomous system of article 17 may appear in those cases where a consumer contract within the meaning of the directive falls outside of the scope of certain consumer contracts in the 1968 Brussels Convention or the 1988 Lugano Convention.²⁸⁸ This could for example be in situations where the conclusion of the contract was not preceded by specific invitation addressed to the consumer or by advertising or maybe more likely if the consumer did not take in that State the steps necessary for the conclusion of the contract.²⁸⁹ It seems reasonable to believe that the European Court of Justice would include the directive in the autonomous understanding of article 17, since it is provided in article 57(3) of the 1968 Brussels Convention that the convention shall not affect the application of provisions which, in relation to

283 1993 Directive on Unfair Contract Terms, article 3.

284 1993 Directive on Unfair Contract Terms, article 6(1).

285 See for example *Océano Grupo Editorial SA v. Roció Murciano Quintero*, Joined Cases 240-244/98 (27 June 2000), paragraphs 22 and 24.

286 *Océano Grupo Editorial SA v. Roció Murciano Quintero*, Joined Cases 240-244/98 (27 June 2000), paragraph 29.

287 *Elefanten Schuh GmbH v. Pierre Jacqmain*, Case 150/80 (24 June 1981), paragraphs 25 and 26. See also *Trasporti Castelletti Spedizioni Internazionali SpA v. Hugo Trumpy SpA*, Case 159/97 (16 March 1999).

288 See also *Larsson, Marie*, *konsumentskyddet över Gränserna – Särskilt Inom EU*, Iustus Förlag, 2002, p. 125 f.

289 See article 13(1) and 4.2.1.5.

particular matters, govern jurisdiction or the recognition or enforcement of judgments and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonised in implementation of such acts.

It must be assumed that the interpretation of the corresponding article 23 of the 2000 Brussels Regulation has to be interpreted in the light of the 1993 Directive on Unfair Contract Terms, since both instruments are part of the common EU legislation. This is also in line with article 67 of the 2000 Brussels Regulation which concerns relations with other instruments and which provides that the regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments. With the amendments of the provisions on certain consumer contracts in the 2000 Brussels Regulation, as accounted for in the previous chapter, the risk of a conflict between the definitions in the regulation and the directive is, all else being equal, lower.

5.4. Conclusion

As established in the previous chapters, the Business is running a real risk of cross-border law enforcement when placing a website on the Internet. It seems reasonable to establish from the examined case law that there is a direct proportionality between the amount of activity in a state and the risk of traditional cross-border law enforcement deriving from those states. The same may be true for alternative law enforcement. In order to carry out traditional cross-border law enforcement, it is a prerequisite that the circumstances dealt with in the two previous chapters are fulfilled. In order to establish whether a website is directed towards a particular state, a number of connecting factors may be examined. These factors do not provide a complete check-list, and it should be emphasised that courts are most likely to attach importance to the economical reality of the activity.

From the examined case law, connecting factors may be grouped into questions concerning 1) access to the website, 2) Magnitude and Nature of Business Activity, 3) the presentation and relevance, 4) marketing measures and 5) the place of business and technical infrastructure. These factors may be used by the Business to evaluate and adjust its website in order to mitigate the risk of cross-border law enforcement.

The Business may also use other measures to delimit the geographical scope of the Business's website activities. In particular technical measures excluding users from particular jurisdictions may be effective to avoid cross-border law enforcement as long as the employment of such measures reflect a genuine intention to avoid commercial activity in those jurisdictions. Technical measures are not 100% effective, and they may be circumvented by the users. There is, however, likely to be a direct proportionality between the effectiveness of the

applied measure and the effectiveness of mitigating legal risks. Technical delimitation may be combined with asking the User to reveal his identity. Other measures of geographical delimitation, such as for example stating the targeted states may also count in the examination of where the website activity is directed. Such measure is, however, not effectively keeping users away from the website. Even though article 12 of the EC Treaty provides that any discrimination on grounds of nationality is prohibited, it seems to be justifiable to carry out geographical delimitation as long as it is done as part of a general business strategy and in order to avoid certain legal risks.

The Business may also mitigate the risk of cross-border law enforcement by entering agreements on forum and applicable law. This is an effective measure to mitigate the possibility of traditional cross-border law enforcement in connection to contracts. The Business may ensure that it can only be sued in its home court and that the law of the Business is to be applied. Agreements on choice of forum and applicable law may be entered electronically, but it requires insight in national law to determine whether a clause on applicable law is valid. The Business must ensure that clauses on choice of forum and applicable law, in reality, are agreed upon by the parties. Agreements on choice of forum and applicable law do not influence the possibilities in cross-border law enforcement in situations outside of contractual relations. The access to benefit from clauses on choice of forum and applicable law is limited in connection to certain consumer contracts.

6. Conclusions

The purpose of this chapter is to sum up on the findings of this thesis and to discuss the hypotheses of this thesis in the light of the research carried out.

