



Ragne Piir

LLM, Doctoral student
University of Tartu



Karin Sein

Professor of Civil Law
University of Tartu

Law Applicable to Consumer Contracts

Interaction of the Rome I Regulation
and EU-directive-based Rules on Conflicts of Laws*

1. Introduction

Questions related to the law applicable to cross-border consumer contracts have long been subject to ongoing discussions for the European legislator and in academic circles. As is well known, Article 6 (2) of the Rome I Regulation^{*1}, which lays down harmonised conflict rules for the EU, provides that even if the parties to a consumer contract have agreed that a particular system of law is to be applied, such choice may not deprive consumers of the protection afforded to them by the mandatory provisions of their state of habitual residence. This means, for instance, that an owner of a web-shop wishing to sell its products in all member states has to consider the mandatory consumer protection provisions of 29 individual legal orders. It was precisely this problem that the proposal for a Common European Sales Law – now already legal history itself – was an attempt to solve.^{*2}

Much less attention has been given to the conflict-of-laws provisions contained in various EU consumer directives. Article 6 (2) of the Unfair Terms Directive,^{*3} for example, stipulates that member states shall take the necessary measures to ensure that the consumer does not lose the protection granted by that directive by virtue of the choice of the law of a non-EU-member country as the law applicable to the contract if the consumer has a close connection with the territory of the relevant member state. Similar rules on conflict of laws are set forth by Article 12 (2) of the Distance Marketing of Consumer Financial Services Directive,^{*4} Article 7 (2) of the Consumer Sales Directive,^{*5} and Article 22 (4) of the Consumer Credit Directive.^{*6} Those

* This article was prepared within the framework of the project EMP205 and ESF Grant No. 9209.

¹ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). – OJ L 177, 4.7.2008, p. 6 ff. For general commentary on Article 6 of Rome I, see, for example, F. Ragno. Article 6. – F. Ferrari (ed.). *Rome I Regulation*. Sellier European Law Publishers 2015, p. 208 ff. – DOI: <http://dx.doi.org/10.1515/9783866539785>.

² Proposal for a Regulation on a Common European Sales Law, COM (2011) 0635 final, preamble p. 3.

³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. – OJ L 095, 21.4.1993, p. 29 ff.

⁴ Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. – OJ L 271, 9.10.2001, p. 16 ff.

⁵ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. – OJ L 171, 7.7.1999, p. 12 ff.

⁶ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC. – OJ L 133, 22.5.2008, p. 66 ff.

provisions have been transposed into national law: in Estonia, by §53 (1), §237 (2), and §403 (6) of the Law of Obligations Act (LOA)⁷ and in Germany, by EGBGB, Article 46b⁸. By contrast, the new Consumer Rights Directive⁹ does not contain a separate conflict-of-laws provision, referring all questions of determining whether the consumer retains the protection granted by the directive in situations wherein the law applicable to the contract is that of a third country to Rome I.¹⁰ It has been debated in legal writing whether the need for such directive-based conflict-of-laws rules remains at all.¹¹

What is more, Estonian directive-based conflict rules – but also Italian ones, for that matter¹² – raise the question of whether those provisions are faithful to their European model (that is to say, whether the provisions of the directives have been correctly implemented in the national laws). In addition, further clarification is needed as to their relationship with Articles 6 and 9 of Rome I. In particular, a question arises as to whether such national conflict rules could be considered overriding mandatory provisions of Estonian law in the sense intended with Article 9 (1) of Rome I, meaning that they could be applied automatically, or whether a judge should conduct comparison in each case to determine which solution would be more advantageous to the consumer – be it the application of Article 6 (2) of Rome I or the national directive-based rule on conflict of laws.

