

## INTERNATIONAL JURISDICTION OVER CONSUMER CONTRACTS IN e-EUROPE

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### I. INTRODUCTION

In its work to maintain and develop the free mobility of judgments within the European Union, the EU approved on 22 December 2000 a new regulation<sup>1</sup> (hereafter the Jurisdiction Regulation) that replaced the Brussels Convention with effect from 1 March 2002.<sup>2</sup> Possibly the most discussed and disputed new development in the Jurisdiction Regulation is Section 4, which concerns jurisdiction over consumer contracts. Before the approval of the Regulation, the provisions of Section 4 were heavily debated. The unreserved right of the consumer, under certain circumstances, to sue the other party in the courts of the State where the consumer is domiciled met strong resistance. This was particularly the case in relation to e-commerce, where there was an expressed fear that the provisions would lead to a scenario where anyone doing business through the Internet or by other electronic means could face the risk of being hauled into court in every state in Europe. It was asserted that this would significantly increase the costs of establishing new businesses online, and that, as a result, small and medium size enterprises would be deterred from offering their products online throughout the EU, and restrain the development of e-commerce in Europe.

The aim of this paper is to discuss and elucidate some of the problems which are expected to occur when the new provisions regulating jurisdiction over consumer contracts are applied to electronic commerce. The emphasis will be on e-commerce carried out by the World Wide Web, but other forms of commercial activities, such as email and electronic agents,<sup>3</sup> will also be

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<sup>1</sup> 'Council Regulation (EC) No 44/2001 of 22 Dec 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters'.

<sup>2</sup> However, Denmark is not bound by the Jurisdiction Regulation, meaning that the Brussels Convention still applies between Denmark and the other Member States of the EU, see recital 21 in the preamble of the Jurisdiction Regulation.

<sup>3</sup> In short, an electronic agent can be described as a software program operating on behalf of a user in a digital environment. The use of electronic agents in e-commerce is growing rapidly, and in the future, electronic agents are believed to escalate from being a merely integrated part of a webshop like today, to an autonomous tool in e-commerce. This means that e-commerce as

discussed. However, a technical description of the Internet and the different forms of e-commerce will not be undertaken.

As this paper is mainly concerned with the difficulties arising in relation to e-commerce, problems that are not considered distinctive for this type of commercial activity will not be given a thorough analysis. Many of the traditional discussions in relation to consumer contracts will therefore only be mentioned in a general manner.

## II. THE JURISDICTION REGULATION

### *A. Background*

The Jurisdiction Regulation is a revision of the Brussels Convention, and was promulgated in order to maintain and develop the area of freedom, security and justice,<sup>4</sup> and to provide

provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation.<sup>5</sup>

The need for a revision must also be seen in the context of the development of new methods for transacting business (such as electronic communication) which did not exist when the Brussels Convention was promulgated in 1968. Though not explicitly expressed in the Jurisdiction Regulation itself, the development of electronic commerce was undoubtedly one of the main reasons for initiating work on the new Regulation.<sup>6</sup> When preparing the Jurisdiction Regulation, the applicability of the provisions in regard to electronic commerce was considered closely, and the Regulation is to a large degree adapted to the new business opportunities created by electronic communication.<sup>7</sup>

we know it, with its traditional web-shops, might, at least to a certain degree, be replaced with agent-based electronic marketplaces, where independent and autonomous electronic agents are able to perform every necessary transaction without the intervention of human beings. For a further introduction to the practical and legal issues of the application of electronic agents in e-commerce, see the special issue in 9/3 *International Journal of Law and Information Technology* (2001).

<sup>4</sup> See recital (1) of the preamble.

<sup>5</sup> See recital (2) of the preamble.

<sup>6</sup> See the different preparatory works described later in this paper.

<sup>7</sup> The Jurisdiction Regulation can therefore be seen as a part of a whole package of legislative instruments introduced by the EU in the area of e-commerce, and is meant to operate with and complement such legislation as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts.

*B. Changes in Relation to the Brussels Convention*

As far as the substantive content of the jurisdiction rules are concerned, the Jurisdiction Regulation involves certain differences and changes to the Brussels Convention. Nevertheless, the existing provisions in the Brussels Convention have been maintained to a large degree. Many of the linguistic and editorial alterations that are included must be seen as an update of the case law that the European Court of Justice (ECJ) has put forward in regard to the Brussels Convention, and do not constitute any real material change from the prevailing law. In recitals 5 and 19 of the preamble, it is explicitly stated that there is a desire to secure continuity between the Brussels Convention, with its case law, and the new Regulation.<sup>8</sup> As a starting point, it is therefore reasonable to assert that the jurisdiction provisions in the Jurisdiction Regulation are in accord with the Brussels Convention, with the exception of situations where explicit and positive amendments have been made. However, the Jurisdiction Regulation involves certain changes. Besides the provisions regulating jurisdiction over consumer contracts, important amendments have also been made concerning contracts in Article 5 (1), a new Section 5 regulates jurisdiction over individual contracts of employment, and an autonomous definition as to where a legal person is deemed to be domiciled in accordance with the Regulation is now contained in Article 60.

## III. CRITICISM OF THE REGULATION

The new provisions regulating consumer contracts were heavily criticised and debated before final approval was granted. The legitimacy of this criticism may of course be discussed, but at least some of it seems to be based on a somewhat inaccurate understanding of what the Jurisdiction Regulation and the consumer provisions are meant to regulate. Before going any further, it seems necessary to clarify some basic misunderstandings.

First of all, the Jurisdiction Regulation only regulates international *jurisdiction* in civil and commercial matters involving cross-border activities and elements, not issues of choice of law. The choice of law in consumer contracts is regulated by the Rome Convention,<sup>9</sup> so it is incorrect to maintain that the consumer provisions in the Jurisdiction Regulation will make e-commerce retailers subject to fifteen different consumer *laws*.<sup>10</sup>

<sup>8</sup> When interpreting the Jurisdiction Regulation, it is therefore not expected that the replacement of a convention by a regulation will involve any significant changes as far as the legal method applied by the ECJ is concerned.

<sup>9</sup> The Rome Convention on the Law Applicable to Contractual Obligations, Official Journal 1980, No L 266:1. See in particular Art 5.

<sup>10</sup> Some, however, claim that the Jurisdiction Regulation in reality will result in such a situation; see for instance some of the submissions made by business groups to the public hearing on

Another common objection against the consumer provisions in the Jurisdiction Regulation is that the so-called ‘country of destination’ principle in Section 4 is not in accordance with the ‘country of origin’ principle laid down in Article 3 of the e-commerce directive.<sup>11</sup> It has therefore been maintained that there is disagreement and tension between the two legislative mechanisms, and that this will lead to incomprehensible and unacceptable situations for retailers. However, the e-commerce directive deals with states regulatory laws<sup>12</sup> which will be applicable to a service provider domiciled within the EU, and not jurisdiction.<sup>13</sup> As the Jurisdiction Regulation deals with what can also be called personal jurisdiction, the e-commerce directive deals with subject matter jurisdiction; likewise, as the Regulation is only applicable to civil and commercial matters and the Directive mainly to regulatory law, it is difficult to understand that this would lead to an untenable and unpredictable situation for retailers.<sup>14</sup>

#### IV. WHY DOES THE REGULATION HAVE SPECIFIC PROVISIONS REGULATING CONSUMER CONTRACTS?

##### *A. Motivation and Policy*

Traditionally, the ECJ has applied a teleological method<sup>15</sup> when interpreting EU legislation, where solutions that serve the purpose, and support the integration and the dynamics of EU co-operation, have been emphasised. It is therefore necessary to have knowledge of the motivation and policy behind the

‘Electronic Commerce: Jurisdiction and Applicable Law’, arranged by the EC Commission in Brussels 4–5 Nov 1999. Some here claimed that because the Rome Convention is due to be revised, the consumer provisions concerning choice of law would be identical to Art 15 in the Jurisdiction Regulation, and that this would mean that e-commerce retailers will be subject to 15 different laws. However, the outcome of the revision of the Rome Convention is uncertain, and, as will be discussed in this paper, the interpretation of Art 15 in the Jurisdiction Regulation put forward by the business as a presupposition for this assertion is doubtful. An identical discussion of jurisdiction and choice of law is therefore not justifiable.

<sup>11</sup> Art 3 states that other countries, within the coordinated field, may not lay down restrictions on a service provider domiciled in another Member State, as long as the operation of the service provider is in accordance with the legislation in the country of establishment. The coordinated field embraces almost exclusively regulatory law only.

<sup>12</sup> In many Civil Law countries, this is referred to as ‘public law’.

<sup>13</sup> Recital 23 in the preamble of the e-commerce directive explicitly states that the Directive does not deal with jurisdiction of Courts.

<sup>14</sup> The situation here described also existed before the Jurisdiction Regulation, as the Brussels Convention in many cases would lead to the same result. It is therefore not correct to maintain that this inconsistency with the e-commerce directive was solely introduced by the Jurisdiction Regulation. Another matter is whether such tension exists between the Rome Convention and the e-commerce directive, but this will not be discussed in this paper.