6.1. Summary

States are sovereign to prescribe, adjudicate and enforce, as long as this sovereignty is exercised with due respect to the sovereignty of other states. This means that traditional law enforcement requires some kind of involvement of and cooperation by the court of the state in which the Business is established. Traditional law enforcement may be carried out either if the Business is sued in its home court and foreign law is applied, or if the Business is sued in a foreign court and foreign law is applied. Substantial inconvenience and costs may also occur in situations where the Business is sued in a foreign court, even though the law of the Business is applied.

In situations where the Business is sued in its home court, foreign law may in particular be applied in connection to tort and certain consumer contracts. Foreign law may also be applied in other contracts if the parties have made a valid agreement on applicable law or if the case is closer connected to a foreign state. The applicable law in tort is determined in accordance with national law, which has not been examined in this thesis. Most states apply the principle *lex loci delicti*, and it is likely that foreign law may be applied to the extent it does not conflict with the public policy in the state of the court. Under public law enforcement, foreign law is not likely to be applied.

The Business may be sued in many courts, but in order to have judgments enforced against the Business, the rendering state relies on the forthcoming of the state of the Business, possibly based on a particular agreement or other kinds of legal relations. There are a number of agreements concerning recognition of foreign judgment both within public and private law enforcement.

All agreements within public law enforcement, but the 2005 Framework Decision of Financial Penalties and the cooperation between the Nordic states, are based on the principle of dual criminality. This means that the activity must be considered a crime under the law of both the foreign state and the state in which the Business is established. The Business is assumed to comply with the law of the state in which it is established, and the requirement of dual criminality is thus not satisfied. The 2005 Framework Decision on Financial Penalties departs from the principle of dual criminality for certain offences and concerning recognition within the European Union. Recognition may, however, be refused if the executing state (the state of the Business) finds the activity to be committed entirely or partially

within its territory. This requirement is likely to be satisfied in the situations dealt with in this thesis. It is notably not an obligation to refuse recognition in such situations, and the situation thus depends on national law including the implementation of the framework decision.

Recognition and enforcement of foreign judgments within private law enforcement is secured through the Brussels/Lugano System, which provides a principle of free movement of judgments within civil and commercial matters between, and with some limitations, the EU Member States, Iceland, Norway and Switzerland. Foreign law is, as accounted for immediately above, likely to be applied in connection to tort and consumer contracts. In these situations, the Business may also be sued in a foreign court. Due to the generally observed homeward trend, a foreign court may be more likely to apply foreign law, and the state where the Business is established cannot refuse recognition on the ground that the foreign court has applied another state's law than the law which would have been applied if the Business was sued in its home court.

As an objection to cross-border law enforcement, the Business may invoke that the action, taken by a law enforcer within the Internal Market, is a restriction of the free movement of goods, services and/or information society services. The country of origin principle for information society services in the 2000 E-Commerce Directive adds another test of justification on top of the principles of freedom to provide goods and services within the Internal Market. The access to impose restrictions under the 2000 E-Commerce Directive is more limited than under the provisions on free movement of goods and services. These principles apply to both traditional and alternative law enforcement as well as private and public law enforcement.

It is not clear whether these principles apply directly to private, alternative law enforcement, but the Member States will at least have an obligation to take action against its nationals if they are hindering the functioning of the Internal Market. The mentioned principles do not directly concern the choice of law rule, but the principles provide that measures which are not justified under available exceptions, may not restrict the principles of the Internal Market. This includes measures where the Business, in fact, is met with requirements under foreign law, such as a lawsuit where foreign law is applied.

The Business may also rely on the principles of freedom of expression as widely recognised and in particular expressed in the 1950 European Convention on Human Rights. There exists a 'commercial freedom of expression', but this right is not as protect-worthy as for example political expressions. The case law on this matter shows that states retain a quite broad margin of appreciation in regulating and restriction commercial expressions. The freedom of expression is more likely to be successfully invoked by law enforcers who are criticising the Business as a means of alternative law enforcement as long as it is carried out in a general interest. The 1950 Convention on Human Rights is ratified by a number of states which are not part of the Internal Market. If the Business is met with restrictions

from those states, it may be able to invoke the freedom of expression against such restrictions.

Traditional cross-border law enforcement is most likely to be carried out in connection to tort, certain consumer contract and fines. In order to carry out traditional cross-border law enforcement in these situations, the Business's activities must have some effect in the state from where enforcement is carried out. A website is by default accessible in all states connected to the Internet, but access is normally not sufficient to be met with cross-border law enforcement. It is a requirement for entertaining jurisdiction under international law that there is a genuine link between the activity and the state exercising jurisdiction.

From the examined case law, concerning where a website activity is directed, it seems that a number of connecting factors can be identified, i.e. 1) access to the website, 2) magnitude and nature of business activity, 3) the presentation and relevance of the website, 4) marketing measures and 5) the place of business and technical infrastructure. These factors do not provide a complete check-list, and it should be emphasised that courts are most likely to attach importance to the economical reality of the activity. It should for good measure be noted that most of the cases examined are entered under common law, and that most states within the Internal Market has a civil law system. It seem, however, sound to assume general application of this approach, because it reflects relevant factors of consideration to be taken into account when assessing where an activity is directed.