Let us illustrate the question with the following example. Suppose that a credit provider situated in Germany advertises its credit products in Estonian media. Suppose further that a consumer residing in Estonia concludes a consumer credit agreement with the German credit provider via the Internet and accepts its standard terms. Assume that according to the standard terms, the consumer has to pay 40 euros as a contract fee and another clause of the standard terms provides that German law is applicable to the credit agreement. Under German law, such a contract-fee clause is unfair and void.¹³ This means that the consumer would not be obliged to pay the fee, and even if he had already paid it, he could reclaim it under the unjust-enrichment regime. According to the LOA,¹⁴ however, Estonian rules on unfair contract terms should be applied. Under Estonian law, such standard terms have never been considered unfair, and therefore the credit provider's claim for contract fees would be justified. One can see from this that the application of German law would be more advantageous to the consumer than application of Estonian law. Therefore, the question arises of which provision should prevail in efforts to determine the applicable law: Article 6 (2) of Rome I or the national directive-based conflict-of-laws rule? Or should a judge apply the preferential approach and determine firstly which law would lead to a more consumer-friendly outcome? Given that similar questions have also been raised in other member states, this article is intended to contribute to the development of European consumer conflict law.

2. Is there continuing need for conflict-of-laws rules that stem from consumer-related directives?

The question of the continuous need for conflict-of-laws rules stemming from consumer-related directives remains unclear, given that Rome I already contains a multilateral consumer-protecting rule on conflict of

⁷ Võlaõigusseadus. – RT I, 7.7.2015, 13.

⁸ Einführungsgesetz zum Bürgerlichen Gesetzbuche, 18 August 1896, BGBl. I.S. 2494, BGBl. I.S. 2010, 2012.

⁹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. – OJ L 304, 22.11.2011, p. 64 ff. The same applies for the new proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM (2015) 634 final.

¹⁰ Recital 58 of the Consumer Rights Directive (see Note 9).

¹¹ S. Leible. Article 6 Rome I and conflict of laws in EU Directives. – *Journal of European Consumer and Market Law* 2015/1–2, p. 39.

¹² F. Ragno (see Note 1), p. 245.

¹³ Decision of the German Supreme Court of 13.5.2014 – XI ZR 405/12. BGH NJW 2014, 2420.

¹⁴ Subsection 36 (2) of the LOA stipulates: 'If the other party to a contract with standard terms is a consumer whose residence is in Estonia or in a member state of the European Union and the contract was entered into as a result of a public offer, advertisement or other such activity in Estonia or the contract is essentially related to the territory of Estonia for any other reason, the provisions of this Division apply even if the place of business of the party supplying the terms or, if no place of business exists, the residence or seat of such party is not in Estonia, regardless of which state's law is applicable to the contract.' For an in-depth analysis of the provision, see I. Kull. Section 36. – P. Varul, I. Kull (eds). *Võlaõigusseadus I. Kommenteeritud väljaanne*. Juura 2006.

laws in its Article 6 that, in addition to a wider scope of application in respect of the types of contracts covered as compared to its predecessor (Article 5 of the Rome Convention^{*15}), also has facilitated the application of requirements related to the circumstances under which a contract is concluded.^{*16} Nevertheless, as is stated in its Article 23, Rome I does not prejudice the application of provisions of Community law that lay down conflict-of-laws rules related to contractual obligations in relation to particular matters, which those consumer-related-directive-based provisions certainly constitute. It has been argued that, although Article 23 prioritises *expressis verbis* the provisions of Community law, the implementing legislation is lent its Community status by the directives those provisions are based on.^{*17} Therefore, it appears that with the entry into force of Rome I, the European legislator did not intend the specific consumer conflict-of-laws rules to lose applicability, even though these rules might initially have been drawn up to complement the somewhat lesser consumer protection regime and scope of application under the Rome Convention.^{*18}

It can be debated, however, whether the practical need to retain the specific consumer-oriented conflict-of-laws provisions stemming from directives side by side with the rules already incorporated in Rome I really remains. The question arises especially since Rome I already creates a coherently drafted system of protection,^{*19} wherein Article 6 is complemented by non-consumer-specific Articles 3 (4) and 9 (2), which guarantee, respectively, the application of mandatory provisions of Community law for purely intra-EU cases (in which all elements relevant to the contract are located in the EU) and the application of overriding mandatory provisions of the forum state.^{*20} Indeed, the protection granted to consumers under Rome I can hardly be considered unsatisfactory. On the contrary, it has even been called 'a bit too generous'.^{*21} In addition to these considerations, it is noteworthy that the replacement of a specific conflict-of-laws provision with the sole reference to Rome I in the new Consumer Rights Directive seems to point to a decline in the need for incorporating specific conflict-of-laws rules into consumer directives and, thereby, enshrining them in national laws.