<sup>15</sup> A teleological method is a designation for interpreting in accordance with the motivation and purpose of the legislation in question. A teleological interpretation of the law means that the interpretation is based on specific knowledge, or an assumed knowledge, regarding the purpose of the law, see Arnesen, *Finn Introduksjon til rettskildelæren i EF*, tredje utgave, IUSEF nr 2 Senter for Europa-rett, Universitetet i Oslo, Universitetsforlaget, Oslo 1995, 34 fl.

specific provisions regulating consumer contracts in the Jurisdiction Regulation. Concerning the corresponding provisions in the Brussels Convention, the ECJ has stated that the special 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 the other party to the contract, 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.<sup>16</sup>

The provisions are thereby designed and promulgated in order to protect the presumed weaker party to the contract, the consumer, by strengthening his position in a lawsuit.<sup>17</sup> The assumed unequal negotiating strength and economic resources of the seller and the consumer is believed to be so significant that the consumer should not be compelled to take the burden of suing in a foreign state, especially not when he is encouraged to enter into a cross-border contract by the supplier.<sup>18</sup> The consumer therefore needs protection.<sup>19</sup> Furthermore, it can also be maintained that vendors are in a better position to handle this risk, either by insurance<sup>20</sup> or by including it as a normal business expense reflected in the price of the end product. As prior payment often is required in relation to e-commerce, it can be maintained that the consumer's position is further weakened,<sup>21</sup> and in its first proposal the Commission specifically 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'.<sup>22</sup>

<sup>16</sup> C-89/91, *Shearson Lehmann Hutton Inc v TVB Treuhandgesellschaft fuer Vermögensverwaltung und Beteiligungen mbH* [1993] European Court Reports:0139, para 18.

<sup>17</sup> The same concern is maintained in the Jurisdiction Regulation, see recital 13. It is therefore not necessary to distinguish between the Brussels Convention and the Jurisdiction Regulation as far as the underlying motivation of the consumer provisions is concerned.

<sup>18</sup> See also Peter Kaye, *Civil Jurisdiction and Enforcement of Foreign Judgments* (Professional Books Limited, 1987) 823 and Peter Stone, *The Conflict of Laws* (Longman Group Limited, 1995) 196. Art 5 of the Rome Convention is also based on the same motivation; see Dicey & Morris *The Conflict of Laws*, 13th edn (London: Sweet & Maxwell, 2000) 1285.

<sup>19</sup> See also Jenard, 'Report concerning the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters' (Official Journal 1979 C 59, s 1–65 and s 66–70) 33, Schlosser 'Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice' (Official Journal 1979 C 59, 71) 117, Giuliano and Lagarde 'Report on the Convention on the law applicable to contractual obligations' (Official Journal 1980 C 282, 1) 23, and C-150/77, *Bertrand v Paul Otto KG* [1978] European Court Reports:1431, para 21.

<sup>20</sup> See amendment 3 with justification in the Report from Rapporteur Diana Wallis: 'Report on the proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters', Committee on Legal Affairs in the Internal Market, Rapporteur: Diana Wallis, COM (1999) 348 – C5-0169/1999 – 1999/0154 (CNS).

<sup>21</sup> This was also emphasised by Rapporteur Diana Wallis, 35.

<sup>22</sup> The Commission's initial proposal, 'Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', presented by the Commission, Document 599PC0348, ch 4.2.

Also, consumer protection has been frequently present on the political agenda, and is also emphasised in the Treaty of Rome. For instance, Article 3 (t) refers to ‘a contribution of the strengthening of consumer protection’, and under Article 95 (3), the Commission is to ‘take as its base a high level of consumer protection’. If the Jurisdiction Regulation was to lay down a strictly ‘country of origin’ principle in relation to e-commerce and consumers, this would mean that the Regulation would be stripped of the existing consumer protection provisions in the Brussels Convention. It could then be argued that this would not contribute to strengthening consumer protection according to the Treaty of Rome, and that it might successfully be attacked in the ECJ on these grounds.<sup>23</sup>

*B. Necessary in Order to Increase Availability of Cross-border e-commerce to Consumers?*

Extensive discussion of the consumer provisions took place before the approval of the Jurisdiction Regulation. Business and consumer organisations worked and lobbied in favour of two opposite solutions,<sup>24</sup> and both sides stated that their respective proposals were necessary in order to increase the availability of cross-border e-commerce to consumers. The business maintained that the investment of examining the different laws and legal systems throughout Europe in order to establish commercial Internet sites would deter small and medium-sized businesses from going online, something that again would seriously damage the development of e-commerce in the EU. In regard to the relationship between the Jurisdiction Regulation and choice of law issues, the Regulation will, as already pointed out, not have any influence on this question. However, it is true that retailers carrying out cross-border transactions through the Internet will have a certain administrative burden of dealing with numerous legal systems. Whether this investment will be perceived as outweighing the attractions of e-commerce is more uncertain. Anyone dealing with international transactions has to take these kinds of risks into consideration, and it is difficult to find decisive factors as to why e-commerce should be treated any differently from transactions that are not carried out by electronic means.<sup>25</sup> Because of the nature of the Internet, the vendor’s expectation of the risk of being sued in a foreign court will not diminish as a result of doing business online.

Even without the consumer provisions in the Jurisdiction Regulation, a retailer selling products to other countries through the Internet still has to examine and take into consideration jurisdictional issues and the legal systems

<sup>23</sup> See Report from Rapporteur Diana Wallis, 13.

<sup>24</sup> In short, business launched a ‘country of origin’ principle, and the consumer organisations a ‘country of destination’ principle.

<sup>25</sup> It would also create many practical problems if the legislation separated electronic transactions and treated these differently from other transactions.

of the respective countries. In the absence of Section 4, the general system laid down in the Regulation would be applicable to consumer contracts, meaning that, for instance, if the retailer were to sue the consumer, this would, in accordance with Article 2, have to take place in the courts of the Member State where the consumer is domiciled. Similarly, the retailer could possibly be sued in another Member State based on other provisions in the Jurisdiction Regulation, such as Article 5.1,<sup>26</sup> Article 5.3<sup>27</sup> and Article 5.5.<sup>28</sup> This proves that the possibility of litigation in other Member States nevertheless will be present in cross-border transactions.

Because of the Rome Convention, and especially Article 5, it is necessary for retailers effecting cross-border consumer transactions to examine the laws of the States where they offer their products. This seems a more extensive, complex and expensive task than does an examination of the legal system in the respective states in order to be prepared for potential lawsuits from consumers.<sup>29</sup> It is therefore somewhat incomprehensible that it is the latter investment that will deter small- and medium-sized businesses from going online. It could, however, also be argued that this is an investment that e-commerce businesses selling products abroad should be able to bear and deal with, since, for instance, catalogue-sale companies have had these expenses under the Brussels Convention for years.<sup>30</sup> In this respect, it is difficult to find any legitimate reasons as to why e-commerce should be treated any differently. The development of e-commerce in Europe can hardly be said to be so totally dependent on including these small and medium sized businesses with such limited financial means that it is necessary to deprive consumers of their otherwise existing protective mechanisms.

Another argument was that a 'country of destination' principle would divide the Single Market into fifteen different markets because retailers, fearing the risk of litigation in foreign states, might offer their products only to consumers domiciled in the same State as the one in which the retailer is established. However, the same scenario was put forward by the consumer organisations, as they predicted that a 'country of origin' principle would deter consumers from buying products from foreign retailers, if they were not allowed to seek remedies in relation to potential disputes in the courts of their own state of domicile.

Consumer organisations claimed that it seemed fairer that the professional party took the burden of suing in a foreign state. It was argued that vendors

<sup>26</sup> Jurisdiction based on a contract.

<sup>27</sup> Jurisdiction based on tort, delict or quasi-delict.

<sup>28</sup> Jurisdiction based on a dispute arising out of the operation of a branch, agency or other establishment.

<sup>29</sup> Several surveys addressing these issues are publicly available, see for instance 'The cost of legal obstacles to the disadvantage of Consumers in the Single Market' a report for the European Commission published online: <[http://europa.eu.int/comm/dgs/health\\_consumer/library/pub/pub03.pdf](http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub03.pdf)>.

<sup>30</sup> See also the Report from Rapporteur Diana Wallis, 30.



were better able and placed to cope with these problems, for instance through insurance or including the costs as a normal business expense. This is an important argument. For instance, businesses claimed that they would be deterred from going online because of the large differences between the legal systems throughout Europe. If such problems do exist, it seems difficult to find any legitimate reason as to why this burden should be laid on the consumer. The consumer is, as already stated, the weaker party to the contract. He does not operate in an international sphere on a regular basis like the vendor, and usually the vendor can expect more support and legal aid from his own business organisations than can the consumer. It would clearly be harder for the consumer to deal with these obstacles than it would be for a professional vendor.

When promulgating the new provisions, it was necessary for the EU to take both views into consideration and find the right balance between protection for consumers on the one hand, and an adequate environment for business to exist in on the other. A reading of the provisions in Section 4 of the Jurisdiction Regulation might give the impression that this balance leans towards the advantage of the consumer. However, certain measures to prevent the retailer being subject unpredictably to litigation in other states have been provided in Article 15. One must also take into consideration the fact that the consumer is presumed to be the weaker party. Particularly when it comes to e-commerce, the professional party is often in a particularly strong position. In e-commerce, it is normal that the supplier requires prepayment from the consumer in order to carry out the transaction, and also in other respects, the supplier is often able to unilaterally dictate the terms of the contract. It is usually impossible for the consumer to renegotiate these terms, and it is difficult to claim that freedom of negotiation exists in current business to consumer e-commerce. Because of this, the vendor would rarely need to sue the consumer, and it can be argued that the consumer's right to sue in his own country of domicile is necessary to level the imbalance in strength between the two parties. Another fact is that through e-commerce, the vendor can reach a potentially much larger market for its products, and thereby increase trade and profit. It can therefore be maintained that the possibility of being sued in a foreign court is eventually one of the risks he must accept, a traditional notion of give and take in business.<sup>31</sup> On the other hand, when interpreting Article 15 of the Jurisdiction Regulation, it must also be considered that the retailer is entitled to operate in an environment where he is able to anticipate and predict in which states he could possibly be sued.

<sup>31</sup> If the consumer would have to sue the vendor at his domicile, the vendor could have been said to be winning in all directions, as he would gain a bigger market and profits, and at the same time no longer have to bear the risk of being hauled into a foreign court as with the earlier legislation.



