“Comments to A. Savin’s Paper: Jurisdiction in Electronic Contracts and Torts: The Development of the European Court’s Case Law”,

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Comments on Savin's "Jurisdiction in Electronic Contracts and Torts- the Development of the European Court's Case Law"

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Prof. Savin mentions some CJ cases (*Pammer/Hotel Alpenhof*, *eDate Advertising*, *Cornelia Buschmann* and *Wintersteiger*)[2] that are connected, in his opinion, because they all answer to the question whether European courts should take jurisdiction in situations which involve *non-resident defendant websites* (p. 2). He arrives at the conclusion that there is a "new stream" or a "new approach" in the Court's case law concerning jurisdiction in electronic contracts and torts. This approach would be developing around "*a simple yet clear idea: courts facing claims arising out of electronic contracts and torts cannot avoid jurisdiction (…) merely because the defendant did not physically enter the forum state. On the contrary, these courts need to ready themselves for jurisdiction arising out of actions of non-present defendants*" (see pp. 2-3). Thus, the answer to the said question would be that European courts should take jurisdiction "*where there is a substantial connection between the forum and the defendant's actions*" (see p. 22).

However, the judgment of the Court in the joined cases *Pammer* and *Hotel Alpenhof*, does not exactly match with the given description, and it probably does not allow drawing out such conclusion. It is true that in *Pammer*, the defendant is a trader domiciled in Germany, and the request comes from a preliminary ruling made by Austrian courts, which question their jurisdiction. But in *Hotel Alpenhof* the defendant is not the website holder, but a person, Mr. Oliver Heller, who does have physically entered the forum state (Austria). And according to the interpretation of the Court, in *Hotel Alpenhof* Austrian courts should avoid jurisdiction, even if the situation is connected with the forum.

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[2] *Pammer and Hotel Alpenhof AG Cases*, 7 December 2010 (C-585/08 and C-144/09); *eDate Advertising AG Cases*, 25 October 2011 (C-509/09 y C-161/10). *Wintersteiger Case* (C 523/10) has still not been ruled. All are available at http://curia.europa.eu/ (last visited 2 Nov. 2011)

The main question that arises in *Pammer/Hotel Alpenhof* is the characterization of contracts as consumer contracts. Indeed, the relevance of the judgment relies on the criteria it gives in order to interpretate the specific provision concerning electronic consumer contracts that Article 15.1 c) Brussels I Regulation settles. As the Court asserts, "*Article 15(1)(C) of Regulation 44/2001 constitutes a derogation both from the general rule of jurisdiction laid down in Article 2(1) of the regulation, which confers jurisdiction upon the courts of the Member State in which the defendant is domiciled, and from the rule of special jurisdiction for contracts, se out in Article 5(1) of the regulation, under which jurisdiction lies with the courts for the place of performance of the obligation in question*" (see paragraph 53). In this matter, the governing principle for jurisdiction is not proximity, but the consumer's protection.

For a contract to be considered a "consumer contract" it is necessary that the person who pursues commercial or professional activities directs such activities to the Member State where the consumer is domiciled. Traders would be reluctant to do business on the Internet if any person with who they contract is considered a consumer just because she/he accedes to the trader's website from her/his domicile. It is paramount for business to have a means for limiting the reach of their activities, since Article 16 obliges them to sue consumers in the Member State of their domicile, and to litigate in this Member State in case they are the defendants. Therefore, for a contract to be qualified as a consumer contract, Article 15(1)(C) BIR demands that the trader directs its activities to the Member State where the consumer is domiciled. Should such direction fail, the consumer would be treated as an active consumer, who does not deserve the protection that Section 5 of the BI Regulation brings to (passive) consumers. The question is, then, how to determine if the professional or the enterprise directs its activities to a given Member State when the activities are offered by means of an instrument that reaches the whole world, i.e., the Internet.

To that end, the judgment of the ECJ gives two important parameters. First, it confirms that directing activities to a certain country is a matter of intention of the trader to target the Member State of the consumer's domicile (paragraph 64). Not only the trader employs the website as a means for internationalizing its activities, but he or she also aims at doing business in the Member State where the consumer is domiciled. And second, it helps in ascertaining such intention. Indeed, intention is a purely subjective

element, whose determination is only feasible either by express confession of the person, or by means of presumption. Thus, on the one hand, the CJ indicates that there are clear expressions of intention, such as an explicit mention that the trader is offering its services or goods in a Member State designated by name, or the fact that the trader makes expenses in order to facilitate the access to its website in a given Member State, by means of a search engine (paragraph 81). On the other hand, the CJ points out to the fact that some objective factors may be taken into account in order to decide whether the trader targets a given Member State. These factors (or evidence) are deduced from advertising (paragraph 65): in particular, from advertising by means of the website (paragraph 68). And there are both negative and positive elements. Among the negative evidence, the CJ's ruling firstly asserts that the accessibility of the website from a given Member State is not enough to consider that the trader targets this Member State (paragraph 74). Moreover, the Court stresses some elements that would not indicate that the trader is directing its activities to one or more other Member State, such as the trader's email address or geographical address and the telephone number without an international code (paragraph 77). Positive items of evidence of the intention of the trader are, to the Court's opinion, the international nature of its activity, the indication of an international phone code; the use of certain domain names; the mention of an international clientele; and the use of a given language or currency (paragraph 83).