In order for the Business to avoid cross-border law enforcement, it may apply risk-mitigation measures. This thesis has focused on geographical delimitation and the choice of forum and applicable law. Geographical delimitation by technological means ('geo-targeting') enables the Business to reject users from certain jurisdictions. Geo-targeting is not perfect and it is not possible to determine the location of all users. The application of geo-targeting to carry out geographical delimitation does, however, indicate that the Business is not directing its activities to the states excluded. The Business can achieve more efficient delimitation if the geo-targeting is combined with asking the User to reveal his identity. Other measures of geographical delimitation, such as for example stating the targeted states may also count in the examination of where the website activity is directed. It is decisive whether the measure is effective and in particular whether it reflects a genuine interest in avoiding the particular jurisdictions. The Business may also adjust its website based on the connecting factors mentioned above.

Article 12 of the EC Treaty provides that any discrimination on grounds of nationality is prohibited. It is not clear to what extent, this provision prohibits the Business from applying geographical delimitation. It seems to be justifiable to carry out geographical delimitation if it is done as part of a general business strategy and in order to avoid certain legal risks. The country of origin principle of the 2000 E-Commerce Directive has limited the amount of legal risks, but notably not eliminated the risk of being met with legal requirements under foreign law.

Choice of forum and applicable law is an effective measure to mitigate the

possibility of traditional cross-border law enforcement in connection to contracts. The Business may thus ensure that it can only be sued in its home court and that the law of the Business is to be applied. The Business may choose to make the usage of the website subject to certain terms, including terms on forum and applicable law. Choice of forum under the Brussels/Lugano System is to be determined by the rules laid down in the respective acts, whereas the 1980 Rome Convention does not intend to lay down all requirements for a choice of law clause. Therefore it requires insight in national law to determine when such clause is valid. Agreements on choice of forum and applicable law can be entered electronically, but it is clear that such clauses must, in reality, be agreed upon by the parties.

Agreements on choice of forum and applicable law do not influence the possibilities in cross-border law enforcement in situations outside of contractual relations. The access to benefit from clauses on choice of forum and applicable law is limited in connection to certain consumer contracts.

6.2. Hypotheses

Based on the research carried out in this thesis, it is possible to relate to the hypothesis set forth in the first chapter. The hypotheses are to be understood in the context of the methodology and delimitation set forth in that same chapter and throughout the thesis. It should be emphasised that the conclusions relate to the test set-up and may thus not be true for other situations. Answers to a number of questions require knowledge of national law, which has not been dealt with in detail. The Business must thus have to examine the law of the state in which it is established. This is in particular true regarding that state's willingness to apply foreign law and its attitude toward recognition of foreign judgments under national law.

The six hypotheses:

First Hypothesis:

'Activities on the Internet are subject to geographical borders, and it is possible to identify factors that are relevant in assessing where activities on a website are directed.'

Second Hypothesis:

'Private parties are better able to carry out traditional cross-border law enforcement than public authorities.'

Third Hypothesis:

'The freedom to provide goods and services in combination with the 2000 E-Commerce Directive restricts the possibilities of cross-border law enforcement (both public and private law enforcement as well as traditional and alternative law

enforcement).'

Fourth Hypothesis:

'Law enforcers established outside the Internal Market have limited access to traditional cross-border law enforcement against the Business, whereas alternative cross-border law enforcement can be applied.'

Fifth Hypothesis:

'Businesses can mitigate the risks of cross-border law enforcement by applying geographical delimitation and by entering into agreements on forum and applicable law.'

Sixth Hypothesis:

'The laws of the Internal Market limit the Business's possibilities in applying geographical delimitation.'

Four of the six hypothesis have been verified through this thesis (Hypotheses One, Two, Three and Five). Hypothesis Four is neither falsified or verified since the answer to this hypothesis depends on an examination of national law, which has not been carried out. Hypothesis Six seems to be verified in general, but falsified in the particular context of this thesis, where it is assumed that geographical delimitation is carried out to avoid the risk of cross-border law enforcement.

6.2.1. First Hypothesis

'Activities on the Internet are subject to geographical borders, and it is possible to identify factors that are relevant in assessing where activities on a website are directed.'

It seems clear that the Internet should not be understood as a Cyberspace, where governments have no power as suggested by John Perry Barlow.¹ Activities on the Internet have consequences in the 'real world' and infringement of the real-world laws is possible. Enforcement of those laws may be cumbersome, if possible at all, but as expressed in *Dow Jones & Company Inc v. Gutnick*, the fact that publication might occur everywhere does not mean that it occurs nowhere.² The idea of the Internet as a zoned medium seems to be in good harmony with the

1 See chapter 1.

2 See 5.1.2.4.1.

concept of sovereignty of states. States are sovereign to prescribe, adjudicate and enforce, within their territory and in relation to their citizens. If an activity is causing actual or potential harm in a state, it must fall within the powers of a sovereign state to intervene. Even though cross-border law enforcement may be cumbersome, it does not change the theoretical right of a state to prescribe and adjudicate within its territory. Difficulties in connection with enforcement does not legalise the unlawful.