## V. ARTICLE 15.1 (c)

## Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

- (a) it is a contract for the sale of goods on instalment credit terms; or
- (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
- (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

For the purpose of the following discussion it is presupposed that certain requirements in Article 15.1 are fulfilled. This means that the consumer contract in question is entered into between a consumer and a professional acting in his course of business. Neither Article 15.1 (a) nor (b) will be discussed, as the most interesting provision in relation to e-commerce is the new Article 15.1 (c).

Article 15.1 (c) is believed to extend the area of application of the consumer provisions in Section 4 compared to the corresponding provision in the Brussels Convention. First, Article 15.1 (c) now refers to 'all other cases', while the wording in Article 13.3 of the Brussels Convention is 'any other contract for the supply of goods or a contract for the supply of services'.<sup>32</sup> Perhaps more important is the fact that the requirement in Article 13.3 (b) of the Brussels Convention, that 'the consumer took in that State the steps necessary for the conclusion of the contract', is not maintained in the Jurisdiction Regulation. Under the Convention it was necessary for the application of the consumer provisions that the consumer, at the time when he took the steps necessary for the conclusion of the contract, actually was *physically* situated in the State of his domicile.<sup>33</sup> This means that Article 15.1 (c) now also applies to contracts concluded in a State other than the consumer's domicile,<sup>34</sup> as long as the other requirements contained in Article 15 are present. According to the preparatory works, this amendment

<sup>32</sup> However, this may not be such a radical amendment as the wording may imply, as it was also assumed that Art 13.3 of the Brussels Convention was intended to cover nearly all activities of a commercial nature, see Ketilbjørn Hertz, *Jurisdiction in Contract and Tort under the Brussels Convention* (Jurist- og Økonomforbundets Forlag, 1998) 200.

<sup>33</sup> M Foss and LA Bygrave 'International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law', 8/2 *International Journal of Law and Information Technology* (2000) 124–5.

<sup>34</sup> See the comments to Art 15 in the Commission's initial proposal.

removes a proved deficiency in the text of old Article 13, namely that the consumer could not rely on this protective jurisdiction when he had been induced, at the contractor's instigation, to leave his home State to conclude the contract.<sup>35</sup>

However, this amendment involves more than just including this particular situation within the scope of Article 15, as the Commission at the same place further stated that:

the consumer can avail himself of the jurisdiction provided for by Article 16 where the contract is concluded with a person pursuing commercial or professional activities in the State of the consumer's domicile directing such activities towards that State, provided the contract in question falls within the scope of such activities.

This amendment seems to a large extent motivated by electronic commerce, as it is explicitly emphasised that 'the removal of the condition in old Article 13.3(b) . . . shall also be seen in the context of contracts concluded via an interactive website'.<sup>36</sup> The specific motivation for this seems to be that:

for such contracts the place where the consumer takes these steps may be difficult or impossible to determine, and they may in any event be irrelevant to creating a link between the contract and the consumer's State.<sup>37</sup>

The latter statement points to one of the main problems relating to private international law and e-commerce; that the traditional emphasis on physical location of persons or things is often difficult to apply in a digital environment. In the context of e-commerce, a requirement of a particular physical presence at the time of the necessary steps may bring along a range of different difficulties. Besides the obvious problem of what is meant by 'steps necessary for the conclusion of the contract',<sup>38</sup> the different steps may also be carried out in different States.

Not surprisingly, scepticism against the removal of old Article 13.3 (b) has been expressed. For instance, the Rapporteur for the European Parliament suggested as a requirement that 'the consumer enters into the contract from his domicile',<sup>39</sup> but this was not supported by the Parliament or the Commission. Further, Foss and Bygrave use as an example a scenario where a German consumer who travels to Italy and accesses an Italian website, orders and picks up the product from that site,<sup>40</sup> and takes the product back to Germany. The fact that the consumer under certain circumstances may be able to sue in a German court is considered by the authors to be a problematic result, as 'it is

<sup>35</sup> Comments to Art 15 in the Commission's initial proposal.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> For instance if this denotes the factual or legal steps, see here Foss and Bygrave, 124 with further references in n 76.

<sup>39</sup> Rapporteur Diana Wallis, 18.

<sup>40</sup> Presumably, the authors are here referring to the situation where the product is downloaded to the consumer's laptop.

extremely doubtful that the consumer in that scenario would expect or should be entitled to expect that he/she could sue in a German court.<sup>41</sup>

However, when it comes to e-commerce, the consumer's expectation of the right to sue in the courts of his own domicile is not necessarily dependent on physical presence. What if the scenario given by Foss and Bygrave is changed, so that the German consumer bought the digital product from the Italian webshop while he was on a two-hour intermediate landing in Italy on his way back to Germany. As long as the website, in accordance with Article 15, is directing its activities to Germany, is it still 'extremely doubtful' that the consumer should expect to be entitled to sue in a German court? Should this scenario be treated any differently to that situation where the consumer waits until he is in German territory? It is here important to remember the above-mentioned statement that Article 15.1 (c) represents a change in emphasis and bases of the assessment, and that the retailer now creates the necessary link when directing his activities towards the consumer's State. The consumer's legitimate expectation of suing in the courts of his own State must now be based on whether the vendor pursues commercial or professional activities in that State, or directs such activities towards that State.<sup>42</sup>

VI. ALTERNATIVE 1: THE CONTRACT HAS BEEN CONCLUDED WITH A PERSON WHO PURSUES COMMERCIAL OR PROFESSIONAL ACTIVITIES IN THE MEMBER STATE OF THE CONSUMER'S DOMICILE

This alternative is a new development compared to the Brussels Convention. Because of the attention given to Article 15 in the preparatory works, it comes as a surprise that this alternative was apparently not mentioned at all. The numerous articles written by legal commentators and business representatives do not pay any attention to this expression. Since all focus has been on the 'directing-test', it is difficult to state with accuracy what this requirement means.

<sup>41</sup> Foss and Bygrave, 137. However, in order for the consumer in this example to be entitled to sue in a German court, the website in question must direct its activities to Germany. It seems here as though the authors are of the opinion that a consumer contract entered into by electronic means in itself is sufficient for the application of Art 15, an interpretation that the further discussion will prove is doubtful.

<sup>42</sup> It could be argued that this is a fair result, as the circumstances surrounding the transaction in most cases occur equally both in relation to the consumer and the vendor, regardless of the physical presence of the parties. In the context of e-commerce, the consumer will most likely act in the same way whether he is in his own domicile or not, for instance by buying the product through his laptop, an Internet-café, or his electronic agent. As for the vendor, it is often difficult to decide in which country the consumer is when entering into a contract; it is therefore more advantageous to emphasise the consumer's domicile.

## A. 'Pursues . . . in the Member State . . .'

It is a requirement that the commercial or professional activities are pursued in the Member State of the consumer's domicile. The exact meaning of 'pursue' in a cross-border commerce context seems somewhat uncertain and difficult to state, especially when no further guidance seems to exist. From a natural understanding of the word, the expression might be given a wide interpretation, ranging from continuous business management, to more sporadic occurrences of commercial activities.

However, there are circumstances indicating that 'pursues' refers to commercial activities of a certain substance. First, most of the other versions of the Jurisdiction Regulation seem to support such an interpretation, as the French version applies the word 'exerce' to describe this activity, the German 'ausübt', the Swedish 'bedriver', the Danish 'udøver', and the Finnish 'harjoittaa'. All these seem to emphasise that the business is carried out in a continuous and systematic way,<sup>43</sup> that the vendor is carrying out these activities through a certain minimum of business arrangements<sup>44</sup> and resources, and that these arrangements have actually resulted in commercial transactions to some extent arising in that Member State. Secondly, 'pursues' must also be seen in relation to the other alternative in Article 15.1 (c). The word 'directs' appears to be a more comprehensive and less precise expression, an impression which is further enhanced by the fact that the first alternative refers to commercial activities in *the* Member State, while the second one in addition includes 'or to several States including that Member State'. Because of this, 'directs' does not seem to require the same level of substance in business arrangements, resources and accomplished transactions.<sup>45</sup> That it was the intention to state such a difference may also be based on the fact that the two alternatives are worded differently. If 'pursues' and 'directs' were supposed to be given the same meaning and interpretation, it is legitimate to expect that Article 15 would operate with a common expression. The opposite would seem to be an unnecessary and gratuitous complication of the provision.

Further, the wording 'pursues . . . activities *in* the Member State' (my emphasis) gives the impression that this alternative is mainly promulgated in order to cover situations where the vendor is actually *physically* carrying out some business activities in the Member State in question.<sup>46</sup> When compared

<sup>43</sup> However, this must not be understood as a reference to the assessment made when determining the general personal jurisdiction in US courts, even though some of the relevant factors may be the same. See for instance the list at p. 32 in Spang-Hansen, Henrik *Cyberspace Jurisdiction in the U.S.—The International Dimension of Due Process*, Complex 5/01, Institutt for Rettsinformatikk, Oslo, 2001, referring to the Utah Court of Appeals in the case *Buddensick v Stateline Hotel, Inc.*, 972 P.2d 928 (1998).

<sup>44</sup> Where, in this author's opinion, e-commerce arrangements must also be included.

<sup>45</sup> For instance, it would be more natural to include the sporadic occurrences of commercial activities as described above within this expression.

<sup>46</sup> However, the Commission in its initial proposal stated that 'the concept of activities pursued

to the other alternative in Article 15.1 (c), 'directs . . . to' (my emphasis), the word 'in' seems to indicate that the commercial activities must have a physical reference or presence in the Member State. This could, for instance, be that the professional party himself, or his sales representative(s), is carrying out business activities on a regular basis through door-step selling or other forms of canvassing, shops, stands at trade fairs, or that he holds licences and/or bank accounts in that state which form a part of the business arrangements.