In order to determine whether a practical use for the specific conflict-of-laws rules proceeding from consumer-related directives remains, the question of whether these provisions really do grant consumers extended protection when compared to the general rules set forth in Rome I needs to be addressed. The answer to this seems to be in the affirmative, since, notwithstanding the expanded protection of the consumer against an adverse choice of law in Article 6 (2) of Rome I, various types of consumer contracts are still *expressis verbis* excluded from the scope of its application.^{*22} In addition, the 'mobile' or 'holidaying'^{*23} consumer who concludes a contract abroad with a trader, seated abroad, that does not pursue any activities in the consumer's country or direct activities to that country remains unprotected under Article 6. Consequently, it can be argued that only certain types of consumer contracts concluded under certain conditions are protected under Article 6 of Rome I.^{*24} Even though Articles 3 (4) and 9 (2) may complement

¹⁵ Convention on the law applicable to contractual obligations of June 1980. The consolidated text of the convention is found in OJ C 334, 30.12.2005, p. 1 ff.

¹⁶ See Articles 6 (4) and 6 (1) of Rome I, respectively.

¹⁷ F. Ragno (see Note 1), pp. 245–246, L.M. van Bochove. Overriding mandatory rules as a vehicle for weaker party protection in European private international law. – *Erasmus Law Review* 7 (2014) / 3, para. 4.1. As the provisions of the directives can be viewed as provisions of Community law that lay down conflict-of-laws rules related to contractual obligations in relation to particular matters in the sense of Article 23 of Rome I, the same status can be transferred to the implementing provisions in national laws. – DOI: <http://dx.doi.org/10.5553/ELR.000030>.

¹⁸ See also E. Čikara. *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien*. Berlin: LIT Verlag 2010, p. 488.

¹⁹ See K. Thorn. Eingriffsnormen. – F. Ferrari, S. Leible (eds). *Ein neues Internationales Vertragsrecht für Europa – Der Vorschlag für eine Rom I-Verordnung*. Jenaer Wissenschaftliche Verlagsgesellschaft 2007, p. 143.

²⁰ The role of the above-mentioned provisions in protecting consumers will be discussed further; see Section 4.

²¹ S.C. Symeonides. Party autonomy in Rome I and II: An outsider's perspective. – *Nederlands Internationaal Privaatrecht* 28 (2010) / 2, p. 198.

²² Article 6 (4) excludes service contracts under which the services are to be provided exclusively in a country other than that of the consumer's residence, contracts related to a right *in rem* or in a tenancy of immovable property, contracts that pertain to financial instruments, carriage contracts, and insurance contracts.

²³ C. Bisping. Consumer protection and overriding mandatory rules in the Rome I Regulation. – J. Devenney, M. Kenny (eds). *European Consumer Protection: Theory and Practice*. Cambridge University Press 2012, p. 242. – DOI: <http://dx.doi.org/10.1017/CBO9781139003452.016>.

²⁴ See also P. de Vareilles-Sommières. L'ordre public dans les contrats internationaux en Europe: sur quelques difficultés de mise en œuvre des articles 7 et 16 de la Convention de Rome du 19 juin 1980. – *Mélanges en l'honneur de Philippe Malaurie*. Éditions Defrénois, EJA 2005, p. 409.

the consumer protection in such excluded situations to some extent, the scope of protection granted by the conflict-of-laws rules of consumer directives in their specific areas seems wider, therefore enabling the affirmation of their justified existence. The latter is expected also since it follows from the logic of Rome I that consumer protection is to be seen as an exception to the general rule of party autonomy, whereas the consumer-related directives proceed first and foremost from the principle of consumer protection and are aimed at ensuring consumer confidence.^{*25} Subsequently, it is possible to view the specific rules on conflict of laws that stem from directives as playing a gap-filling role^{*26} with respect to the gaps left by the primarily party-autonomy-orientated Rome I.