In the context of this thesis, the Internet is best perceived as a medium which can be used to disseminate, or make available, information to a large potential audience. Legal risks, in the context of cross-border law enforcement, arise in conjunction with actual or potential harm to a legal or natural persons or the society as such. Harm deriving from information may occur when and where the information is being perceived. In order for the Business to infringe the law of a state, and thus expose itself to cross-border law enforcement, the website activity is normally required to be directed towards the state in question.³ The Internet is by default not divided into geographical zones, and it appears from the case law examined that the 'place of activity' has to be determined on a case to case basis, with respect to the factual circumstances and the purpose of the regulation in question. Based on the case law examined, the following groups of connecting factors can be identified:⁴

1. access to the website,
2. magnitude and nature of business activity,
3. the presentation and relevance of the website,
4. marketing measures and
5. the place of business and technical infrastructure.

It is thus possible to identify a number of connecting factors, but it should be emphasised that the list is not exhaustive and that the economic reality of the activity is in fact the most important factor. The connecting factors can provide guidance to the Business that wants to carry out legal risk management.

When information is published on the Internet, the potential audience is quite large and involves persons from a number of jurisdictions. Legal risks arise, in principle, already on the basis of the potential audience, since potential harm may also trigger cross-border law enforcement. Cross-border law enforcement requires that a potential law enforcer will obtain knowledge of the activity. This normally requires an actual audience, and it may be assumed that the risk of law enforcement will rise in conjunction with an increased actual audience.

The country of origin principle in the 2000 E-Commerce Directive⁵ does not

3 See in general 5.1.

4 See 5.1.3.

5 See 2.5.

abolish borders in connection to Internet activities on the Internal Market. The directive provides a principle of free movement for information society services, which entails that foreign states may have limited access to carrying out cross-border law enforcement. A country of origin principle entails a potentially better law enforcement (national law enforcement, at the source), but requires sufficient mutual confidence between states, which so far has been found within the Internal Market.

6.2.2. Second Hypothesis

'Private parties are better able to carry out traditional cross-border law enforcement than public authorities.'

States have a quite wide access to claim extraterritorial jurisdiction under international law, provided that the breach of law has an effect in that state.⁶ There is, however, no generally accepted standards of recognition of judgments within international law. Traditional law enforcement is faced with challenges relating to the sovereignty of states. It requires that the state in which the Business is established is either willing to recognise foreign judgments or to apply foreign law under national procedure. Some states are willing to recognise foreign judgment as a matter of comity, but usually only within private law enforcement.⁷

In traditional, public cross-border law enforcement, the fundamental principle of dual criminality requires the activity to be punishable under the law of both the country of origin and destination.⁸ It is assumed that the Business complies with the legislation in the country of origin, which means that the principle of dual criminality is not satisfied. The Nordic States have departed from the principle of dual criminality, and the principle has also been departed from in some legal instruments adopted under the Treaty Establishing the European Union, including in particular the 2005 Framework Decision on Financial Penalties.⁹ The framework decision provides a principle of free movement of judgments concerning certain financial penalties. It should be noted that a state may decline execution if the decision relates to acts which are perceived as committed in whole or in part in the territory of that state. It is most likely that the state in which the Business is established will consider an act to be carried out at least partially in the territory of

6 See 3.2.1.

7 See 4.2.1.8.

8 See 3.2.2.

9 See 3.2.3.3.

that state. Under such circumstances, recognition depends on the national law of the state in which the Business is established.

Under private law enforcement, the law enforcer may rely on the free movement of judgments under the Brussels/Lugano System,¹⁰ when suing in a foreign court. Moreover, the plaintiff may rely on the provisions of the 1955 Hague Convention and the 1980 Rome Convention,¹¹ when suing the Business in a court of a state which have acceded to those conventions. This means that the Business in particular runs the risk of being sued in a foreign court, and with the application of foreign law, in certain consumer contracts and in tort. This is also true for other contracts, when the Business has to perform its obligation in a foreign state and the contract in general has the closest connection to that state.

Private law enforcement may also be carried out by suing the Business in its home court. This is of particular interest for plaintiffs, who cannot benefit from the free movement of judgments under the Brussels/Lugano System or any other form of recognition, such as comity. Suing in the home court of the Business may also be preferable for a plaintiff seeking damages for tort in more than one state.¹² In the situations mentioned above, the home court of the Business may apply foreign law. Due to the homeward trend, the Business's home court may be more reluctant to apply a law foreign to the Business than a foreign court.