To sum up, the decision of whether the requirements of the first alternative in Article 15.1 (c) are fulfilled should be based on a total assessment of the vendor's entire business operation in the Member State in question, including e-commerce arrangements, with a particular emphasis on how systematic and continuous these activities have been, demonstrable business arrangements, and the extent<sup>47</sup> of business activities actually carried out in that Member State.

Based on this, it seems that the first alternative does not apply to 'pure' e-commerce.<sup>48</sup> However, it is not certain that the ECJ will include such a requirement of physical presence as stated above in its interpretation of Article 15.<sup>49</sup> In general, explicit requirements of physical location of persons or things should be avoided in order to bring the legislation into conformity with electronic communication. But as the other alternative in Article 15.1 (c) is tailor-made to include and regulate e-commerce, it can be argued that such considerations do not have the same relevance and significance regarding the first alternative in Article 15.1 (c).

However, in many situations it might be just as natural to claim that the vendor is pursuing commercial activities *in* a state through e-commerce, instead of directing *to* that state. This could, for instance, be the case if the vendor over a long period of time has operated a webshop particularly established and designed for the inhabitants of one Member State, or operates by an electronic agent on a strictly national electronic marketplace.<sup>50</sup> Even if the vendor has no physical presence or equipment situated in that state, it seems natural to claim in such a case that the vendor is pursuing commercial

in or directed towards a Member State is designed to make clear that point (3) [now (c)] applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile.' But the applicability of the first alternative to e-commerce was not further elaborated, neither in this proposal nor in the other preparatory works. All discussions seemed to be focused on the 'directing-test', and it is therefore uncertain whether the Commission here actually intended to address this problem.

<sup>47</sup> Referring to both the number of contracts, and revenues generated through these.

<sup>48</sup> Meaning that the vendor does not have any physical presence or representation in the Member State.

<sup>49</sup> Especially since the Jurisdiction Regulation was promulgated with a view, *inter alia*, to take account of new forms of commerce, it could be argued that it would run counter with the 'philosophy' of the Regulation to put forward such a requirement of physical presence.

<sup>50</sup> E-commerce by electronic agents is believed, at least in the beginning, to be carried out through smaller electronic marketplaces based on parameters like geography, nationality, interests, goods, branches, etc. Just as with websites today, some of the electronic marketplaces of the future could primarily be intended for persons domiciled within a particular state.

activities *in* that state.<sup>51</sup> It may, here, be legitimate to maintain that the application of the first alternative in Article 15.1 (c) hinges on whether it is natural to conclude that the vendor through these activities has pursued business in that state or not. Normally this would mean that the vendor, through electronic means, must repeatedly enter into contracts with persons domiciled in that state, and that transactions of a more occasional and sporadic nature are not covered. Furthermore, the area of application is also believed to be dependent on the interpretation of the second alternative.<sup>52</sup>

VII. ALTERNATIVE 2: BY ANY MEANS, DIRECTS SUCH ACTIVITIES TO THAT MEMBER STATE OR TO SEVERAL STATES INCLUDING THAT MEMBER STATE, AND THE CONTRACT FALLS WITHIN THE SCOPE OF SUCH ACTIVITIES

Even though the discussion in the preparatory works and elsewhere seemed to give the opposite impression, the second alternative in Article 15.1 (c) is not a technologically dependent and specific provision. The neutral expression 'by any means' makes it clear that not only are activities carried out by electronic communications covered, but also other more traditional forms of crossborder transactions. However, the main purpose behind the formulation was to include e-commerce, and to promulgate a provision suitable to regulate such activities in a desirable way.<sup>53</sup> To what extent this will be reflected in the interpretation of Article 15.1 (c) is uncertain. However, the difference between commercial activities carried out by electronic and more traditional means is not believed to involve any significant difficulties in the application of this provision.

The decision of whether the second alternative in Article 15.1 (c) is fulfilled or not must be based on an assessment in which all the commercial activities of the vendor directed towards the Member State in question are taken into consideration. In the context of electronic communication, not only will Internet websites be relevant, but also electronic agents, electronic mail, Internet Relay Chat, Newsgroups/Newsnet and other similar Internet communication channels. Commercial activities carried out through digital TV, digital radio and mobile phones must also be included. Concerning the more traditional forms of commerce, all the activities discussed in relation to the first alternative in Article 15.1 (c) will be relevant. In addition, mail-order catalogues, letter or telephone canvassing, advertising in media such as ordinary TV and radio broadcasting, newspapers and magazines, together with other forms of advertisements and promotions, must be included.<sup>54</sup> Regarding the applicability of Article 15.1 (c),

<sup>51</sup> At least from the consumer's point of view.

<sup>52</sup> However, it is believed that it will only be in very rare cases where a situation will only be covered by the first alternative, and not also by the second one.

<sup>53</sup> See the comments to Art 15 in the Commission's initial proposal.

<sup>54</sup> Even though these activities may also be relevant in relation to the first alternative, it seems more natural to characterise these as directed *to*, and not pursued *in*, a state.

it is therefore not necessary to distinguish between e-commerce and traditional commerce. However, it is important to realise that these different forms of commerce do not exclude each other, and may be employed simultaneously in order to attain a more efficient cross-border business.

#### A. 'Directs' in General

The main requirement in the second alternative in Article 15.1 (c) is that the vendor 'directs such activities to that Member State or to several Member States including that Member State'. The phrase 'to that Member State or to several Member States including that Member State' seems also to be mainly motivated by e-commerce, and is believed to be promulgated in order to ensure that situations where a vendor directs his commercial activities to a range of different Member States are covered by the provision. This is particularly relevant regarding e-commerce, where the very nature of electronic communication allows the vendor to pursue his business in several states at the same time with relatively little effort and resources.

#### B. The Preparatory Works

The concept of 'directs such activities' was subject to much attention in the preparatory works. But, as will be shown, it is difficult to state with certainty what relevance and weight these different statements should be accorded. Irrespective of this, it is necessary to have certain knowledge of how this concept was dealt with in the preparatory works, as this in any case seems to reflect the thoughts and purposes behind the provision. In its initial proposal, the Commission emphasised that

The concept of activities pursued or directed towards a Member State is designed to make clear that point (3) [now (c)] applies to consumer contracts concluded via an interactive website accessible in the State of the consumer's domicile. The fact that a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction.<sup>55</sup>

Further, the Commission proposed a recital (13), stating that

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

<sup>55</sup> See the comments to Art 15 in the Commission's initial proposal.



Even though both statements address e-commerce, they seem to have a somewhat different approach to the 'directing-test'. The comments to Article 15 distinguish between interactive and passive websites, and suggest that jurisdiction may not be granted based on simple knowledge of such passive websites.<sup>56</sup> However, the recital states that 'goods or services by a means accessible in another Member State constitutes an activity directed to that State'.<sup>57</sup> This seems to take the opposite approach to the comments, as it indicates that mere accessibility of a website in a Member State is sufficient to trigger the protective provisions in Section 4, and does not reflect the difference between interactive and passive websites.

The 'directing-test' was also mentioned by the Rapporteur of the European Parliament. In the Report it seems presupposed that Section 4 of the Jurisdiction Regulation will not be applicable in a situation where the entrepreneur specifies that his services are not available to consumers resident in the Member State in question.<sup>58</sup> The Rapporteur did not seem to be particularly enthusiastic about the concept, as she suggested that the 'directing-test' in the second alternative in Article 15.1 (c) was replaced with 'the contract has been concluded at a distance with a consumer having his domicile in another Member State'.<sup>59</sup> If approved, Article 15 would then be a very broad and all-embracing provision, covering every consumer contract entered into not only by e-commerce, but also by other various types of distance sale. Compared to the Brussels Convention, it could be maintained that this would involve a significant expansion of the area of application of Section 4 contrary with the scheme of the Jurisdiction Regulation, where the main jurisdictional rule is contained in Article 2; the domicile of the defendant.<sup>60</sup> Further, it could be argued that it would be difficult for the vendor to predetermine his legal situation, as it is the mere existence of a consumer contract which is decisive, and not also the way in which he operates his business.<sup>61</sup>

In the last stages before the final approval, issues relating to Article 15 were much debated. For instance, the Parliament proposed several amendments in

<sup>56</sup> It is, however, worth mentioning that the comments talk about the 'possibility of buying goods via a passive website'. As will be discussed later, a passive website is usually characterised by the fact that it is *not* possible to buy goods through it. It is therefore difficult to know exactly what the expression 'passive website' here means.

<sup>57</sup> It seems somewhat peculiar that recital 13 mentions 'goods or services', since the corresponding provision is based on the broader term 'in all other cases'. However, this inconsistency does not seem to be intended, and is most likely to be considered as an inadvertence.

<sup>58</sup> See the Report from Rapporteur Diana Wallis, 35.

<sup>59</sup> See amendment 23 in the Report from Rapporteur Diana Wallis.

<sup>60</sup> However, it can be argued that the existing version of Art 15 does not reflect the traditional relationship between the main rule in Art 2 and the alternative/exclusive jurisdictions in the Regulation, as Art 15 in reality perhaps could be considered as the main rule regarding consumer contracts. But an expression as proposed by the Rapporteur would almost totally exclude the applicability of Art 2 to consumer contracts.