An important problem with the existence of the various directive-based consumer-protecting conflict-of-laws rules exists, however: the possibility of their different transposition into internal legal orders, which is carried out by various means and often incorrectly.^{*27} Unlike the targeted full harmonisation approach opted for in the new Consumer Rights Directive^{*28} and the Consumer Credit Directive,^{*29} the earlier consumer directives were based on the principle of minimum harmonisation, thereby making it possible for their provisions not to be uniformly implemented in national laws. This may create a ‘colorful bouquet’ of national conflict-of-laws rules, causing unpredictability and general difficulties in their application.^{*30} It therefore would appear more reasonable to abandon the specific directive-based conflict-of-laws rules gradually in favour of a uniform set of rules along the lines of the new Consumer Rights Directive. Such an approach would be justified in light of the relatively high level of consumer protection already granted by the logic of Rome I, and its advantage would lie in the prevention of problems deriving from possible variations in the directive-based rules’ transposition into national laws.

3. Do the Estonian LOA’s conflict-of-laws rules comply with the consumer-related directives?

As highlighted above, it is far from guaranteed that the provisions stemming from consumer directives are uniformly implemented in national laws, especially where minimum-harmonisation directives are involved. This has been exemplified by how the Italian legislator has mishandled the implementation by stipulating the priority of Italian consumer protection provisions for all consumer contracts in which a choice of law other than Italian law has been made.^{*31} Indeed, the consumer-related directives foresee an obligation for the member states to ensure that consumers, if the contract has a close link with the territory of one or more member states, do not lose the protection granted by the directives by virtue of choice of the law of a third country to be the law applicable to the contract.^{*32} Therefore, the aim with the directives’ provisions pertaining to conflict of laws is to prevent the possibility of escaping the protection granted to consumers by way of choice of the law of a non-member state when the contract is closely connected to the territory of at least one member state.^{*33} Consequently, the directive-based conflict-of-laws provisions should not be applicable if the law of a third country is designated on the basis of an objective connection.^{*34} The same should

²⁵ See, e.g., Recital 8 of the Consumer Credit Directive (see Note 6).

²⁶ In German, *Lückenfüllungsfunktion*; see, for instance, D. Kluth. *Die Grenzen des kollisionsrechtlichen Verbraucherschutzes*. Jenaer Wissenschaftliche Verlagsgesellschaft 2009, p. 30.

²⁷ See S. Sánchez Lorenzo. Choice of law and overriding mandatory rules in international contracts after Rome I. – *Yearbook of Private International Law* 2010/12, p. 75. See also F. Ragno (see Note 1), p. 242.

²⁸ See Article 4 and Recital 2 of the Consumer Rights Directive (Note 9).

²⁹ See Article 22 (1) and Recital 9 of the Consumer Credit Directive (Note 6).

³⁰ S. Sánchez Lorenzo (see Note 27), p. 76. For more on the term (in German, *Bunter Strauss*), see E. Čikara (see Note 18), p. 488, with further references.

³¹ Article 143 (2) of the Italian Consumer Code establishes that if the parties choose to apply any other law than that of Italy to a contract, consumers shall still be entitled to the basic protection afforded them by said code. Available at <http://www.consumatori.it/images/stories/documenti/Codice%20del%20consumo%20english%20version.pdf> (most recently accessed on 1.3.2016). See also F. Ragno (see Note 1), p. 245.

³² See the Consumer Credit Directive (Note 6), Article 22 (4). Similar provisions, in a slightly different wording, are entailed by directives 2002/65, Article 12 (2), and 1999/44, Article 7 (2) (Notes 4 and 5).

³³ F. Ragno (see Note 1), p. 241.

³⁴ J.-J. Kuipers. *EU Law and Private International Law: The Interrelationship in Contractual Obligations*. Brill Nijhoff 2011, pp. 221–222. – DOI: <http://dx.doi.org/10.1163/9789004206724>.

apply in cases wherein a choice of law has been made in favour of the law of another member state that has correctly transposed the directive in question.