Injunctions may be issued on the application of both private and public law enforcers. Under the 1998 Injunctions Directive,¹³ certain appointed law enforcers of both private and public nature, may seek an injunction aimed at the protection of the collective interests of consumers included in a number of directives.¹⁴ The directive does not appoint the applicable law, but the country of origin principle in the 2000 E-Commerce Directive is likely to ensure that the Business, within the scope of the 1998 Injunctions Directive, has to comply only with the directives as implemented in the country of origin. In civil and commercial matters, the plaintiff, which may also be a private organisation,¹⁵ may utilise the tort forum under the Brussels/Lugano System to sue in foreign courts.

It seems reasonable to conclude that private parties are better able to enforce national legislation across border than public authorities. This is mainly due to the dual criminality principle and the system for free movement of judgments under the Brussels/Lugano System and the likelihood of applying foreign law under civil procedure. It should be borne in mind that this research has not dealt with national law, including recognition on the basis of comity. The thesis has also not dealt with more practical issues relating to traditional cross-border law enforcement.

10 See 4.2.1.

11 See 4.1.

12 See 4.2.1.6.

13 See 3.3.

14 See 3.3.

15 See 4.2.1.1.

6.2.3. Third Hypothesis

'The freedom to provide goods and services in combination with the 2000 E-Commerce Directive restricts the possibilities of cross-border law enforcement (both public and private law enforcement as well as traditional and alternative law enforcement).'

The provisions on free movement of goods and services in the Internal Market concern all restrictions which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade.¹⁶ Restrictions may be both legal requirements and other means of restriction such as unfavourable commenting or the blocking of access to the Business's website. Restrictions may be justified if they are necessary ('proportionality') for securing mandatory requirements, which include public policy and the protection of consumers.¹⁷ If an area is harmonised by Community law, it is as a starting point not possible to justify restrictions. The application of a law foreign to the Business is likely to be a restriction either under the provisions on the free movement of goods and services or under the country of origin principle. It is not the application of foreign law itself which is a restriction, but rather the consequences of the concrete application of foreign law.

The European Court of Justice has attached importance to the effectiveness of the medium in question when it assess restrictions.¹⁸ The Internet is of particular importance to achieving the goals of the Internal Market. This is also the political rationale behind the country of origin principle in the 2000 E-Commerce Directive. This principle adds a layer on top of the free movement of goods and services, for those activities that are carried out online. The access to impose restrictions under the 2000 E-Commerce Directive is more limited than under the provisions on free movement of goods and services.¹⁹

Certain selling arrangements fall outside the scope of the free movement of goods, provided that those provisions apply to all relevant traders operating within the national territory, and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. If a ban on certain advertisement prevents foreign operators from gaining access to a market, the requirements under certain selling arrangements are not met. The country of origin principle of the 2000 E-Commerce Directive applies, however, to restrictions on information society services, which are considered as falling under

16 See in general 2.3.1 and 2.4.1.

17 See 2.3.2 and 2.4.2.

18 See 2.4.1.

19 See 2.5.3.

certain selling arrangements.²⁰

A state cannot circumvent the provisions by derogating its powers to a private entity.²¹ Powerful collective actors, such as organisations, are also limited under these provisions. It is unclear to what extent private natural or legal persons are limited in their activities. To the extent private parties, carrying out cross-border law enforcement, fall under these provisions, they may rely on the possible justifications under mandatory requirements. The national courts are part of the state, and are obliged, also in private disputes, to observe Community legislation. Member States are further required to control its nationals and thus ensure that private entities are not tampering the functioning of the Internal Market.

6.2.4. Fourth Hypothesis

'Law enforcers established outside the Internal Market have limited access to traditional cross-border law enforcement against the Business, whereas alternative cross-border law enforcement can be applied.'

It is assumed that alternative law enforcement can be carried out without cooperation by the state in which the Business is established. This thesis does not include further analysis of the effectiveness or functioning of alternative law enforcement, including the economical consequences relating to the reputation of the Business. Public law enforcement within the European Union may benefit from the 2005 Framework Decision on Financial Penalties, and private law enforcers within the Brussels/Lugano System may benefit from that system. If a law enforcer outside of the Internal Market wants to carry out traditional law enforcement, it requires either that the state in which the Business is established recognises foreign judgments under national law or is willing to apply foreign law.

The 1980 Rome Convention is to be applied even if the plaintiff is not established in a contracting state. In particular in certain consumer contracts, this means that the law of a foreign state may be applied even though that state is not part of the Internal Market. The homeward trend may make it more likely that foreign law is not applied and differences in law and culture may make it more likely that foreign law is not applied, possibly with reference to public policy concerns. The same counts for applying foreign law in tort, where the state of the Business does not have a legal obligation to apply foreign law. The choice of law

20 See 2.6.1.

21 See in general 2.8.

in tort is not harmonised, but a draft regulation on the matter is proposed.²²

A foreign law enforcer may not benefit from the Brussels/Lugano System, but this hypothesis cannot, without knowledge of national law in the state where the Business is established, be clearly verified or falsified.

6.2.5. Fifth Hypothesis

'Businesses can mitigate the risks of cross-border law enforcement by applying geographical delimitation and by entering into agreements on forum and applicable law.'

