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The Recent Shift from the Passive to the Active Consumer

On the causal link between 'directing activities (at the consumer's State)' and the consumer's conclusion of the contract with respect to Article 17.1 (c) Brussels I Regulation

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Abstract: *The debate on the protection of consumers in cross-border settings has flared up repeatedly since the introduction of the consumer protection rules of the Brussels I and Rome I Regulations. Whilst in the past consumer protection had not often been prioritised and the CJEU had insisted on strict interpretations to the consumers' detriment,*[1] *and though since then a middle road between the interests of the entrepreneur and the consumer has been sought,*[2] *it seems that the pendulum has now swung back the other way again. According to the CJEU's latest judgment in C-218/12 Emrek/Sabranovic, in all cases where an entrepreneur concludes a contract with a foreign consumer, this falls under the adjudicatory jurisdiction of the consumer's domicile, even if the entrepreneur's marketing activity in the consumer's state was not causally relevant for the eventual conclusion of the contract.*

Keywords: *Conflict of Laws; International Procedure; Adjudicary Jurisdiction; Consumer Law; Cross-border Consumer Contracts.*

I. Introduction

When it comes to consumer claims against entrepreneurs, international jurisdiction is determined in the European context by the Brussels I Regulation.[3] This Regulation provides for an adjudicatory jurisdiction, supplementing the general jurisdiction of the defendant entrepreneur's habitual domicile (Article 4 Brussels I Regulation). As well as the State where the obligation in question was to be performed – which usually coincides with the defendant's domicile (Article 7.1 (a) Brussels I Regulation) – the State where the consumer is domiciled also has jurisdiction insofar as the entrepreneur

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1 For instance, CJEU 20. 1. 2005, C-464/01, *Johann Gruber/BayWa AG*.

2 For instance, CJEU 7. 12. 2010, C-585/08, C-144/09, *Pammer/Reederei Schlüter and Alpenhof/Heller*; cf *Gillies*, Clarifying the 'Philosophy of Article 15' in the Brussels I Regulation: C-585/08 Peter Pammer v Reedere Karl Schluter GmbH & Co and C-144/09 Hotel Alpenhof GesmbH & Co KG v Oliver Heller, ICLQ 2011, 557 (557 et seq).

3 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition of judgments in civil and commercial matters, OJ 2012 L 351/1.

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directs his or her commercial activity *to* that State and the contract falls within the scope of the activity (Article 17.1 (c) in connection with Article 18 Brussels I Regulation). Such specific rules also exist in the provisions on the applicable law for consumer contracts laid down in Article 6 Rome I Regulation. According to recitals 7 and 24 of that regulation, they must be understood as consistent with Article 17 Brussels I Regulation.

In light of the continuing growth in online commerce and the ubiquitous web presence of entrepreneurs, the debate has centred on the phrase 'directed [...] to' the State where the consumer is domiciled in relation to their commercial or professional activity.[4] The question arose whether an online presence was sufficient to satisfy this criterion and establish the competence of the courts in the State where the consumer was domiciled. As is well known, the CJEU handed down a landmark decision on this issue in the joined cases C-585/08 and C-144/09, *Pammer/Reederei Schlüter* and *Alpenhof/Heller*,[5] referred by the Austrian Supreme Court (Oberster Gerichtshof, OGH) for preliminary rulings.[6] The court did not formulate any abstract definition of the legal phrase 'directed to', but instead provided a list of *indicia* it considered suitable to determine how the activity in question is 'directed'. It remains to be seen whether the CJEU did itself any favours by proceeding in this way – we must expect that there will be ever more applications for preliminary rulings looking for resolutions in individual cases. This aspect will not, however, be examined in any more detail here.[7]

Nonetheless, it is striking that, while the CJEU went into depth on *indicia* for how the entrepreneur 'directed' the activity in question, it did not pay any attention to the subsequent event – the consumer's conclusion of the contract.[8] In contrast with this, Germanic supreme courts[9] have always required that the consumer show this internal link as a restrictive criterion; the activity (directed to the consumer's State) must have been the cause of the actual conclusion of the contract.