What is more, it has been argued in legal literature that the principle of minimum harmonisation applies only on a substantive level and not at the level of conflict of laws.^{*35} This would imply that the conflict-of-laws rules should be fully harmonised in national legislation, leaving no leeway for the member states to determine the scope of application of their corresponding consumer-protection-related conflict rules. Therefore, it would appear that the Italian legislator has been overzealous in implementing the consumer-related directives by stretching the Community rule to an extent that distorts its purpose from the original one.^{*36}

It should be noted, for that matter, that the corresponding provisions of the Estonian LOA do not seem to comply with the requirements set forth in the consumer directives either. Namely, Articles 36 (2), 53 (1), 237 (2), and 403 (6) of the LOA all stipulate that the provisions determining the rights and obligations of the consumer and of the trader apply to contracts with consumers residing in Estonia or the EU, if the contract is entered into in consequence of a public tender, advertising, or similar economic activities taking place in Estonia or if the contract is fundamentally linked to the territory of Estonia for any other reason, whichever state's law applies to the contract.^{*37} The requirement foreseen in the directives of a close link with the territory of the EU has therefore been met. Nevertheless, this cannot be said for the requirement that a choice of the law of a third country have been made. In fact, the LOA's provisions do not prescribe a choice-of-law clause as a prerequisite for application of national consumer protection rules at all. Although the text's omission of a choice-of-law clause does not change the practical application criteria for the LOA provisions in cases wherein the trader pursues commercial activities in or directs them to Estonia,^{*38} it nevertheless expands the application of Estonian consumer protection provisions to the – presumably rare – cases in which foreign law governs the contract on the basis of an objective connection but the contract also shows an essential link to Estonia. It appears from this that the scope of application of the Estonian law is wider than the protection required by the directives.^{*39} Added to that is the fact that, according to the conflict-of-laws provisions of the LOA, national consumer protection rules should be given precedence also over a choice of law of another member state. Accordingly, it can be concluded that the Estonian conflict-of-laws rules in the LOA do not comply with the provisions of the consumer-related directives, as – similarly to the Italian Consumer Code – they unduly expand the set of cases wherein national consumer protection rules are given precedence.

From the wording of the specific directive-based conflict-of-laws provisions in the LOA, it seems that the Estonian legislator has opted for a unified approach, overlooking the differentiation in the level of protection foreseen across the various consumer directives. To be more precise, the wording of the above-mentioned provisions, as far as their mandatory nature is concerned, overlaps with Article 386 of the LOA, which was based on the previously valid Timeshare Directive.^{*40} However, it must be considered that, whereas the Timeshare directive expressly obliged the member states to ensure that whatever the law applicable was, the purchaser may not be deprived of the protection afforded by the directive if the immovable property was situated within the territory of a member state,^{*41} this is not the case for other consumer

³⁵ F. Ragno (see Note 1), p. 245.

³⁶ *Ibid.*

³⁷ It has been noted that the aim with these provisions is to guarantee the level of protection afforded to the consumer by the consumer directives and to prevent the consumer being deprived of the backing of the consumer protection provisions through a choice of law for contracts concluded in Estonia. I. Kull (see Note 14), No. 4.2.1.

³⁸ In such situations, Estonian law would in any case be applicable according to Article 6 (1) of Rome I when the parties have not specified their choice of law applicable to the contract.

³⁹ According to the general remark in the explanatory note to the draft of the LOA (116 SE), all consumer protection provisions that are based on directives are in full compliance with the requirements of the consumer-related directives (p. 194). Available at <http://www.riigikogu.ee/tegevus/eelnoud/eelnou/0d9390ea-974c-35ab-a6c7-cb14062c3ad3/V%C3%B5la%C3%B5igusseadus/> (most recently accessed on 1.3.2016).

⁴⁰ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. – OJ L 280, 9.10.1994, p. 83 *ff.* This has been superseded by directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts. – OJ L 33, 3.2.2009, p. 10 *ff.*

⁴¹ Article 9 of the former Timeshare Directive. The new directive, 2008/122/EC, although referring matters of conflict of law to Rome I, also obliges the member states to ensure, when the contract is closely connected with the EU, application of the

directives. The latter, as is shown above, are designed only to prevent a choice of law in favour of the law of a third country depriving consumers of the protection afforded to them by the directives, and therefore these are not applicable in situations wherein no choice of law is made.