As dealt with under the first hypothesis, the risk of traditional cross-border law enforcement normally requires that the activity was directed towards the state of the law enforcer.²³ A fundamental requirement is that users in that state have access to the website. If the Business effectively excludes users from a particular state, it is hard to find reasons why that state's law should apply. It is clear that technical solutions to carry out geo-targeting are not 100% effective.²⁴ The effectiveness of a geographical delimitation solution is likely to form part of the assessment of where the website activity is directed, but it is the economic reality of the activity which is most important. The geographical delimitation is thus not likely to exclude cross-border law enforcement, if the reality of the Business's activity is to carry out business in the particular market. It is crucial whether the geographical delimitation reflects a genuine interest in avoiding business activities in the particular market.

Choice of forum and applicable law may be useful to mitigate the risk of cross-border law enforcement.²⁵ The Business may choose to enter a contract with the User which, provided the formal requirements are satisfied, may determine jurisdiction and applicable law. Agreements on choice of forum and applicable law may be entered electronically, but it requires insight in national law to determine whether a clause on applicable law is valid. Agreements on choice of forum and applicable law are only binding between the parties, and only within the scope of the contracts. It does, in particular, not affect the access to carry out public cross-border law enforcement or cross-border law enforcement relating to tort. Choice of forum and applicable law seem to be of most value in relation to contracts falling outside the scope of certain consumer contracts, where the parties may specify

22 See 4.1.

23 See also 5.1.1.

24 See 5.2.1.

25 See 5.3.

which court is to have jurisdiction and which law is to apply in the event of a dispute concerning the contract. Choice of forum and applicable law can be applied only with a limited effect and to a limited extent in certain consumer contracts.

This thesis does not deal with consequences of alternative law enforcement, but it may be assumed that geographical delimitation, all else being equal, will lower the risk of alternative cross-border law enforcement. Choice of forum and applicable law is not likely to have an effect on alternative law enforcement, since it, in essence, relates to traditional cross-border law enforcement.

6.2.6. Sixth Hypothesis

'The laws of the Internal Market limit the Business's possibilities in applying geographical delimitation.'

Discrimination on the grounds of nationality is prohibited under the EC Treaty.²⁶ The application of geographical delimitation may constitute, directly or indirectly, discrimination on the ground of nationality. It is not clear whether the prohibition on discrimination applies to private businesses. As mentioned above under the Third Hypothesis, Member States have an obligation to control its nationals, and to the extent private parties are bound by provisions of the EC Treaty, they may also rely on possible justifications of such measures. If the geographical delimitation is, as assumed in the test set-up, carried out as part of a commercial strategy and the reason is to avoid infringing the law of particular states, it is found reasonable to assume that geographical delimitation can be carried out. In the case, *Familiapress v. Heinrich Bauer Verlag*,²⁷ the European Court of Justice seems to accept discrimination by denying, based on domicile, certain users' access to certain features of a product in order to comply with the legal order of the state where activities are directed. It should be emphasised that the case law on this matter does not provide a clear-cut answer to this question.

This also corresponds with the proposed service directive,²⁸ which provides that conditions of access may be justified by objective criteria, including extra risks linked to rules differing from those of the Member State of origin. The country of origin principle limits the risks of cross-border law enforcement, and it may be used as an argument against justification of discrimination, in particular when the

26 See 5.2.2.

27 See 5.2.2.1.

28 See 2.4.4.

Business is not entering contracts with consumers. But the country of origin principle does notably not provide full harmonisation.

Finally, it can be argued that it seems unreasonable if the Business cannot itself choose how and when to roll-out its activities in different states.

6.3. Danish Summary (Dansk Resumé)

Denne Ph.d. afhandling behandler spørgsmål omkring virksomheders håndtering af risikoen for at blive mødt med grænseoverskridende håndhævelse af markedsføringslovgivning (urimelig konkurrence / regler om markedsadfærd) i forbindelse med handel og markedsføring på Internettet (en hjemmeside på World Wide Web).

Grænseoverskridende retshåndhævelse omfatter sanktioner for overtrædelse af fremmede staters lovgivning. Retshåndhævelse kan udføres af både private personer (privat retshåndhævelse) og af staten (offentlig retshåndhævelse). Den private retshåndhævelse kan ske både i og uden for kontrakt. Manglende overholdelse af regler om markedsføring kan for eksempel medføre ugyldighed eller indgå i en mangelsbedømmelse. Håndhævelsen kan ske gennem domstolene (traditionel retshåndhævelse) eller gennem alternativ retshåndhævelse. Alternativ retshåndhævelse dækker over for eksempel dårlig omtale af virksomheden eller blokering af virksomhedens hjemmeside.