It may be assumed that the causal link between the marketing activity and the conclusion of the contract is only very rarely at issue in practice. The consumer, who bears the burden of proof in cases brought outside of the defendant's domicile (Article 4 Brussels I Regulation), will usually submit that he took notice, first, of the entrepreneur's marketing activity directed at his State (typically the entrepreneur's online presence) and, second, of the entrepreneur himself. He will claim that in consequence he concluded the contract because of the marketing activity. This is not the position adopted in Luxembourg, however, as C-218/12 *Emrek/Sabranovic*[10] illustrates.

4 See e.g. *Øren*, International Jurisdiction over Consumer Contracts in e-Europe, ICLQ 2003, 665 (665 et seq).

5 CJEU 7. 12. 2010, C-585/08, C-144/09, *Pammer/Reederei Schlüter und Alpenhof/Heller*.

6 OGH 6 Ob 192/08s ecolex 2009/114; OGH 6 Ob 24/09m ecolex 2009/300.

7 This is not a tenable objection to a flexible system in the present authors' opinion, cf *Thiede,* A Topless Duchess and Caricatures of the Prophet Mohammed. A Flexible Conflict of Laws Rule for Crossborder Infringements of Privacy and Reputation, in *Bonomi/Romano* (eds), Yearbook of Private International Law 2012/2013 (2013) 247 (247 et seqq); *Symeonides*, Codification and Flexibility in Private International Law, in *Brown/Snyder* (eds), General Reports of the XVIIIth Congress of the International Academy of Comparative Law (2011) 167 (167 et seq); with a different view *Aubry/Poillot/Sauphanor-Brouillaud*, Panorama de droit de la consummation 2013, Recueil Dalloz 2013, 945 (974); *d'Avout*, JCP G 2011, 226; *Mankowski*, Autoritatives zum „Ausrichten" unternehmerischer Tätigkeit unter Art. 15 Abs. 1 lit. c EuGVVO, IPRax 2012, 144.

8 In the *Pammer/Reederei Schlüter and Alpenhof/Heller* case this was perhaps understandable because there was an undeniable causal link between the direction of the activity and the conclusion of the contract.

9 See OGH 2 Ob 256/08y EvBl 2009/136 (*Clavora*); BGH III ZR 71/08 CR 2009, 174 = EuZW 2009, 26 (*Leible/Müller*) = IPRax 2009, 258 (*Mankowski* 238) = NJW 2009, 298; OLG Köln 12 U 49/09 NZM 2010, 495; OLG Karlsruhe IPRax 2008, 348 = NJW 2008, 45 = AnwBl 2008, 380; OLG Schleswig WM 1997, 991 = RIW 1997, 955; OLG Karlsruhe 14 U 72/06 IPRax 2008, 348 (*Mankowski* 333) = IPRspr 2007/145 = NJW 2008, 85.

10 CJEU 17. 10. 2013, C-218/12, *Lokman Emrek/Vlado Sabranovic* (not published).

There it was clear that the contact between the defendant entrepreneur and the claimant consumer could not be traced back to the entrepreneur's website. The CJEU decided that Article 17 Brussels I Regulation did not require a causal link between the means employed to direct the activity at the consumer's state (such as a website) and the conclusion of the contract with that consumer.

In the following sections, the facts of the case (II) and the arguments of the CJEU (III) will be summarised, and the decision discussed with regard to its doctrinal justification (IV) and its underlying policy (V). It will be argued that, from a doctrinal perspective, the arguments raised by the CJEU are highly questionable and methodologically weak. Similarly, from a consumer protection perspective they reflect a trend of developments based on the use of law as a means to encourage certain consumer conduct, rather than as a means to balance unequal bargaining power.

II. Facts

The dispute in *Emrek/Sabranovic* arose from the following facts. A German consumer bought a car in France. It was possible to prove that the communication between the entrepreneur and the consumer was not linked to the entrepreneur's website, but instead to a recommendation given by an acquaintance of the claimant. The claimant only discovered the defendant's website after the contract was concluded, but he then tried to rely on it in order to establish that his domicile state had jurisdiction under Article 17.1 (c) Brussels I Regulation. Given the design of the website, there was no doubt that it was directed at foreign clients in the sense of the relevant rule. As the website had in no way provided the motive for the consumer to conclude the contract, however, and given that the consumer had travelled abroad on his own initiative and only learned of the website after the contract was concluded, there was, strictly speaking, no link between that aspect of the entrepreneur's activity and the actual contract. The crux of the matter was, therefore, whether a restrictive causality requirement applied, or else whether the mere co-existence of two elements (with no causal link) was sufficient to engage the jurisdiction of the consumer's domicile State in accordance with Article 17.1 (c) Brussels I Regulation.