The CJ's ruling is constructive in that it will help the European courts in the task of determining a trader's intention, using some elements that are to be derived from the website of the trader[3]. It also has the virtue of having revised the inexplicable assertion of the Council and the Commission in their joint declaration on Article 15 of BIR, concerning the use of a language and a currency. According to this Statement, these factors are not relevant for the purpose of determining whether an activity is directed to one or more other Member State[4]. But they certainly are. In fact, there is a common point in *Pammer/Hotel Alpenhof*, *eDate Advertising* and *Wintersteiger*, which is that they all reflect that the use of a given language in the internet might be relevant for the purpose of establishing jurisdiction; mainly when such language is "territorial".

[3] P. de Miguel Asensio, "Contratos de consumo celebrados a través de Internet: alcance del régimen de protección del Reglamento Bruselas I", *Anuario Español de Derecho Internacional Privado*, t. 10, 2010, pp. 1021-1023, esp. p. 1022.

[4] "Joint declaration of the Council and the Commission on Articles 15 and 73 of Regulation No 44/2001", DG H III 14139/00, http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf (last visited, 2 Nov. 2011).

The CJ's judgment in *Pammer/Hotel Alpenhof*, however, is not fully satisfactory.

To begin with, some of the items that constitute evidence of the trader's intention could be used in a more accurate way. In particular, the point of view adopted in relation to some of the elements is not completely correct. When the Court refers to the domain name, the language and the currency that are employed in the trader's website that the consumer has entered, it asserts that they constitute evidence that the activities are directed to the consumer's Member State if they are different to the geographical domain name, the language and the currency habitually employed in the Member State where the trader is established (see paragraph 84 and judgment). Thus, according to this approach, it constitutes evidence, e.g., that a trader established in France pursues activities in other Member State if it uses a geographical domain name other than ".fr", a language other than French and a currency other than the euro. In my opinion, the viewpoint should be other. What is relevant is that the elements used in the trader's website match with the consumer's Member State. There is no evidence of directing activities to Greece or Italy if the French trader translates it website into English or Spanish, and gives the prices in British pounds and Dollars; but such evidence is clear if it uses Greek or Italian, by means of websites that employ the geographical domain name ".gr" and ".it".

Furthermore, I do not think that the fact of taking into account only the items that derive from advertising is entirely correct, according to the Regulation. Article 15(1)(C) BIR establishes no limitation as to the moment in which it must be established that the trader directs its activities to a given Member State. But the CJ's approach separates, at this stage, intention and facts. It asserts that the trader's intention is to be determined by means of the evidence existing *before any contract with the consumer is concluded* (paragraph 76). I believe that the conclusion of the contract itself could constitute evidence -strong evidence, that the trader pursues activities in the Member State where the consumer is domiciled. The consumer deserves protection irrespectively of the intention of the trader to target the consumer's Member State before the contract was concluded. By means of the conclusion of the contract, the professional or enterprise would be showing that *is* doing business in this Member State. But the trader must be aware of the fact that the consumer is domiciled in another MS. Indeed, this more

accurate interpretation of Article 15(1)(C) would fit with the promotion of e-trade only if some certainty is guaranteed to the trader, i.e., if the consumer's domicile is known. And such knowledge is irrefutable where the contract is performed in the MS of the consumer; for instance, because the goods are served there or because the services are supplied there.

A problem is that, according to the Brussels I Regulation, it does not matter if the contract is entirely performed in a Member State other than the Member State of the consumer's domicile. In such situation, the trader might not expect the consequences of the conclusion of the transaction on jurisdiction. For instance, in *Hotel Alpenhof* and in *Pammer*, both consumers received the services entirely outside their MS. This is perhaps the reason why the ECJ renounces to the separation of facts and intention in a second stage, and demands (*obiter dictum*) that the contract is concluded at a distance (in the first case: see paragraphs 85-87) and that the trader is conscious of the internationality of its activities (in the second: see paragraph 89).

These requirements probably respond to the necessity of guaranteeing certainty to the traders, but first, they are not settled in the regulation; and, second, they could be rather arbitrary. According to the judgment, even if *Hotel Alpenhof's* website showed clearly the intention to attract consumers domiciled in Germany, Mr. Heller deserved protection just because he made the reservation at a distance. Should Oliver Heller had visited the website of the Austrian Hotel and decided to overnight there but made no reservation on line, but just at his arrival, at the reception desk, he would have been considered "active consumer". Same trader's intention, but different protection. And no clear provision in this sense.

If certainty is needed and wanted, it would perhaps be pertinent to introduce some legal amendments. In this sense, the BIR could contemplate the same limitation as the Rome I Regulation in the characterization of a contract as a consumer contract; it could consider that it is not a consumer contract the contract for the supply of services where the services are to be supplied exclusively in a country other than that in which she/he has her/his domicile.