I afhandlingen anvendes en traditionel, retsdogmatisk metode, som er anvendt på et nærmere defineret scenarium. Scenariet, som udgør en del af afhandlingens afgrænsning, skal gøre det lettere at omsætte afhandlingens resultater til praksis. Scenariet består af en virksomhed ("Virksomheden"), som er etableret i en EU stat og som overholder lovgivningen i den stat. I første omgang undersøges mulighederne for grænseoverskridende retshåndhævelse. Det antages at alternativ retshåndhævelse, i modsætning til traditionel retshåndhævelse, kan gennemføres uden medvirken fra den stat, hvori Virksomheden er etableret. Traditionel retshåndhævelse kræver at denne stat enten er villig til at anvende fremmed ret eller er indstillet på at anerkende og tvangsfuldbyrde fremmede retsafgørelser. Desuden vil der være omkostninger forbundet med et sagsanlæg i udlandet, selvom virksomhedens lovgivning anvendes under sagen.

Reglerne om fri udveksling af varer og tjenesteydelser i det indre marked samt e-handelsdirektivet sætter grænser for både privat og offentlig retshåndhævelse uanset om det sker som traditionel eller alternativ retshåndhævelse. Afsenderlandsprincippet i e-handelsdirektivet betyder, at virksomheder som udgangspunkt kun skal overholde lovgivningen i den stat, hvor de er etableret. Der er dog undtagelser for bl.a. forbrugerkontrakter. Virksomheden kan også i begrænset omfang påberåbe sig en kommerciel ytringsfrihed, som dog efterlader stater med en bred adgang til at regulere virksomheders markedsadfærd.

De fleste internationale aftaler om traditionel, offentlig retshåndhævelse bygger på princippet om dobbelt strafbarhed ("dual criminality"). Princippet betyder at

handlingen skal være strafbar efter både gerningslandets og domstolslandets lovgivning. Dette kriterium er ikke opfyldt i det anvendte scenarium, idet det antages at Virksomheden overholder lovgivningen i den stat, hvor den er etableret. Bødeafgørelser kan i et vist omfang tvangsfuldbyrdes inden for EU, og fremmede myndigheder har, inden for det indre marked og i et begrænset omfang, mulighed for at anlægge sag i Virksomhedens land med påstand om forbud.

Traditionel, privat retshåndhævelse kan navnlig finde anvendelse i forbindelse med erstatning uden for kontrakt samt i forbindelse med visse forbrugeraftaler. Virksomheden kan i sådanne forhold blive sagsøgt i en EU eller EFTA stat (de 25 EU lande plus Island, Norge og Schweiz), som vil anvende national lovgivning. Sådanne afgørelse skal som udgangspunkt anerkendes og tvangsfuldbyrdes i Virksomhedens hjemlands. Grænseoverskridende retshåndhævelse kan også finde anvendelse i forbindelse med andre kontrakter, hvis sagens er nærmere tilknyttet en anden stat end den, som Virksomheden er etableret i. Spørgsmålet om anerkendelse og tvangsfuldbyrdelse af afgørelser afsagt uden for EU og EFTA kræver kendskab til national ret i den stat, hvor Virksomheden er etableret.

Reglerne om fri udveksling i det indre marked samt e-handelsdirektivet kan begrænse muligheden for anvendelse af fremmed ret i forbindelse med erstatning uden for kontrakt. Hvis Virksomheden sagsøges ved eget hjemting af en udenlandsk sagsøger i forbindelse med sager om erstatning uden for kontrakt samt visse forbrugeraftaler, er der en risiko for at fremmed ret anvendes. Dette gælder også selvom sagsøgeren er bosat uden for EU og EFTA.

Grænseoverskridende retshåndhævelse forudsætter som udgangspunkt, at Virksomhedens aktiviteter har været rettet mod den pågældende stat. Hjemmesider er som udgangspunkt tilgængelige for brugere i hele verden. Med udgangspunkt i udvalgt retspraksis, kan der fastslås en række faktorer, som kan tillægges vægt ved vurderingen af hvortil en aktivitet er rettet. Det drejer sig navnlig om faktorer vedrørende 1) adgang til hjemmesiden, 2) omfanget og karakteren af aktiviteten, 3) hjemmesidens udformning og relevans på markedet, 4) andre markedsføringsforanstaltninger og 5) placering af virksomheden og dens tekniske infrastruktur. Der er ikke tale om en udtømmende checkliste, da det er den økonomiske realitet bag aktiviteten, som er afgørende.

Virksomheden kan minimere risikoen for grænseoverskridende retshåndhævelse ved at afgrænse sine aktiviteter til bestemte markeder. Dette kan ske ved at tilpasse hjemmesiden med udgangspunkt i ovennævnte faktorer. "Adgang til hjemmesiden" kan begrænses ved at anvende teknikker til geografisk identifikation af brugerne. Dette kan kombineres med et krav om at brugeren skal tilkendegive, hvorfra han kommer. Såfremt en sådan teknisk afgrænsning er udtryk for et oprigtigt ønske om at begrænse sine aktiviteter til udvalgte markeder, er det en effektiv form for risiko-begrænsning. Det kan ikke udelukkes at en sådan afgrænsning inden for det indre marked kan være i strid med ikke-diskriminations-princippet. Det antages dog, at en sådan afgrænsning ikke er i strid med fællesskabsretten, såfremt afgrænsningen sker som led i en saglig forretningsstrategi og med henblik på at

undgå at overtræde lovgivningen i de fravalgte lande.