<sup>61</sup> This is further reinforced by the fact that the contract in question no longer would have to fall within the scope of the activities directed to the Member State, meaning that every commercial activity within the vendor's business could be subject to the protective consumer provisions.

order to clarify the concept of 'directs such activities'. In relation to the previously mentioned recital 13 advanced by the Commission, the Parliament suggested that e-commerce in goods or services accessible in another Member State should constitute an activity directed to that State 'where the on-line trading site is an active site in the sense that the trader purposefully directs his activity in a substantial way to that other State.'<sup>62</sup> Further, it proposed a new paragraph in Article 15, stating that

The expression 'directing such activities' shall be taken to mean that the trader must have purposefully directed his activities in a substantial way to that other Member State or to several countries including that Member State. In determining whether a trader has directed his activities in such a way, the courts shall have regard to all the circumstances of the case, including any attempts by the trader to ring-fence his trading operation against transactions with consumers domiciled in particular Member States.<sup>63</sup>

Here, the Parliament addressed two different conditions, which could make it easier for vendors carrying out crossborder transactions to foresee in which Member States they could be hauled into court in disputes related to a consumer contract. First of all, the requirement that the 'trader must have *purposefully* directed his activity in a *substantial way*' (emphasis added) to the Member State in question, would make it possible for the vendor to avoid situations where he, by mistake, enters into an unintended contract.<sup>64</sup> Further, the fact that the commercial activities had to be directed in a substantial way to the State, precludes the application of Section 4 where the vendor only occasionally, or perhaps just once, enters into a contract with a consumer in that Member State. This seems also to be in accordance with the Commission's comments to Article 15 in its initial proposal, where it stated that 'the philosophy of new Article 15 is that the co-contractor creates the necessary link when directing his activities towards the consumer's State'.<sup>65</sup> This can also be considered as fair in relation to the consumer, as it could hardly be maintained that he has a legitimate expectation of being able to sue the vendor in the courts of the Member State where he is domiciled, unless the vendor's attempt to carry out crossborder transactions with customers in that State is evident and of a certain substance.

Perhaps more interesting is the suggestion that any 'attempts by the trader

<sup>62</sup> See Amendment 36 from the Parliament in Proposal for a Council regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', Document number A5-0253/2000 COM (1999) 348–C5-0169/1999–1999/0154 (CNS).

<sup>63</sup> Amendment 37 in the Proposal from the Parliament.

<sup>64</sup> However, to operate with such 'subjective' criteria in relation to e-commerce is not supportable, as this would often be very difficult to prove and would require a comprehensive production of evidence which would increase the costs of the legal proceedings. It could also be argued that this is a redundant criterion, since it is difficult to imagine situations where the commercial activities are considered as directed in a substantial way to a Member State, without that, at the same time, being the vendor's intention.

<sup>65</sup> See the Commission's initial proposal.

to ring-fence his trading operation against transactions with consumers domiciled in particular Member States' should also be taken into consideration when deciding whether the 'directing-test' is fulfilled. The Parliament did try to establish by law what the Rapporteur of the European Parliament<sup>66</sup> and some legal commentators<sup>67</sup> thought would exclude the applicability of the consumer provisions in Section 4. At least from the vendor's point of view, this would be a good solution as far as predictability is concerned.<sup>68</sup>

However, the Commission did not accept the suggested definition by the Parliament, and stated in its amended proposal that

The Commission cannot accept this amendment, which runs counter to the philosophy of the provision. The definition is based on the essentially American concept of business activity as a general connecting factor determining jurisdiction, whereas that concept is quite foreign to the approach taken by the Regulation. Moreover, the existence of a consumer dispute requiring court action presupposes a consumer contract. Yet the very existence of such a contract would seem to be a clear indication that the supplier of the goods or services has directed his activities towards the state where the consumer is domiciled. Lastly, the definition is not desirable as it would generate fresh fragmentation of the market within the European Community.<sup>69</sup>

It is here important to emphasise that the Commission seemed to reject the definition merely because the *American concept* of purposefully directing activities in a substantial way, was 'counter to the philosophy of the provision'. This implies that the use of the ring-fence mechanism is *not* ruled out as being relevant in relation to the 'directing-test'. Also, to include such attempts to ring-fence commercial operations against transactions with certain Member States seems quite natural and legitimate, as one should assess all the circumstances of the case when determining whether the vendor has directed his activities in such a way as described by Article 15.<sup>70</sup>

Another matter worth mentioning is the comment from the Commission suggesting 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'. This, however, does not seem to be in accordance either with a natural understanding of the wording in Article 15.1 (c), or the earlier preparatory works and discussions. If the mere existence of a consumer contract would be sufficient to trigger the protective mechanisms in Section 4, why then, in addition, stipulate a requirement of

<sup>66</sup> Rapporteur Diana Wallis, 35.

<sup>67</sup> See for instance Stuart Dutton, 'Transnational E-Commerce', (2000) 16 *Computer Law & Security Report*, 107.

<sup>68</sup> Different forms of ring-fence mechanisms will be discussed later in the paper.

<sup>69</sup> Commission's amended proposal, 5–6.

<sup>70</sup> Something which is surely not contrary to the philosophy of Art 15. Another argument for including such ring-fencing attempts, is that this appear to be a natural counterbalance of the expression 'directs such activities'.

'directs such activities' to the Member State in question?<sup>71</sup> If Article 15.1 (c) were to be interpreted in this way, the 'directing-test' would clearly be redundant. It would also be contrary to what all previous statements and discussions in the preparatory works have presupposed and indicated, and it is difficult to imagine that the Commission, by this, actually deviated from what it earlier had stated. If the Commission wanted to stress that the consumer contract in itself was enough, it must be expected that the wording in Article 15 was to be amended, or that this somehow became known in the preamble.<sup>72</sup> A natural understanding of the word 'directs' indicates that the vendor must do something more than just entering into a contract with a consumer, and Article 15 could delude and bewilder both the professional and the consumer if 'directs' was left behind as a redundant and ineffective expression. This outcome would certainly not contribute to establishing predictable jurisdictional rules in cross-border transactions within the European Union.

Even though the criticism from the Commission did not seem to be directed to all parts of the proposed amendments from the Parliament, the Commission rejected both amendments in full. But the Commission went even further, by omitting recital 13 in its entirety, not even including the original recital 13 contained in its initial proposal. The reason for this removal does not seem to be expressed by the Commission, since the statement only concerns the amendments proposed by the Parliament. This means that the final Regulation does not contain any guidance for the interpretation of Article 15.1 (c), and one is left with no indications that the phrase 'directs such activities' originally was given in order to reflect and include commercial activities carried out by electronic means. The absence of reasons for this removal makes it difficult to decide the meaning which the Council of the European Union finally adopted regarding the 'directing-test', the significance and weight that the previous discussions and statements in the preparatory works should be given when interpreting Article 15, and which of the statements should be considered as being consistent with the final understanding of the provision.

### *C. Interactive v Passive Websites—The US 'Sliding Scale' of Personal Jurisdiction via the Internet*

The difference between interactive and passive websites was repeatedly mentioned in the preparatory works. Even though it is difficult to decide how significant this distinction is for the interpretation of Article 15.1 (c), it would

<sup>71</sup> The Commission does, however, only say that such a contract is a *clear indication* that the vendor has directed his activities to the state, but with such a basis, the mere existence of a consumer contract would very often be sufficient for the application of Art 15.

<sup>72</sup> For instance, the Rapporteur of the European Parliament suggested that the wording of the second alternative in Art 15.1 (c) should be 'the contract has been concluded at a distance with a consumer having domicile in another Member State.' This seems to be more in accordance with what the Commission here is suggesting.

nevertheless be profitable to be aware of this concept. At least regarding e-commerce, the distinction could provide certain helpful guidelines in the application of Article 15. The concept of interactive and passive websites must be seen in relation to the approach taken by US case law on jurisdictional issues occasioned by Internet usage. In such cases, the courts seem to be focused on the nature and quality of commercial activity that an entity conducts over the Internet,<sup>73</sup> and the exercise of jurisdiction is to a large degree determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the websites in question. In order to determine whether Internet activities can provide sufficient minimum contacts with a forum state so that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice, a Pennsylvania District Court created a 'sliding scale' test in *Zippo Manufacturing Co v Zippo Dot Com, Inc.*<sup>74</sup> Based on this decision, it has been common to operate with a three-fold spectrum of Internet activity:<sup>75</sup>

- Situations where the defendant *clearly does business over the Internet* by entering into contracts with residents of a foreign jurisdiction that involves the knowing and repeated transmission of computer files over the Internet. These websites do usually provide sufficient grounds for the exercise of personal jurisdiction.
- *Passive websites*; websites that merely provide information to a person visiting the site, and do not allow the user to purchase or order goods or exchange information with the website host through the website. Personal jurisdiction is usually not exercised based on such websites.
- Between these two categories are those websites characterised as *interactive*, meaning websites that enable the users to exchange information with the host computer. The exercise of jurisdiction is here determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web.

As US case law seems to be the closest to a thorough examination of personal jurisdiction and electronic communication as one can get, it is naturally tempting to base the interpretation of Article 15.1 (c) in the Jurisdiction Regulation on this doctrine. However, there are several factors indicating that this would not be so expedient after all. To start with, the motivation and policy behind the two concepts are quite different. The Zippo-test is applied in order to decide whether personal jurisdiction based on Internet activity comports with the US Constitution's 14th Amendment [Due Process Clause], while Section

<sup>73</sup> *Zippo Manufacturing Co v Zippo Dot Com, Inc.*, 952 F Supp, 1119 (W.D. Pa. 1997), at 1124.

<sup>74</sup> A more thorough discussion of the Zippo case will not be given here.

<sup>75</sup> See for instance also Spang-Hansen and McWhinney, Christopher, Wooden, Sean, McKown, Jeremy, Ryan, John and Green, Joseph 'The "Sliding Scale" of Personal Jurisdiction Via the Internet', published online: <[http://stlr.stanford.edu/STLR/Events/personal\\_jurisdiction/contents\\_html](http://stlr.stanford.edu/STLR/Events/personal_jurisdiction/contents_html)>.

4 in the Jurisdiction Regulation exists in order to protect consumers as the assumed weaker party to a contract. Further, most of the case law regarding this 'sliding scale' arises in the context of alleged trademark infringements and domain name disputes, and little concerns consumer contracts.<sup>76</sup> The Zippo-test is therefore not tailor made for such commercial activities as Section 4 presupposes, and as torts cover a more variety of situations compared to consumer contracts, the jurisdiction test put forward in relation to torts may not necessarily be suitable for consumer contracts.

