The Conflict of Laws of Data Protection

A Contribution on the Interaction between the Substantive Law of the European Union and the Conflict of Laws

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Outline

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E. Legal Instruments

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II. Japan

Act on the Protection of Personal Information (Act No. 57 of 2003).

III. United States of America

1. Federal Law

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3. Regulations

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Introduction

I. The Rise of Personal Data

As the digitalisation of all aspects of society progresses, the value and importance of data[1] becomes more and more clear. Even though data are not specifically connected to the digital, i.e. machine readable, world or the usage of computer, their relevance today mainly derives from the increasing omnipresence of digital devices and services. They allow to collect and process extensive amounts of data with ease. Further, data are the basis of every machine operation as they are required to start or influence a calculation process executed by a machine. This is particularly highlighted by the German language, where the operations performed by computers are referred to as "Elektronische Datenverarbeitung", which means electronic data processing. Nowadays, it is therefore highly convenient to process data. At the same time, however, digitalisation also presupposes the existence of data, as data processing is not possible without data.

The significance of data is also reflected in the volume of data collected worldwide. Huge amounts of data are already being stored today to allow for data processing in the future or to secure the results of processes which have already been carried out. In 2023 the existing data amount to over 100 Zettabyte, which is a unit with 21 Zeros, and will reach 175 Zettabyte by 2025.[2]

The increased importance of data especially applies to data that are directly or indirectly linked to an individual person. Such a connection may result from the data either being based on statements made by an identifiable person or from data being collected in such a way as to be assignable to an identifiable person. These data reflect parts of our being and allow not only companies but also public authorities to create profiles and to draw conclusions on our own personality. They make it possible to estimate our future behaviour and to offer goods and services of which we do not know yet that we will need them. This further results in potentially decisive advantages over competitors who do not have access to such kind of data. These data may provide direct and far-reaching insights into our lives. From a public law perspective, they

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[1] The meaning of the term data is very broad and context-dependent (see the variety of meanings in the Oxford English Dictionary, "data, n." OED Online, Oxford University Press <www.oed.com/view/Entry/296948> accessed 9 December 2023); for the purposes of this study, the term data is to be equated with the term information, which is the impartment of knowledge ("information, n." OED Online, Oxford University Press, <www.oed.com/view/Entry/95568> accessed 9 December 2023).

[2] David Reinsel, John Gantz and John Ryding, 'The Digitization of the World' (May 2020) IDC White Paper #US44413318, 6 available at <https://www.seagate.com/files/www-content/our-story/trends/files/dataage-idc-report-final.pdf> accessed 29 November 2023.

may therefore affect – at least according to a European understanding – fundamental rights of individuals. Data, which contain this kind of information, are called personal data.

Since personal data have a special relation to a person and can therefore be used economically particularly well, they are attributed an economical value and considered to be commercial goods. This value is also recognized by cyber-criminals, who gain unauthorised access to this type of data to sell it or use it for their own purposes. But it is not only cybercriminals who are aware of the value of our personal data and handle them in a manner which may seem inappropriate or at least unforeseeable when we voluntarily disclose personal data. Even companies with an apparently respectable business model are attracting public attention from time to time due to a worrying handling of personal data. The most famous example in this connection might be the Cambridge Analytica incident. In this incident, a company called Cambridge Analytica collected personal data of up to 87 million Facebook users by asking just 270 000 Facebook users for their consent to acquire also their friend's personal data on Facebook when downloading the app "This Is Your Digital Life". Cambridge Analytica used these data to enhance political campaigns with an individual targeting approach.[3] This incident sheds light, firstly, on the effect of an access to greater amounts of data not only to single individuals but also to societies and their political system as a whole. This is because personal data may be used to influence the distribution of political power. Secondly, this event also illustrates the ease with which the hurdle of obtaining a large amount of data in a manner which may be legally permissible but being in fact inappropriate can be overcome. Another example demonstrating how this improper handling of data does not have to be intentional is the frequency of cases in which companies having collected huge amounts of data have inadvertently disclosed this data to the public.[4]

Consequently, it is important to establish sufficient legal barriers worldwide to protect the high economical as well as personal value of personal data. The handling of personal data in the past demonstrates an insufficient awareness of its economic and personal value for the individual. However, this value is currently more and more recognised. The relevance of personal data protection and the inadequacy of the existing rules in the classification, handling, and protection

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3 Nicholas Confessore, 'Cambridge Analytica and Facebook: The Scandal and the Fallout So Far' *The New York Times* (New York, 4 April 2018) <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> accessed 27 November 2023.