4. The relations between the conflict-of-laws rules stemming from consumer-related directives and Rome I

4.1. Relations to Article 6 of Rome I

The determination of the law applicable to consumer contracts that fall within the scope of the consumer-related directives may **therefore** have a different legal basis. As indicated above, the new Consumer Rights Directive does not regulate issues of conflict of laws; it refers the matter to Rome I, in a contrast to the ‘old-style’ consumer directives,⁴² which include specific conflict-of-laws rules to be implemented by the member states. It is obviously the latter that may give rise to the question of which conflict-of-laws rule is to be given priority where the applicable law could be determined either in line with Article 6 of Rome I or on the basis of a national conflict-of-laws rule stemming from directives. This holds especially true since the scope of application of Article 6 of Rome I is so wide as to cover all types of consumer contracts also regulated by the consumer directives. Therefore, two conceivable approaches could be proposed.

The first possibility is to take the position that the implementing conflict-of-laws provisions should prevail over the general rule of Rome I in the sense of Article 23 of Rome I. However, their precedence can be justified only if they faithfully reproduce the content of the provision of the directive. Therefore, when the domestic legislator has overly implemented the directives – that is, when an obvious difference between the domestic rule and its European model exists, as is the case with Estonia – the forum court should apply Article 6 of Rome I instead and not attribute priority to the national implementing provisions in accordance with Article 23.⁴³ The latter would mean that as long as the requirements of Article 6 are met, the forum court should, under the preferential approach attributed to the provision,⁴⁴ apply the law that provides the consumer with better protection, be it the chosen law or the *lex causae*. The rationale behind this criterion is that the excessively implemented rules should not be considered Community rules, since the aim of the European legislator was not to rule out choosing the law of another member state.⁴⁵

Secondly, it can be argued, on the basis of the gap-filling role of the implementing conflict-of-laws provisions, that the mere stipulation in Article 23 that specific Community conflict-of-laws rules shall prevail in relation to particular matters does not imply that also the implementing provisions should automatically be granted priority. This approach would mean that the national conflict-of-laws rules are therefore to be considered subordinately where the prerequisites of Article 6 (1) have not been met and the protection afforded by Article 6 (2) proves inadequate. To enhance application of this approach, it has even been advocated in legal writing that the conflict-of-laws rules set forth in consumer directives should be transposed into national laws only inasmuch as they extend beyond the level of protection already afforded to the consumer by Article 6 of Rome I.⁴⁶

In this article, we take a position in favour of the second approach. Although it would seem reasonable to primarily apply the specific conflict-of-laws provisions as *lex specialis*, the obligation for the judiciary to

protective provisions of the directive by stipulating that when the law of a third country applies to the contract, consumers shall not be deprived of the protection granted by the directive if the relevant immovable property is situated in a member state or if the trader pursues or directs commercial activities in a member state. See Article 12 (2) and Recital 17.

⁴² L.M. van Bochove (see Note 17), para. 4.1.

⁴³ F. Ragno (see Note 1), pp. 245–246; L.M. van Bochove (see Note 17), para. 4.1.

⁴⁴ For more on the preferential/double-protection approach (in German, *Günstigkeitsvergleich*), see, for example, S.C. Symeonides. Party autonomy in Rome I and II from a comparative perspective. – *Convergence and Divergence in Private International Law*. Liber Amicorum Kurt Siehr. Schulthess 2010, p. 532. Symeonides states that, although the double-protection rule may appear too generous, the other party may avoid it by simply not choosing a law other than the *lex causae*, as objectively determined under Rome I.

⁴⁵ See also O. Remien. Variationen zum Thema Eingriffsnormen nach Art. 9 Rom I-VO und nach Art. 16 Rom II-VO unter Berücksichtigung neuerer Rechtsprechung zu Art. 7 Römer Übereinkommen. – *Grenzen überwinden – Prinzipien bewahren*. *Festschrift für Berndt von Hoffmann*. Bielefeld, Germany: Verlag Ernst und Werner Giesecking 2011, p. 340.

⁴⁶ B. Heiderhoff. Art 6 Rom I-VO. – T. Rauscher (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*. Munich: Sellier European Law Publishers 2011, No. 12.

prove their consistency with the directives each time they might be applicable would be excessive. Another advantage of this approach is that the specific directive-based conflict-of-laws rules do not establish a preferential approach as does Article 6 of Rome I. Finally, the second approach would also enable a gradual and, in practice, more simplified waiver of the conflict-of-laws rules stemming from consumer directives, which seems to be the trend displayed by the private international consumer contract-law directives.⁴⁷ Therefore, we propose in this paper that the implementing rules be considered only after it has been established that the requirements for application of Article 6 of Rome I have not been met. In practice, however, the national conflict-of-laws rules stemming from the directives would remain in place, for the most part, for cases involving a mobile consumer, since Rome I covers other areas concurrently regulated by the consumer directives, and contracts exempted from the scope of Rome I are also not regulated by the directives.