III. CJEU's decision

To cut the story short, the CJEU rejected a causation requirement. Since the consumer, as the weaker party in contracts with professional entrepreneurs, must be protected, he or she must not be exposed to difficulties in proving his or her case. 'Difficulties' includes having to prove causation where it might be disputed by the professional entrepreneur. Requiring proof of causation might dissuade consumers from suing in their domestic courts, ultimately weakening the protection provided by the above rules.[11]

IV. Legal doctrine

Strictly speaking, Article 17.1 (c) Brussels I Regulation requires only that the commercial activity was directed towards the consumer's State and that the specific contract should fall within the scope of the business area of the commercial activity directed in this way. The wording of Article 17.1 (c) Brussels I Regulation does not provide any basis for a causation requirement.

11 *Op cit* No 10, para 25.

Nonetheless, a glance at the second part of the rule, which stipulates that the contract must fall within the business area of the activity directed at the consumer's State, is enough to cause legitimate doubts as to whether an internal link between the direction of the activity and the conclusion of the contract is unnecessary. It is difficult to conceive of scenarios in which the business area requirement retains an independent scope without there being a causal link between the marketing activity and the conclusion of the contract.[12] The entrepreneur would have to have directed the marketing activity in his or her business area in the relevant sense, without the purchase contract in this business area coming about through that marketing activity. As the interaction of the two requirements cannot just serve to exclude the jurisdiction of the consumer's domicile in the hypothetical case of inventory being sold, a requirement of a link to the conclusion of the contract seems to be implied.[13]

This interpretation also accords with the content of materials which authorise conclusions to be drawn on the concepts, values and aims underlying the rule; the ongoing criticism of Article 17.1 (c) Brussels I Regulation occasioned the Commission and the Council to make a joint declaration in 2000 concerning Article 17.1 (c) Brussels I Regulation.[14] This declaration emphasises that, in respect of the application of Article 17.1 (c) Brussels I Regulation, 'it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence [...] a contract must also be concluded within the framework *[sic!]* of its activities.' It is questionable whether such a declaration can be relied on in itself, given its uncertain legal status and lack of normative authority. However, the declaration is not completely isolated from other, closely connected legislation, namely the Rome I Regulation.[15] As mentioned above, Article 17.1 (c) Brussels I Regulation was adopted to determine the applicable law for consumer contracts in Article 6.1 Rome I Regulation. The joint declaration concerning Article 17.1 (c) Brussels Regulation is cited in detail in the Rome I Regulation, especially in respect of the need for the entrepreneur's marketing activity to cause the contract to be concluded. This requirement is also added in Recital 25 Rome I Regulation.[16] According to that provision:

12 Cf *Nielsen* in *Magnus/Mankowski* (eds), Brussels I Regulation (2007) Art 15 No 37.

13 Cf *F. Bydlinski*, Methodenlehre[2] (1991) 444: „Führte eine bestimmte Interpretation [...] dazu, dass (die) Bestimmung [...] zweck- und funktionslos wird, so ist diese Auslegung nicht anzunehmen." ('If a certain interpretation would lead [...] to the provision [...] becoming purposeless and losing its function, then this interpretation should not be taken,' translation provided by the authors).

14 Joint declaration of the Council and the Commission on Articles 15 and 73 of Regulation No 44/2001, Annex II to the note of the General Secretariat of the Council of the European Union for the Permanent Representatives' committee of 14. 12. 2000 in the corrected version of 20. 12. 2000, 14139/00 and 14139/00 COR2 (en)-JUSTCIV 137.