There are also other inconsistencies between the Zippo-test and the approach taken in the preparatory works. First of all, the preparatory works seems to operate with a different understanding of the word 'interactive website', as they give the impression that a consumer contract concluded via such a site in itself would be sufficient to invoke the protective provisions in Section 4.<sup>77</sup> However, in the Zippo-test, these websites will not automatically grant jurisdiction, as the exercise of jurisdiction is here determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web.<sup>78</sup> Neither does the concept of 'passive websites' appear to be in accordance with the appraisal put forward by Article 15 in the Jurisdiction Regulation. In the 'sliding scale', jurisdiction is usually not exercised based on these sites, as they merely provide information to a person visiting the site, and do not allow the user to purchase or order goods or exchange information with the website host through the website.<sup>79</sup> However, it could not be ruled out that such sites could meet the requirements put forward in the 'directing-test' of Article 15. For instance, different forms of advertising must here be included in the assessment, and because Section 4 in the Brussels Convention could be invoked by certain forms of advertisement, it is believed that this would also be the case regarding the new Regulation. It is often adequate to characterise product information provided through websites as advertising,<sup>80</sup> and based on the content of the website, it could be possible to identify certain Member States to which this commercial activity is directed.<sup>81</sup>

<sup>76</sup> Foss and Bygrave, 119.

<sup>77</sup> See the comment to Art 15 in the Commission's initial proposal.

<sup>78</sup> The words 'interactive website' in the preparatory works seems therefore more likely to refer to the first category in the Zippo-test; situations where the defendant clearly does business over the Internet.

<sup>79</sup> It is therefore somewhat peculiar that the comments to Art 15 in the Commission's initial proposal refers to the 'possibility of buying goods via a passive website', see the Commission's initial proposal. The characteristic of a passive website in accordance with the US approach is the very opposite, something that indicates that Art 15.1 (c) of the Jurisdiction Regulation may not be so influenced by US case law as one might at first think.

<sup>80</sup> See Foss and Bygrave, 114–17, where the authors conclude that webpages containing promotional information may qualify as advertising pursuant to Art 13 (1)(3)(a) in the Brussels Convention. Also in the same direction, Cheshire and North's *Private International Law*, 13th edn (London: Butterworths, 1999), 1288.

<sup>81</sup> An example could be a German retailer operating a passive website in which he presents his products, but where the information is only given in Swedish, prices are listed in the Swedish

To sum up, the interpretation of Article 15.1 (c) in the Jurisdiction Regulation should not be based in its entirety on the sliding scale in the Zippo-test. However, the US approach may contribute with some helpful guidelines, but must not be applied in any further extent than is justified by the specific circumstances in the different disputes.

#### *D. The Narrower Meaning of 'Directs'*

As the discussion above has proved, it is difficult to state with certainty what is actually meant by the expression 'directs such activities'. The preparatory works are often more confusing than helpful on this matter, while the US approach does not seem to provide the necessary guidelines. The interpretation of Article 15 in the Jurisdiction Regulation must therefore be based on the traditional legal method applied by the ECJ pursuant to EU-legislation, and on a natural linguistic understanding of the wording with particular emphasis on the policy and motivation behind the provision.

The word 'directs' seems to indicate that the vendor deliberately has arranged his commercial activities in order to reach customers in particular states. A natural question is therefore whether the application of Section 4 is dependent on the vendor's subjective intentions as to the Member States to which the commercial activities are directed. This matter seems not to be dealt with in the preparatory works either of the Jurisdiction Regulation or the Brussels Convention, but a similar discussion arises in the context of the Rome Convention. Some statements in the Giuliano–Lagarde Report may indicate that the vendor's subjective intentions are decisive,<sup>82</sup> but some legal commentators are of the opposite view. For instance, Foss and Bygrave maintain that 'the stronger argument is in favour of considering as decisive the vendor's imputed intentions based on an objective assessment of all of the facts of the marketing activity concerned'.<sup>83</sup> They further claim that this argument also fits with the thrust of the Giuliano–Lagarde Report.<sup>84</sup> In relation to the application

currency, the products offered could be characterised as mainly 'Swedish', and where the retailer through the website specifically invites and encourages customers domiciled in Sweden to order the products from Germany through a telephone-/faxnumber or physical address. It can here be maintained that the retailer is directing his activities towards Sweden, and that Art 15.1 (c) under certain circumstances may be applicable.

<sup>82</sup> See Giuliano and Lagarde 23–4, where for instance it is stated as 'where the trader has taken steps to market his goods or services in the country where the consumer resides', and 'special advertisement intended for the country of the purchaser'.

<sup>83</sup> Foss and Bygrave, 118.

<sup>84</sup> Based on the statement 'If, for example, a German makes a contract in response to an advertisement published by a French company in a German publication, the contract is covered by the special rule. If, on the other hand, the German replies to an advertisement in American publications, even if they are sold in Germany, the rule does not apply unless the advertisement appeared in special editions of the publication intended for European countries. In the latter case the seller will have made a special advertisement intended for the country of the purchaser' on 24 in the Giuliano–Lagarde Report, Foss and Bygrave conclude that the 'decisive is whether the promotional information is intended, objectively speaking, to be accessed in that State'.



of Article 15.1 (c) in the Jurisdiction Regulation, it seems therefore natural to consider the vendor's imputed intentions based on an objective assessment of the commercial activities in question. If not, the provisions in Section 4 could risk being stripped of much their intended effectiveness, as it would often be difficult and costly to prove the vendor's subjective intention in a legal procedure.<sup>85</sup>

If 'directs' is not to be reduced to a redundant expression, a normal requirement would be that the vendor has made some efforts in order to obtain business transactions with customers domiciled in the Member State in question prior to the conclusion of the consumer contract, and that these cross-border activities appear to be a planned and intended business also from an objective perspective. It is, therefore, this author's opinion that the mere existence of a consumer contract, as vaguely indicated by the Commission,<sup>86</sup> is not sufficient in itself to invoke the provisions in Section 4 of the Jurisdiction Regulation. This seems also to be in accordance with the motivation and philosophy behind the provision, as 'the co-contractor creates the necessary link when directing his activities towards the consumer's State.'<sup>87</sup> Without any such requirement concerning previous business behaviour of the vendor, it would be very difficult for the vendor to predict in which Member States he could be hauled into court in disputes relating to consumer contracts.<sup>88</sup> This outcome seems also fair in relation to the consumer, as he could hardly hold any legitimate expectations of being able to sue the vendor at the courts of the state where he is domiciled unless traceable evidence of the vendor's business activity in that state could be demonstrated.

In some situations it is quite obvious that the vendor has directed his commercial activities towards a state. For example, if the vendor has made an express offer to the consumer by letter or by telephone canvassing, there is no doubt that the 'directing-test' in Article 15.1 (c) is fulfilled.<sup>89</sup> In the context of e-commerce, a somewhat similar scenario may appear regarding email. It is not unusual that offers from vendors are sent by electronic mail without any prior initiative from the receiver.<sup>90</sup> However, an email address is not necessarily

<sup>85</sup> However, it cannot be ruled out that the vendor's subjective intentions could have relevance, especially when these are made visible to the surrounding world in a clear and unambiguous way, and where the business activities are carried out in accordance with these intentions.

<sup>86</sup> Commission's amended proposal, 5.

<sup>87</sup> See the comments to Art 15 in the Commission's initial proposal.

<sup>88</sup> It could here also be mentioned that the purpose of the main rule in the Jurisdiction Regulation, ie Art 2, domicile of the defendant, is to create predictable rules, and that all provisions that derogate from Art 2 are to be interpreted and applied restrictively.

<sup>89</sup> Whether the vendor has been carrying out these activities for a period of time or not, does not seem to have any relevance here. Such activities will in many circumstances create in themselves a legitimate expectation for the consumer of being able to sue the vendor in the courts of the Member State where the consumer is domiciled. These situations can be compared to 'specific invitation' in Art 13 of the Brussels Convention, and are believed to create the necessary connection to the Member State in question in order to invoke the provisions in Section 4 of the Jurisdiction Regulation.

<sup>90</sup> Often referred to as unsolicited commercial mail, or 'spam'.

associated with a specific state in the same way as geographical addresses and telephone numbers are, and it could therefore be more difficult to state with certainty to which state or states the commercial activity is directed. But normally, if the email is sent to an address ending with, for instance, .de, the commercial activity should be regarded as directed towards Germany.<sup>91</sup> The vendor is here clearly trying to do business with consumers resident in Germany, and should therefore be able to predict that Section 4 of the Jurisdiction Regulation will be applicable. As the email is sent to the consumer's personal email address, it is most likely that the consumer holds the same expectations of being able to sue in his or her own courts in these situations as with letter or telephone canvassing.

More problematic is the situation where the consumer is domiciled in a state other than that indicated by the email address.<sup>92</sup> In the example above, should a consumer domiciled in France be able to invoke Section 4 in a contract concluded as a result of an offer received by his .de email account? As for the vendor, it is quite obvious that his main intention was not to direct his activities towards France. But on the other hand, he should be aware of the possibility that the receiver could be domiciled in another State.<sup>93</sup> Regarding the consumer, an offer sent to his personal email account will, as already stated, create certain expectations of being able to sue the vendor in the courts of the Member State where he is domiciled. These expectations could be further strengthened by the fact that the consumer is allowed to enter into a contract with the vendor, something that, from a more objective perspective, could give the impression that the vendor is directing his business, not only towards Germany, but also to other countries as well.<sup>94</sup> It is therefore believed that such contracts, under certain circumstances, could be sufficient to trigger the application of Section 4 in the Jurisdiction Regulation, even if the vendor has no previous business records with customers domiciled in France.<sup>95</sup> If the vendor here wants to avoid the possibility of being sued in France, he should implement adequate mechanisms and routines in his business management in order to prevent contracts being concluded with consumers domiciled outside Germany.