Ved at indgå aftaler om lov- og forumvalg, kan Virksomheden begrænse risikoen for at blive underlagt fremmed ret og sagsøgt i udlandet. Sådanne aftaler har dog ingen effekt på risikoen for at blive i sagsøgt i forhold uden for kontrakt, og er kun i begrænset omfang anvendelige i forbindelse med visse forbrugeraftaler.

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7.3. Acts, Regulations, Conventions etc.

TEU¹

EC Treaty²

EU Constitution³

2005 Framework Decision on Financial Penalties⁴

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2 Treaty establishing the European Community - (consolidated text), Official Journal C 325 of 24 December 2002.

3 Treaty establishing a Constitution for Europe, Official Journal C 310, 16 December 2004.

4 Council Framework Decision 2005/214 (24 February 2005) on the application of the principle of mutual recognition to financial penalties.

- 2005 Directive on Unfair Commercial Practices⁵
 2002 Framework Decision on the European Arrest Warrant⁶
 2000 Charter of Fundamental Rights⁷
 2000 Treaty of Nice⁸
 2000 E-Commerce Directive⁹
 2000 Brussels Regulation¹⁰
 2000 Regulation on Consumer Protection Cooperation¹¹
 2000 Convention on Cybercrime¹²
 1999 Consumer Sales Directive¹³
 1998 Injunctions Directive¹⁴
 1997 Distance Selling Directive¹⁵
 1997 Amsterdam Treaty¹⁶
 1996 UNCITRAL Model Law on Electronic Commerce.¹⁷
 1995 Data Protection Directive¹⁸
 1993 Directive on Unfair Contract Terms¹⁹
 1991 Brussels Convention²⁰
 1988 Lugano Convention²¹

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- 5 Directive 2005/29 (11 May 2005) concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.
- 6 Council Framework Decision 2002/584 (13 June 2002) on the European arrest warrant and the surrender procedures between Member States.
- 7 Charter of Fundamental Rights of the European Union (2000/C 364/01).
- 8 Treaty of Nice, Official Journal C 80 of 10 March 2001.
- 9 Directive 2000/31 (8 June 2000) on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).
- 10 Council Regulation 44/2001 (22 December 2000) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- 11 Regulation 2006/2004 (27 October 2004) on cooperation between national authorities responsible for the enforcement of consumer protection laws.
- 12 Council of Europe, ETS 185, Budapest, 23 November 2001. The convention has of 11 July 2003 only been ratified by Albania, Croatia and Estonia which mean that the convention has not yet entered into force. See <http://conventions.coe.int>.
- 13 Directive 99/44 (25 May 1999) on certain aspects of the sale of consumer goods and associated guarantees.
- 14 Directive 98/27 (19 May 1998) on injunctions for the protection of consumers' interests.
- 15 Directive 97/7 (20 May 1997) on the protection of consumers in respect of distance contracts.
- 16 Treaty of Amsterdam, Official Journal C 340 of 10 November 1997.
- 17 1996 UNCITRAL Model Law on Electronic Commerce with Guide to Enactment. General Assembly Resolution 51/162 (16 December 1996).
- 18 Directive 95/46 (24 October 1995) on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
- 19 Directive 93/13 (5 April 1993) on unfair terms in consumer contracts.
- 20 Convention on the Enforcement of Foreign Criminal Sentences, Convention of 13 November 1991.
- 21 Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano).

1984 Misleading Advertising Directive²²

1980 Rome Convention²³

1972 Free Trade Agreement²⁴

1972 European Convention on the Transfer of Proceedings in Criminal Matters²⁵

1970 Hague Convention²⁶

1968 Brussels Convention²⁷

1965 Convention on Racial Discrimination²⁸

1958 New York Convention²⁹

1955 Hague Convention³⁰

1950 European Convention on Human Rights³¹

22 Directive 84/450 (10 September 1984) concerning misleading and comparative advertising.

23 Convention on the Law Applicable to Contractual Obligations (consolidated version), opened for signature in Rome on 19 June 1980. Official Journal C 027, 26/01/1998 p. 34 to 46.

24 The Convention establishing the European Free Trade Association, Official Journal L/300 (31 December 1972), pages 189 to 280.

25 European Convention on the Transfer of Proceedings in Criminal Matters, Council of Europe, European Treaty Series - No. 73 (15 May 1972).

26 Council of Europe, European Treaty Series No. 70 (28 May 1970).

27 EC Convention on Jurisdiction and Enforcement of judgments in Civil and Commercial Matters, 27 September 1968.

28 United Nations' International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965).

29 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York (10 June 1958).

30 Convention of 15 June 1955 on the law applicable to international sales of goods (The Hague).

31 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome (4 November 1950). <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