Let us now return to our hypothetical case. Employment of the latter approach would mean that the law applicable to the consumer credit contract should be determined on the basis of Article 6 of Rome I, leading to the result that, according to Article 6 (1) of Rome I, German law governs the contract, apart from the Estonian law's provisions that cannot be derogated from by agreement, as set forth in Article 6 (2). Even though this would, in principle, lead to the application of Estonian unfair-contract-terms regulation as mandatory consumer protection provisions, the consumer could still be favoured on account of the preferential approach of Article 6 (2). This allows the judge to apply whichever law is more protective to the consumer and also to exploit the protection of both laws, for separate aspects of the contract, if necessary.⁴⁸ Therefore, the Estonian consumer could still make use of the provisions of German law that are more advantageous than the Estonian rules on unfair contract terms and escape payment of the contract fee. In contrast, had we employed the first approach, such a comparison could not have been conducted and Estonian consumer protection provisions would have to have been applied notwithstanding the substantive content of the provisions.

4.2. Whether the LOA's conflict-of-laws rules are to be considered overriding mandatory provisions in the sense of Article 9 of Rome I

It is widely agreed that the simple mandatory rules must be distinguished from the internationally mandatory rules (overriding mandatory provisions in the sense of Article 9 of Rome I).⁴⁹ Given that consumer protection provisions represent, in principle, simple mandatory rules that cannot be derogated from by agreement, the extent to which they could also be applied as overriding mandatory provisions remains unclear. In fact, the question of the possibility of placing consumer protection rules within the framework of overriding mandatory provisions is twofold.

In the first place, debate centres on the question of whether and under which circumstances the substantive consumer protection rules could be seen as embodying a public policy that is necessary for qualifying them as overriding mandatory provisions in the sense of Article 9 of Rome I.⁵⁰ The relationship of consumer protection rules to overriding mandatory provisions is not uniformly resolved either in the legal literature or in the judicial practice of the member states. Illustrating this, the German courts and doctrine do not consider those provisions with which protection of the public interest is only a reflex of the primary purpose (protecting private interests) to be overriding mandatory provisions, whereas French courts have taken a broader approach and applied as mandatory provisions also those rules that serve to protect the weaker party.⁵¹ The latter also holds true for Italian and Belgian as well as British doctrine, as the abuse

⁴⁷ See Section 2, above. The need to transpose conflict rules set forth in directives has been considered outdated also by B. Heiderhoff (see Note 47), No. 14.

⁴⁸ See Subsection 4.1, above, and S.C. Symeonides (see Note 44), p. 532.

⁴⁹ Recital 37 of Rome I clarifies that overriding mandatory provisions should both be distinguished from the expression of provisions that cannot be derogated from by agreement and be construed more restrictively.

⁵⁰ Article 9 of Rome I defines overriding mandatory provisions as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation'. For analysis of the concept of overriding mandatory provisions, see, for example, R. Piir. Eingreifen oder nicht eingreifen, das ist hier die Frage. Die Problematik der Bestimmung und des Anwendungsbereichs der Eingriffsnormen im internationalen Privatrecht. – *Juridica International* 2010/XVII, p. 199 ff, Section 2.