4 See e.g. the exposure of 773 million unique email-addresses by hackers (Troy Hunt, 'The 773 Million Record "Collection #1" Data Breach' <https://www.troyhunt.com/the-773-million-record-collection-1-data-reach/> accessed 9 December 2023) or the unintentional exposure of 419 million phone numbers by Facebook (Zack Whittaker, 'A huge database of Facebook users' phone numbers found online' *TechCrunch* (4 September 2019) <https://techcrunch.com/2019/09/04/facebook-phone-numbers-exposed/> accessed 9 December 2023)

of data as a novel legal object is increasingly recognised especially by the legislator. One of the best-known examples in this context is the General Data Protection Regulation[5], which was adopted by the European Union in 2016 and has been applicable since 25 May 2018.[6] It replaces the Data Protection Directive dating back to 1995. These two legal acts restrict the "collecting" and "processing" of "personal data" and grant specific rights on these data to people to whom these data are related. But the significance of data protection has also been recognised in other parts of the world. In California, the California Consumer Privacy Act[7] has been passed 2018 and became effective on 1 January 2020. Further, China enacted on 1 November 2021 the Personal Information Protection Law[8], with the objective of strengthening data protection.

The increased legislative activity regarding data protection has led to a plethora of laws on data protection. Due to a lack of coordination, those laws differ quite considerably in terms of their legal characterisation, the scope of application and protection, the object of protection, obligations, and legal remedies.

There are basically two different approaches of effectively protecting personal data. On the one hand, the means of private law may be employed to confer a right on the person to whom the data relates. On the other hand, public authorities can be authorised by public law to ensure compliance with data protection regulations. As a middle way, the objective of data protection can be assigned on both individuals and public authorities. The latter approach establishes a situation with diverse interests and a legal matter combining and mixing both public and private law. It thus creates an area of law on the boundary between public and private law. However, none of the aforementioned approaches has become generally accepted worldwide. For instance, the GDPR grants individuals a right to compensation for violations of its provisions[9] and at the same time enables the authorities to impose a penalty on the perpetrator.[10] Similarly, the PIPL comprises provisions granting private claims and empowers authorities to intervene.[11] In contrast, the CCPA only provides individuals with rights to protect their data.

But it is not only in this fundamental aspect where regulatory approaches differ. There are also considerable differences in detail. This starts with the different terminology utilised in the

5 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 (GDPR).

6 Article 99(2) GDPR.

7 CA Civ Code § 1798.100-1798.199.100 (2022) (CCPA).

8 PIPL.

9 Article 82 GDPR.

10 Article 84 GDPR.

11 Article 44-50, 63-71 PIPL.

various laws. While the GDPR protects "personal data", the CCPA and the PIPL apply to "personal information". Also in other countries, the object of data protection laws varies.[12]

Furthermore, there are considerable differences with regard to the subject of protection. For instance, the GDPR defines the term "personal data" as "any information relating to an identified or identifiable natural person".[13] The PIPL likewise limits the subject of protection to natural persons.[14] Conversely, under the CCPA it is sufficient for the existence of personal information, if the information allows identification with a particular household.[15]

Also, the scope of persons who have to comply with data protection laws when processing personal data varies significantly. While the GDPR and PIPL in principle subjects any private and public body to its provisions[16], the CCPA is only addressing "businesses", i.e. a legal entity that is organised or operated for the profit or financial benefit of its shareholders or other owners.[17] In addition, the businesses affected by the CCPA are limited by further requirements.[18] In contrast, the data protection laws of other legal systems provide for other restrictions.[19]

Differences between the laws of the different legal systems are further evident in terms of the level of protection. The significance of data protection is emphasised by legislators at European level in particular. Besides the GDPR, the protection of personal data is explicitly enshrined as a fundamental right within the Charter of Fundamental Rights of the European Union.[20] Also, the European Convention on Human Rights protects the right to privacy.[21] This legislative activity also illustrates, at least from the perspective of European legislators, the insufficiency of the GDPR to adequately guarantee the protection of personal data and that a more fundamental level of protection as a human right is required.

These divergences between the individual data protection laws have no impact on purely domestic matters. However, something else holds true for cross-border situations. In these situations, parties will repeatedly be confronted with the issue of whether and which data protection law apply to them. The existence and scope of data protection and the corresponding obligations can only be assessed depending on the applicable data protection law. This legal

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12 See e.g. the Japanese Act on the Protection of Personal Information (Act No. 57 of 2003) (APPI), which defines "personal data" is under the APPI a specific form of "personal information", Article 2(6) APPI.