<sup>91</sup> See also Foss and Bygrave, 122.

<sup>92</sup> This may occur quite often, since it is usually not required that the consumer must be domiciled in the state indicated by the email address in order to operate it. Also, persons tend to hold on to their email addresses as long as possible, even if they move to another country, especially if this is a frequently used address where most of the user's electronic communications are carried out from.

<sup>93</sup> See Hertz, 205, concerning advertising in media received across the border in a neighbouring State.

<sup>94</sup> This impression could be further enhanced by other existing factors, for instance that the offer is written in English (which in this example cannot be characterised as a country specific *indicia*), that the product offered is not a distinctive 'German' product, and the number of previous contracts entered into with French domiciled consumers.

<sup>95</sup> Reservation is here made against a consumer who deliberately represents himself as domiciled in a Member State other than the one in which he is in fact domiciled. The importance of this will be discussed later in this paper.

Where the offer is sent to an email address ending with .com or other similar addresses which does not contain any country-specific indicia, the vendor will most likely be considered to direct his business to the addressee's State of domicile no matter which one this is.<sup>96</sup> The vendor must here be aware that the receiver could be domiciled in any state throughout the world,<sup>97</sup> and as long as the vendor chooses to enter into a contract with a consumer domiciled in one of the Member States, this should be sufficient to invoke the provisions in Section 4.

Perhaps the most difficult and interesting assessment regarding the 'directing-test' is related to websites and webshops.<sup>98</sup> A somewhat similar question arises in the context of Article 13 in the Brussels Convention, where some legal commentators argued that marketing and promotional information through the world wide web was directed towards all states from which it was possible to access the vendor's website.<sup>99</sup> However, it is this author's opinion that this is not an adequate approach to the problem, either regarding the Brussels Convention, or the Jurisdiction Regulation.<sup>100</sup> But at least when it comes to Article 15 in the Jurisdiction Regulation, this approach must now be considered as rejected by the introduction of the 'directing-test'.<sup>101</sup>

When assessing the question to which geographical area a website is directed, a natural starting point could be the existence of country-specific indicia occurring on the website. This could for instance be national indicia in the domain name,<sup>102</sup> the language used on the website, the offered product(s),<sup>103</sup> the currencies accepted for payment, the use of geographically

<sup>96</sup> See also Foss and Bygrave, 122.

<sup>97</sup> Meaning it will be almost impossible, from an objective point of view, to identify which particular States the commercial activities are directed towards.

<sup>98</sup> It is here maintained that in order to fulfil the 'directing-test', it cannot be required as an absolute condition that it is possible to enter into contract through the website. As the previous discussions have proved, commercial activities may be considered as directed towards a Member State through a website even if it is only promotional information which occurs on the site. Refer here what has been earlier said about the distinction between interactive and passive websites.

<sup>99</sup> See Stone, Peter, 'Internet Consumer Contracts and European Private International Law' (2000) 9 *Information & Communication Technology Law*. Also Hertz, 205–6 and Nielsen, Peter *Arnt International privat- og procesret*, Jurist- og Økonomforbundets Forlag, København 1997, 518 seem to take the same line, although the latter pertains to Art 5 (2) of the Rome Convention.

<sup>100</sup> This seems like a somewhat hasty and premature solution which does not reflect the nature of electronic communication in a desirable way. This is because one of the fundamental ideas behind the Internet is that a website should be accessible to everyone connected to it, irrespective of geographical location. To make a comparison with other media, it is hard to believe that anyone would claim that this paper is directed to every person in the world who knows how to read, even if it is published in an international journal available for sale in every country throughout the world.

<sup>101</sup> This seems like a more appropriate solution, since emphasis on where an activity is directed towards and has its effect, instead of mere accessibility of the website in question, is a more adequate approach in achieving predictability regarding jurisdictional matters.

<sup>102</sup> Typically by containing national suffixes as .de, .uk or .es.

<sup>103</sup> For instance, if this can be characterised as a strictly 'national' product for the Member State in question, only useful for persons domiciled in that State, this could indicate that the foreign vendor is directing his activities towards that State.

limited credit cards or guarantors, the vendor's stated account number, etc.<sup>104</sup> These are usually easy to identify, and especially if all the indicia point to the same State(s), this will create a certain impression to the surrounding world that the vendor is directing his activities to this geographical area. However, the significance of this should not be exaggerated. Such indicia could often be misleading, and will in many situations not provide any guidance at all. For instance, domain names containing suffixes like .com, .net and .org are nationally neutral, and in *crossborder* e-commerce it is obvious that the vendor often will operate his webshop under a domain name of his own State of domicile, and not under a domain name of the State to which he is directing his business.<sup>105</sup> Neither is language always a strong connecting factor. Certain languages are spoken in several different countries, and when it comes to the Internet, it can be maintained that English in particular is used as a universal and common language often irrespective of which States the website is intended for. On the other hand, if a webshop is presented in a language with a narrow and clear geographical spread, typically one Member State, this could indicate that the vendor is directing his business to that State. But then another question arises; is the vendor only directing his activities towards that geographical area, or also at the same time to every person speaking that language irrespective of State of domicile? And lastly, with the introduction of the Euro, currency is no longer a particular strong guide in relation to the Jurisdiction Regulation.<sup>106</sup> Based on this, it is obvious that the weight and significance of national indicia will vary considerably in different situations. They are not particularly suitable in creating predictability for the parties, and must therefore be no more than a starting point in the overall assessment necessary in order to decide whether the 'directing-test' in Article 15.1 (c) of the Jurisdiction Regulation is fulfilled or not.

As already mentioned, it is regrettable that the Jurisdiction Regulation itself does not contain any guidance concerning the interpretation of Article 15.1 (c) in the context of e-commerce. In particular, this would be helpful for vendors, since they seem to be in special need of clear and predictable jurisdictional rules in order to foresee in which Member States they may be hauled into court.<sup>107</sup> When it comes to e-commerce, such predictability could most likely be achieved in two different ways: either by applying Section 4 to every existing consumer

<sup>104</sup> It could also be mentioned that it is quite usual that advertising for webshops occurs in other more traditional media such as TV, radio and newspapers. The existence of such marketing in national media will of course enhance the impression that the commercial activities carried out through that webshop are directed towards the Member State.

<sup>105</sup> However, if the foreign vendor were operating a webshop under a domain name connected to the Member State in question, this would be a relevant factor in the assessment.

<sup>106</sup> However, if the price of the products is denominated in, for instance the Swedish currency, this is a quite strong indication that the activities are directed towards Sweden.

<sup>107</sup> It could also be maintained that the vendor to a certain degree is entitled to this, as recital (11) in the Regulation states that 'the rules of jurisdiction must be *highly* predictable' (emphasis added).

contract irrespective of the previous behaviour of the vendor, as suggested by the Rapporteur of the European Parliament,<sup>108</sup> or by emphasising the existence of attempts to ring-fence commercial activities against consumers domiciled in particular Member States, as suggested by the European Parliament.<sup>109</sup> As for the first suggestion, this must clearly be considered as rejected by the introduction of the 'directing-test'. Nor was the alternative concerning ring-fence mechanisms upheld and included in the Regulation text. But as discussed earlier, the Commission did not seem to make any explicit reservations against the relevance of such mechanisms, as it rejected the proposal from the Parliament in its entirety based on other facts and circumstances. Also, as the decision of whether Article 15.1 (c) is fulfilled or not must be based on a total assessment of the entire situation, taking into consideration all aspects of the vendor's business, it is difficult to find any legitimate reason why the existence of such ring-fence attempts should be excluded from the assessment.<sup>110</sup>

Regarding predictability, the existence of such ring-fence mechanisms may serve two different purposes in relation to Article 15. First, ring-fence attempts indicate in a clear and evident way that the vendor only intends to do business with customers domiciled within the stated Member States. This means that a consumer who is domiciled outside this geographic area will have a diminished expectation of being able to sue in the courts of the State where he is domiciled. Secondly, such mechanisms will to a large degree be able to prevent the vendor from entering into a contract with consumers domiciled outside the target area, which is of course the most effective way of avoiding unforeseen lawsuits in foreign states based on Section 4. However, it must be a requirement that the vendor acts conscientiously in accordance with the impression created by the ring-fencing if this is to have any weight and significance in the overall assessment.<sup>111</sup> If the purpose of the implementation of such mechanisms is to circumvent the consumer protection provisions in the Jurisdiction Regulation, they should be ignored. The vendor has here acted with the intention of misleading the consumer, and should therefore not be protected by the requirements contained in Article 15.<sup>112</sup>

Several different ring-fence mechanisms are conceivable, for instance specific statements on the website, requiring the consumer to state his

<sup>108</sup> See amendment 23 in the Report from Rapporteur Diana Wallis.

<sup>109</sup> See amendment 37 in the Proposal from the Parliament.

<sup>110</sup> Especially since this seems to be the natural counterbalance of the expression 'directs such activities'.

<sup>111</sup> The importance of this has also been addressed in US case law, see for instance *Euromarket Designs, Inc v Crate & Barrel Ltd*, 96 F Supp 2d 824 (NDIll 2000), also referred to in Spang-Hansen 359–60.