15 Regulation (EC) No 593/2008, OJ L 2008/177, 6 et seqq.

16 The background to Recital 25 Rome I Regulation is the so-called 'El Corte Inglés' case: 'El Corte Inglés' is a department store chain with a flagship store in Madrid and, inter alia, a branch in Lisbon. A Portuguese citizen, living in Portugal, came to Madrid and went shopping there in the local 'El Corte Inglès'. Since the overall enterprise El Corte Inglès also directs its commercial activity at Portugal, given the fact that a branch is located there, the application of Portuguese law was a possibility. In the course of the negotiations regarding Rome I Regulation, however, the Spanish delegation ultimately managed to exclude this possibility. Cf *Mankowski*, Muss zwischen ausgerichteter Tätigkeit und konkretem Vertrag bei Art. 15 Abs. 1 lit. C EuGVVO ein Zusammenhang bestehen? IPRax 2008, 333 (337).

> '[…] consumers should be protected by such rules of the country of their habitual residence […] provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.'

Thus the Rome I Regulation establishes that the specific contract at issue must be the result of the targeted activity.

Finally, it must be established whether Recital 24 Rome I Regulation (with the quotation from the joint declaration) and Recital 25 Rome I Regulation (requirement of a causal link) must be considered when interpreting the Brussels I Regulation. Recital 7 Rome I Regulation provides support for this idea, since it stipulates that the Rome I Regulation must be interpreted consistently with the Brussels I Regulation, and thus requires that the two Regulations be applied harmoniously. Since Recital 7 Rome I Regulation is intended to tie the more recent Regulation to the older one (i.e., it aims to produce coherence), it seems to be satisfied; no divergence of aims between the Brussels I and Rome I Regulations is identifiable in this area. The interpretation of Article 17.1 (c) Brussels I Regulation already mentioned at the beginning points in the same direction as Recital 25 Rome I Regulation. The only remaining question in respect of the transferability of a Recital from one piece of legislation – and a more recent one at that – to the interpretation of an older regulation was answered by the CJEU in C-463/06 *FBTO Schadeverzoekeringen/Oderbreit*[17] *apropos* the Brussels I Regulation. Specifically, the issue was whether Article 13 Brussels I Regulation should be construed in light of Recital 16a of the Fourth Motor Insurance Directive of 2000, which was only introduced in 2005 by Article 5 Fifth Motor Insurance Directive. The CJEU did not hesitate in that case to assume (incorrectly on the particular facts, in the opinion of the authors of this text)[18] that this was a correct and authentic reproduction of the historical legislative ambit.

In consequence, we can note the following. Both the interpretation which preserves an independent scope for the requirement that the contract be within the business area of the targeted activity and the joint declaration of the Commission and the Council in this respect – which is unambiguous and is quoted in Recital 24 Rome I Regulation and also Recital 25 of the Rome I Regulation (the latter two being relevant on the basis of Recital 7 Rome I Regulation and the *FBTO Schadeverzekeringen* case) – strongly support imposing a requirement of a causal link between the directed activity and the consumer's conclusion of the contract.

V. Legal politics

Traditionally, European consumer protection in international procedural and private law has been directed towards the passive consumer. 'Passive' in this context means that the consumer is not the initiator of the international contract. The passive consumer principally limits his or her demand for goods to his or her home country, and is one who has no intention to enter the in-

17 CJEU 13. 12. 2007, C-463/06, *FBTO Schadeverzekeringen/Odenbreit*.

18 Likewise *Fuchs*, Gerichtsstand für die Direktklage am Wohnsitz des Verkehrsunfallopfers? IPRax 2007, 302; *Heiss*, Die Direktklage vor dem EuGH: 6 Antithesen zu BGH 29. 9. 2006 (VI ZR 200/05), VersR 2007, 327; *Thiede/Ludwichowska*, EuGH, 13. 12. 2007, C 463/06, FBTO Schadeverzekeringen NV v Jack Odenbreit, VersR 2008, 631; *Wittwer*, Direktklage im Inland gegen ausländische Kfz-Haftpflichtversicherung, ZVR 2006, 404 (406).

ternational market. A foreign trader, however, pursues the consumer in his or her home country with advertising activities and induces him or her to conclude a contract. The consumer thus becomes a party to an international contract because he or she is the target of the commercial activities of a foreign trader, and not because of his or her own desire to trade internationally. The counterpart to the passive consumer is the active consumer, who takes the initiative to enter the international market, for example by travelling to a foreign country in order to conclude a contract with a foreign trader.[19]