⁵¹ C. Bisping (see Note 23), p. 245. See also A. Bonomi. Le régime des règles impératives et des lois de police dans le règlement „Rome I” sur la loi applicable aux contrats. – E.C. Ritaine, A. Bonomi (eds). *Le nouveau règlement européen „Rome I” relatif à la loi applicable aux obligations contractuelles*. Schulthess 2008, p. 228.

of weaker parties can be viewed as a threat to civil society.^{*52} The question therefore remains open, with further instructions awaited from the European Court of Justice. That being said, it can nevertheless be predicted that, given the widened scope of application of Article 6, the necessity of even considering Article 9 in cases involving consumer contracts should diminish in any case.^{*53}

Of particular importance for purposes of this article is, on the other hand, the question of whether the directive-based rules in the LOA on conflict of laws could be considered of an overriding mandatory nature, which the way they have been phrased would suggest. Indeed, the wording of a provision being one of the indications in determination of the overriding nature of a rule, theirs certainly refers to an obligatory nature by stipulating that the respective provisions apply regardless of which state's law is applicable to the contract. In contrast, it has been argued that the consumer directives do not oblige the member states to transpose the conflict-of-laws rules as overriding mandatory provisions.^{*54} According to some authors, the aim with these provisions, which have in similar contexts also been called scope rules, localising rules, outward conflict rules, and *Annexkollisionsnormen* (in German)^{*55}, is not even to designate the applicable law but to ensure the effective application of secondary EU law – that is, to help the court of the forum to ascertain the sense in which a mandatory provision is mandatory.^{*56} This means that, in contrast to the multilateral conflict-of-laws rules set forth by Rome I, the national implementing provisions are designed simply to ensure the standard of consumer protection set forth in the directives for all cases closely related to member states. Since the wording of the LOA's conflict-of-laws rules does not seem intended to establish them as overriding mandatory provisions,^{*57} it is submitted here that these provisions do not constitute overriding mandatory provisions in the sense of Article 9 of Rome I.

In this respect, it should be noted that legal writing on consumer directives has not considered their conflict rules to be overriding mandatory ones either.^{*58} A difference from Article 12 (2) of the Timeshare Directive must, however, be emphasised: its terms have rightly been regarded as overriding mandatory rules since it assures consumers the protection offered by the directive whichever system of law is applicable.^{*59} Other consumer conflict-of-laws provisions should nevertheless be seen as intended to be only domestically mandatory, as they foresee that the protection offered by the directives cannot be avoided via a mere choice of law. Even the fact that the obligation to transpose the provisions addressing conflict of laws has been regulated on a European level and through directives aimed at ensuring the proper functioning of the internal market cannot suffice to tie these provisions to an overriding public interest.^{*60}

5. Conclusions

This paper has discussed the abundance and interaction of rules aimed at determining the law applicable to cross-border consumer contracts. It follows from the above that the level of consumer protection afforded by Rome I seems to allow for a waiver of the simultaneously existing directive-based conflict rules. Such renunciation would not only resolve the issue of inaccurate transposition to national laws – an apparent problem for the Estonian legislator as well – but also contribute to legal certainty. It has been submitted that, while the conflict-of-laws rules of Rome I and the national directive-based rules coexist, the latter are only to be considered subordinately to Rome I. The conflict rules of the LOA are also not to be viewed as overriding mandatory rules in the sense of Article 9 of Rome I; these are deemed to be only domestically mandatory.

⁵² A. Bonomi (see Note 51), p. 229; L.M. van Bochove (see Note 17), para. 2.1; A. Nuyts. Les lois de police et dispositions impératives dans le Règlement Rome I. – *Revue de Droit Commercial Belge 2009/6*, p. 559. See also M. Giuliano, P. Lagarde. Report on the Convention on the law applicable to contractual obligations. – OJ C 282, 31.10.1980, p. 1 ff, p. 28, where consumer protection provisions are cited as an example of overriding mandatory provisions.

⁵³ Also supported by A. Bonomi (see Note 51), p. 222; O. Remien (see Note 45), pp. 336–337.

⁵⁴ F. Ragno (see Note 1), p. 331

⁵⁵ For the terms, see, respectively, J.-J. Kuipers (see Note 34), p. 224; L.M. van Bochove (see Note 17), para. 4; S. Sánchez Lorenzo (see Note 27), p. 75; and D. Kluth (see Note 26), p. 29.

⁵⁶ J.-J. Kuipers (see Note 34), p. 224. He submits that the implementing provisions do not constitute conflict-of-laws rules in the strict sense at all.

⁵⁷ See Section 3, above.

⁵⁸ See, e.g., F. Ragno (see Note 1), p. 331.

⁵⁹ J.-J. Kuipers (see Note 34), p. 223.

⁶⁰ F. Ragno (see Note 1), p. 253.