<sup>112</sup> For instance, if the vendor allowed every consumer, irrespective of domicile, to enter into a contract, these ring-fence mechanisms would in reality exclude Section 4 and force the consumer to sue the vendor at his domicile in accordance with Art 2 or, if applicable, at the appointed jurisdiction in accordance with Art 5.1. With such an interpretation of Art 15, it would be too easy to deprive the consumer protection.

domicile in a registration process, or technical devices identifying the location of the consumer based on the computer by which he is connected to the Internet.<sup>113</sup> The appropriateness of these mechanisms though, will vary. As for statements on the vendor's website informing that the webshop is intended for customers domiciled in certain Member States only, these are not particularly effective in order to prevent contracts being entered into with consumers domiciled outside the targeted area. Though they will be able to diminish the consumer's legitimate expectation of being able to sue the vendor in his State of domicile, the importance of such statements should not be exaggerated. They are not always easily accessible,<sup>114</sup> and unless the consumer is forced to click or scroll through the statements before entering into a contract, they are often overlooked. Further, the fact that consumers domiciled outside the stated geographical area are allowed to do business with the vendor may create a false impression of the statements, and that the vendor is seeking to do business with these consumers but without giving them protection.<sup>115</sup>

A more appropriate mechanism is to require that the consumer state his domicile before the conclusion of a contract. This could, for instance, be done by a mandatory registration process, where the consumer has to provide certain personal information, including the State of domicile, on a special scroll-menu set up on the vendor's website.<sup>116</sup> As long as the vendor is aware of the domicile of the consumer, he is also able to predict in which States he can be exposed to lawsuits based on Section 4 of the Jurisdiction Regulation. For instance, he can install technical devices refusing to go any further in the negotiation process of the contract, unless the consumer is domiciled in one of the targeted Member States. But what if the vendor chooses to enter into a contract, even if the consumer has stated that he is domiciled in a State outside the targeted area, and the vendor has specifically stated that consumers domiciled within that State are not allowed to do business through the website? On the one hand, the legitimate expectation of the consumer of being able to sue the vendor in the courts of his own State may be said to be modest because of these ring-fence mechanisms. On the other hand, the fact that the vendor still enters into a contract will enhance the consumer's expectation. Further, it could also create the impression that the vendor is acting in a misleading

<sup>113</sup> See also Norwegian Research Centre for Computers and Law, 'Legal technology - interlegal issues', published online: <[http://www.eclip.org/documents/deliverable\\_2\\_2\\_5\\_PIL\\_law&tech.pdf](http://www.eclip.org/documents/deliverable_2_2_5_PIL_law&tech.pdf)>.

<sup>114</sup> For instance, they can be difficult to identify in a website overloaded with information, they can be concealed by small typing in a corner of a website, or presented on a different website which is only visible if the consumer activates it by clicking on its hyperlink.

<sup>115</sup> Further, if the business with customers domiciled in one of these Member States is of a certain extent, eventually, it also will be a question of whether the first alternative in Art 15.1 (c) of pursuing activities in the Member State is fulfilled.

<sup>116</sup> The collection of such personal information will be regulated by Directive 95/46/EC of the European Parliament and of the Council of 24 Oct 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data, OJ L 281, 23/11/1995, 31, but this problem will not be discussed in this paper.



manner as discussed above, especially if such contracts are entered into frequently. It may therefore perhaps be argued, that once the vendor is acting contrary to his stated policy and the impression created by this, he should not be protected by the requirements in Article 15.1 (c).<sup>117</sup>

Another problem which emerges in relation to such statements of domicile is misrepresentation from the consumer. If the consumer declares that he is domiciled in one of the targeted States, while he in reality is domiciled outside this geographical area, should the consumer be entitled to invoke the provisions in Section 4? In the context of e-commerce, this is an important question for the vendor, as the lack of direct contact between the parties may make it difficult for the retailer to determine the domicile of the buyer. For instance, if the contract concerns a digital product which is to be downloaded to the consumer's laptop, this statement will often be the only reliable fact which can create predictability for the vendor. Compared to physical objects, there will be no geographical address of the shipment which can support the accuracy of the statements as to the domicile of the consumer. Also, as there is no requirement concerning physical location at the time of the conclusion or execution of the contract, it would be of little help for the vendor even if he knew that the product was to be downloaded by a computer situated outside the targeted area. However, this is quite similar to the frequently discussed problem regarding a consumer who deliberately holds himself out as acting in the course of business in accordance with Article 15.1. In relation to the Brussels Convention, most legal commentators seem to agree that Section 4 should not be applicable where the consumer deliberately holds himself out as acting in the course of business.<sup>118</sup> Based on the same arguments, it seems legitimate to reach the same conclusion regarding false statements of domicile,<sup>119</sup> especially where the retailer, taking all the circumstances into consideration, could not be said to be in a position where he ought to have known the actual State of domicile of the consumer. The consumer has here acted with the intention to mislead the vendor, and as long as the vendor is in good faith, the protective provisions in Section 4 should not be invoked.

Another ring-fence mechanism could be technical devices able to identify the geographical location of the consumer based on the computer by which he is connected to the Internet.<sup>120</sup> This would be effective in order to exclude

<sup>117</sup> However, this may not seem so well founded if the contract in question is based on special circumstances, where the vendor has had no previous business contact with the State in question, the vendor in no way has misled the consumer, and it is obvious that this is an extremely rare case which is not an attempt to circumvent the provisions in Section 4.

<sup>118</sup> Hertz, 95, Stein Rognlien, *Luganokonvensjonen, Kommentarutgave, Internasjonal domsmyndighet i sivile saker*, Juridisk Forlag AS, Oslo 1993, 174–5, and Foss and Bygrave 106 with further references.

<sup>119</sup> See also Hertz, 206, Foss and Bygrave, 106, and Peter Stone, 'Internet Consumer Contracts and European Private International Law' (2000) 9 *Information & Communication Technology Law*.

<sup>120</sup> For instance through the computer's IP-number.



customers *situated* in ‘unwanted’ Member States from entering into a contract, but such devices cannot guarantee that the consumer is *domiciled* in the state where he is present at the time. In some situations, consumers actually domiciled in one of the targeted Member States would therefore not be allowed to enter into a contract when abroad. From a business point of view, the best solution would perhaps be to use such technical devices as a means of verifying the statement from the consumer concerning his State of domicile.<sup>121,122</sup>

Concerning electronic agents, the same assessment as described above will be necessary. However, due to the technological characteristics of electronic agents, some of the previously mentioned factors will not be present. For instance, country-specific indicia will often be lacking, or at least not so prominent, both because electronic agents rarely appear through a physical media visible to the surrounding world, and because the interaction with natural persons is replaced by agent-to-agent based transactions. From a practical point of view, the best and most effective procedure in order to avoid the electronic agent entering into unwanted contracts with consumers domiciled outside the target area is to require the other party, or his electronic agent, to state the relevant domicile prior to the conclusion of the contract. The solution to avoid the risk of being hauled into court in every Member State seems therefore to lie in the programming of the electronic agent.

#### *E. ‘The Contract Falls Within the Scope of Such Activities’*

A last requirement in the second alternative in Article 15.1 (c) is that the contract in question falls within the scope of the commercial activities directed by the professional party towards the Member State in which the consumer is domiciled.<sup>123</sup> This does not mean that *all* of the vendor’s business activities are subject to Section 4 in the Jurisdiction Regulation, rather only those which fulfil the ‘directing-test’ in Article 15.1 (c). The fact that some of the vendor’s business operations are directed towards other Member

<sup>121</sup> A further problem would then be how to handle a situation where the statement from the consumer is inconsistent with the physical location. At least when it comes to ‘pure’ e-commerce, where the delivery of the product is done by electronic means, it is believed that the vendor should be able to rely on the statement; see what has been earlier said about misleading behaviour and lack of requirements concerning physical location at the time of conclusion and execution of the contract. The assessment will perhaps be somewhat different in a situation involving the shipment of physical goods, since geographical addresses often involve a more permanent and physical connection and presence. Still, the consumer has acted with the intention of misleading the vendor, and as long as the vendor is in good faith, this situation should not be treated any differently to the first one.

<sup>122</sup> Irrespective of the different forms of ring-fence attempts, a common question is whether the application of such mechanisms is in conflict with the principle of non-discrimination embodied in the Treaty of Rome. For further reading, see Foss and Bygrave in n 65 on 121, where it is further indicated that this could also be problematic in relation to general EC competition law.

<sup>123</sup> See also the comments to Art 15 in the Commission’s initial proposal.

States does not automatically mean that the entire business as such is regulated by Section 4. This requirement could therefore be characterised as a further remedy for the vendor in order to foresee his legal position, and to predict in which Member States he might be exposed to lawsuits based on Section 4 of the Jurisdiction Regulation.

#### VIII. CONCLUDING REMARKS

As this paper has proven, some uncertainties exist concerning the new consumer provisions in Section 4 of the Jurisdiction Regulation, especially in the context of e-commerce. However, the ‘directing-test’ in Article 15.1 (c) of the Jurisdiction Regulation may not be so incomprehensible as it might appear at first sight, and compared to the Brussels Convention, there is no doubt that the new provision is better suited to regulate jurisdictional issues in cross-border consumer contracts entered into by electronic means. However, the preparatory works do not seem to provide sufficient guidelines for the application of the provision. It is therefore submitted that the interpretation of the expression must be based on the traditional legal method applied by the ECJ pursuant to EU-legislation, with particular emphasis on the natural linguistic understanding of the wording together with the policy and motivation behind the provision.

Further, the decision of whether Article 15.1 (c) is fulfilled should be based on a total assessment in which all the commercial activities of the vendor directed towards the Member State in question are taken into consideration. Normally, the vendor must have made some efforts in order to obtain business transactions with customers domiciled in the Member State in question, and from an objective perspective, these cross-border activities should appear to be a planned and intended business. In addition, it could be maintained that the consumer, based on these activities from the vendor, should hold certain legitimate expectations of being able to sue the vendor in potential disputes at the courts in the Member State where the consumer is domiciled. In order to create predictability for the parties, it is also maintained that attempts to ring-fence the commercial activities against transactions with consumers domiciled in particular Member States should be emphasised, provided that the vendor is acting conscientiously in accordance with the impression created by the relevant ring-fence mechanisms.