The traditional focus of international consumer protection on the passive consumer was obvious in the Rome[20] and Brussels Conventions.[21] Article 13 Brussels Convention and Article 5 Rome Convention required that the consumer had taken all the steps necessary in his or her country on his or her part for the conclusion of the contract, and that these steps were preceded by an entrepreneur's specific invitation or advertisement.[22] The active and mobile consumer, who travels to a foreign country and then enters into the contract, was subject to these provisions only if the journey was arranged by the seller for the purpose of inducing the consumer to contract.[23]

In contrast, Article 6 Rome I Regulation and Article 17 Brussels I Regulation also apply to active consumers insofar as their applicability does not depend on the location where the contract was concluded.[24] It is irrelevant whether the contract was concluded in the consumer's home country, the entrepreneur's,[25] or even in a third country. If the entrepreneur pursues commercial activities in the consumer's country, or directs such activities to that country, then the link to the consumer's country is considered strong enough to subject the entrepreneur to its jurisdiction and its law.[26]

In comparison to the previous rules of the Rome Convention and the Brussels Convention, Article 6 Rome I Regulation and Article 15 Brussels I Regulation are thus considered a compromise between the active and passive consumer[27] and an extension of the 'semi-passive'[28] consumer. As the following analysis will show, the *Emrek/Sabranovic* decision pushes this extension further.[29]

The traditional restriction of consumer protection to passive consumers on the one hand, and the partial expansion to active consumers on the other, correspond to different goals of European consumer law. European consumer law aims not only to improve consumer protection in the

19 Cf *Ragno*, The Law Applicable to Consumer Contracts unter the Rome I Regulation, in *Ferrari/Leible* (eds), Rome I Regulation: The Law Applicable to Contractual Obligations in Europe (2009) 129 (144 et seqq).

20 Convention on the law applicable to contractual obligations of 19 June 1980; regarding its focus on passive consumers see *Reich/Halfmeier*, Electronic Commerce: Consumer Protection in the Global Village, Dick. L. Rev 2001, 112 (117 et seq): 'The passive consumer is the beloved child of private international law who needs to be cuddled and protected, while the active consumer – whether an ocasional surfer or an Internet addict – opts out of his or her home jurisdiction by choice and, therefore, may be subjected to whatever law the supplier proposes, even offshore jurisdiction.'

21 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968.

22 Art 5.2 Rome Convention, Art 13.3 lit a and b Brussels Convention.

23 Art 5.2, second indent Rome Convention.

24 Cf *Ragno* in *Ferrari/Leible* 144 et seqq; *Staudinger* in *Rauscher* (ed), Europäisches Zivilprozess- und Kollissionsrecht: EuZPR/EuIPR (2011) Art 15 Brüssel I-VO No 11; *Mankowski*, IPRax 2008, 335; *Schoibl*, Vom Brüsseler Übereinkommen zur Brüssel-I-Verordnung: Neuerungen im europäischen Zivilprozessrecht, JBl 2003, 149 (160 et seq).

25 See for example CJEU 6. 9. 2012, C-190/11, *Mühlleitner/Yusufi and Yusufi*.

26 Art 15.1 lit c Brussels I Regulation; Art 6.1 Rome I Regulation; cf *Staudinger* in *Rauscher*, Art 5 Brüssel I-VO No 11.

27 *Ragno* in *Ferrari/Leible* 145 et seq.

28 *Mankowski*, IPRax 2008, 338.

29 According to *Rühl*, Kausalität zwischen ausgerichteter Tätigkeit und Vertragsschluss: Neues zum situativen Anwendungsbereich der Art. 15 ff. EuGVVO, IPRax 2014, 41 (41, 43 et seq), this interpretation goes beyond the law and the intention of the legislator.

Member States, but also to establish and promote the internal market. This aim is to be realised by creating equal competition conditions for companies, and by making it easier for consumers to operate *actively* in other EU states without running the risk of being subject to foreign jurisdiction and law.[30] Consumers should thus be motivated to participate (actively) in the internal market. Some authors have recently stated that, although the main, traditional goal of consumer law was the protection of the weaker party for social reasons, the aim at present is increasingly dominated by the desire to strengthen the internal market. Accordingly, consumer confidence in the internal market should be increased in order to encourage those consumers to take advantage of the internal market and to buy consumer goods in other Member States.[31]

This also extends to the question of jurisdiction. The ultimate objective in granting the consumer the right to litigate in his or her own jurisdiction is not to compensate unequal bargaining power, but rather to encourage certain socially desirable conduct: (active) participation in the internal market. Accordingly, in *Emrek/Sabranovic* the Advocate General[32] explicitly indicated that the special jurisdiction of Article 17 Brussels I Regulation serves as an incentive for consumers to conclude contracts in other Member States. The active consumer is thus not only an object of protection but the status principally encouraged in consumer law. This policy implies the assumption that people respond to such incentives, and that the law may serve as a powerful tool to encourage socially desirable conduct and discourage undesirable conduct. This assumption seems to be shared by parts of the so-called 'behavioral law and economics' movement,[33] even though an empirical behavioral approach to law would imply checking the consumers' reactions (or non-reactions) to such legal incentives in real life (in order to verify or falsify the assumption).[34]

The requirement of a definite link between the entrepreneur and the consumer's home country fulfils different functions depending on whether consumer policy follows the traditional or the behavioural approach. Following the traditional approach, this link not only functions as a guarantee of foreseeability for the entrepreneur, but also as a 'lure' which induces the consumer to conclude the contract. Following the behavioural approach, by contrast, it functions only as a means to make sure that the special jurisdiction is foreseeable by the entrepreneur. In accordance with Article 17.1 Brussels I Regulation, there is foreseeability if the entrepreneur pursues his commercial activities in the consumer's country or if he directs those activities to that country.

In aiming to protect the passive consumer who has been pursued and lured by the entrepreneur, the traditional approach definitely requires a causal link. The consumer must have been caught in the net of the international contract not merely accidentally, but because of the trader's target-oriented advertising measures. On the other hand, by guaranteeing the consumer access to his

30 *Lurger/Augenhofer*, Österreichisches und europäisches Konsumentenschutzrecht[2] (2008) 12.

31 *Heiderhoff*, Zum Verbraucherbegriff der EuGVVO und des LugÜ, IPRax 2005, 230 (231); *Staudinger* in *Rauscher*, Art 5 Brüssel I-VO Art 15 Brüssel I-VO No 1.

32 Advocate General 18. 7. 2013, C-218/12, *Emrek/Sabranovic* No 37.

33 *Korobkin/Ulen*, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, California Law Review 2000, 1051 (1054); regarding the application of behavioural economics in consumer law cf *Bar-Gill*, The Behavioral Economics of Consumer Contracts, Minnesota Law Review 2008, 749; *Rischkowsky/Döring*, Consumer Policy in a Market Economy – Considerations from the Perspectives of the Economics of Information, the New Institutional Economics as well as Behavioural Economics, J Consum Policy 2008, 285; *Tscherner*, Can behavioral research advance information duties, boilerplate and withdrawal rights? Austrian Law Journal 2014, 144 (144 et seqq).

34 *Lurger*, Empiricism and Private Law: Behavioral Research as Part of a Legal-Empirical Governance Analysis and a Form of New Legal Realism, Austrian Law Journal 2014, 20 (25 et seqq).

or her own jurisdiction in order to motivate him or her to enter the internal market, the behavioural approach does not necessarily require a causal link between the entrepreneur's activities and the conclusion of the contract. The directed activity requirement does not function as a lure, but only as a guarantee of foreseeability for the entrepreneur. If the entrepreneur directs commercial activities to a certain country in order to acquire clients then it can be assumed that the jurisdiction and the law of that country do not come to him as a surprise.[35]

This approach can already be seen when reading between the lines in the aforementioned decisions *Pammer/Reederei Schlüter* and *Alpenhof/Heller*,[36] as well as in *Mühlleitner/Yusufi and Yusufi*,[37] where the CJEU argued that the European Union legislature had removed the condition requiring the consumer to have taken the steps necessary for the conclusion of the contract in his state, replacing it with "conditions applicable to the trader *alone*".[38] It is sufficient if the trader pursues his or her commercial activities in the consumer's domicile, or by any means directs such activities to that Member State, and thus manifests his intention to establish commercial relations with the consumers who have their domicile there.[39]

The Advocate General in *Emrek/Sabranovic* explicitly refers to this argument, confirms that the only conduct relevant to the special jurisdiction issue is the conduct of the entrepreneur, and denies that a causal link is required.[40] Whether the directed activities and the concluded contract are connected is irrelevant because the entrepreneur will hardly be aware of it. Whether the special jurisdiction was foreseeable to him or her therefore has no influence on the criterion. This means that the special jurisdiction applies to all consumers, passive and active, whenever a foreign jurisdiction would not come as a surprise to the entrepreneur. [41]

VI. Conclusion

From a doctrinal perspective, the above arguments clearly indicate that a causal link is a requirement. It is somewhat surprising that none of the arguments raised received any mention in the *Emrek/Sabranovic* decision; the CJEU takes as its sole motivation the potential evidential difficulties a consumer might face[42]. However, the CJEU cannot act to alleviate such difficulties for the consumer, since it does not have the relevant competence for the question of whether a *non liquet* can be held against the consumer. To be sure, this should be left to the European legislator to provide for the needs of the European consumers as it was done for victims of road traffic accidents in course of the Fifth Motor Insurance Directive.[43]

35 *Mankowski*, IPRax 2008, 334.
36 CJEU 7. 12. 2010, C-585/08, C-144/09, *Pammer/Reederei Schlüter und Alpenhof/Heller*.
37 CJEU 7. 9. 2012, C-190/11, *Mühlleitner/Ahmad Yusufi and Wadat Yusufi*.
38 CJEU 7. 12. 2010, C-585/08, C-144/09, *Pammer/Reederei Schlüter und Alpenhof/Heller* No 60; CJEU 7. 9. 2012, C-190/11, *Mühlleitner/Ahmad Yusufi and Wadat Yusufi* No 39.
39 CJEU 7. 12. 2010, C-585/08, C-144/09, *Pammer/Reederei Schlüter und Alpenhof/Heller* No 60; CJEU 7. 9. 2012, C-190/11, *Mühlleitner/Ahmad Yusufi and Wadat Yusufi*.
40 Advocate General 18. 7. 2013, C-218/12, *Emrek/Sabranovic* No 17.
41 Cf Advocate General 18. 7. 2013, C-218/12, *Emrek/Sabranovic* No 20 und 38; Advocate General 18. 5. 2010, C-588/08 and C-144/09, *Pammer/Reederei Schlüter und Alpenhof/Heller* No 64.
42 CJEU 17. 10. 2013, C-218/12, *Lokman Emrek/Vlado Sabranovic* (not published) No 25.
43 By, for instance, taking prima facie evidence as the standard, since contracts are not coincidentally concluded, and in some circumstances the unsubstantiated contesting of a causal link may not be sufficient to necessitate full proof by the consumer.

With regard to the traditional purpose behind special jurisdiction for consumer contracts (the protection of the consumer who has been induced by the entrepreneur to enter into the contract), the CJEU's position is untenable; a consumer who concludes a contract abroad for reasons other than the entrepreneur's directed activity is simply not covered by the rule. In the absence of such coverage, he or she is not entitled to the jurisdiction of his or her home courts.

The CJEU reveals a single-minded focus on European consumers neglecting tenable interests of entrepreneurs, notably those of SMEs (small and medium-sized enterprises): not all entrepreneurs have sophisticated means to defend themselves in *fori* all over Europe. Must now even smallest Bed & Breakfast abstain from accommodating foreign guests just because it provides a website in a foreign language (which, we may add, had no influence on choosing this B&B in the first place)?

Without more, the *Emrek/Sabranovic* decision reflects a shift in consumer policy, which replaces the traditional stance of protecting the passive consumer with the aim of creating an active consumer. In this context, the special jurisdiction functions as an incentive to encourage the consumer to enter contracts with entrepreneurs in other Member States and, simultaneously, strengthens the internal market. Thus, the consumer who (whether physically or virtually through the internet) travels to another Member State and enters into a contract will be granted the right to proceed in his home jurisdiction whenever the special jurisdiction is foreseeable for the entrepreneur.

In accordance with this policy, consumer law does not primarily aim to balance the interests of the consumer against those of the entrepreneur with regard to unequal bargaining power and social justice, but rather to provide incentives to encourage certain consumer conduct with the intention of strengthening the internal market. Whether this approach favours consumers or entrepreneurs in the long-term, and whether it actually strengthens the internal market, remains to be seen.