13 Article 4(1) GDPR.

14 Article 2 PIPL.

15 CA Civ Code § 1798.140(o)(1).

16 Article 4(7-10) GDPR, Article 2, 33 PIPL.

17 CA Civ Code § 1798.140(d)(1).

18 CA Civ Code § 1798.140(d)(1).

19 See e.g. the APPI, which excludes governmental bodies from its scope of application, Article 2(5) APPI.

20 Article 8 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

21 Article 8 European Convention on Human Rights.

uncertainty is a risk factor for businesses in particular and may restrict them in offering goods and services across borders. However, individuals to whom the data are connected will also be faced with the issue of whether their data protection law also applies in cross-border situations. In view of this uncertainty, individuals also have an interest in knowing the applicable law.

For these reasons, regulation at the level of substantive law is not sufficient to ensure a comprehensive protection of personal data and legal certainty in international business transactions in the processing of personal data. This issue is even more pertinent as digital personal data, by its intrinsic nature, may readily be collected and processed regardless of national borders. Digital personal data can be stored and processed worldwide merely requiring an Internet connection and sufficient hardware. Further, the person to whom the data relates and the person collecting or storing the data are often located in different jurisdictions. This is because companies collecting and processing data offer their services without any selection of customers based on the country in which they are based. Furthermore, these services are accessible almost everywhere, regardless of the country of origin. Moreover, the physical location of data is irrelevant to its collection, *de facto* accessibility, and economic value, as the person creating or storing the data may be located in completely different physical location.

As different countries and their jurisdictions are frequently affected, the issue arises as to which data protection law should be applied. Consequently, it is necessary to specify how the governing law is identified in the context of data protection. In civil matters, the governing law is specified by the rules of conflict of laws. But the relationship between data protection law, which may also contain elements of public law, and the conflict of laws is largely unclear. Furthermore, the significance of data protection law as a purely substantive law for conflict of laws remains undefined.

Both aspects are particularly significant when it comes to the application of the GDPR. Article 3 GDPR regulates the territorial scope of application of the GDPR. However, European conflict of laws also comprises of the Rome I and Rome II Regulations, which specify the law governing contractual and non-contractual obligations in general. In principle, these legal acts also extend to obligations arising in the context of data processing. There is already some discussion in this connection about how precisely the territorial scope of application under Article 3 GDPR is to be ascertained. The relationship between the Rome Regulations and the GDPR as well as the extent to which the GDPR is a regulation determining its international scope of application itself has so far been less addressed. But also beyond the scope of the GDPR, the issue of how and under which conditions foreign data protection law applies in cross-border situations must

be resolved. In this respect, it is particularly uncertain whether and how the provisions of the GDPR may determine the applicability of foreign data protection law.

It is therefore uncertain to what extent the conflict of laws is of relevance to assess the law governing data protection claims. In addition, the general conflict of laws might have to be considered for legal issues not falling within the scope of the data protection laws. It furthermore has to be examined whether the law governing data protection claims also refers to the general tort rules of the respective legal system.

As far as the general conflict of laws is therefore employed to determine the governing law, this assessment is complicated by factual and legal aspects. At the factual level, the intangible nature of data and the complexity of technical processes involved in collecting, processing and storing data cause certain difficulties. At the legal level, it is already doubtful which factual characteristics should be taken into account to assess the law with the closest connection to the facts of the case. The aforementioned factual characteristics demonstrate how physical connecting factors with regard to data are unsuitable to adequately reflect the legal interests of the parties in determining the governing law. This follows not least from the arbitrariness of the location of the data resulting in a lack of significance for the legal assessment.

However, sometimes the rules of conflict of laws may stipulate both the GDPR and a foreign data protection law to be applicable. This ultimately raises the issue of deciding what happens if several data protection provisions claim applicability to the same situation.

II. Structure of the Analysis

The foregoing essentially raises three central issues: the relevance of the GDPR in assessing the law applicable to data protection claims, the determination of the law applicable to data protection claims under general conflict of laws and the managing of overlapping data protection laws. Finding answers to these questions requires a comprehensive examination of substantive legal classification of data protection law. However, besides the special legal nature of the GDPR on a substantive level, the specific characteristics of the method of its regulation on a formal level must also be taken into account. In addition to the special legal nature of its regulatory subject matter, the GDPR is characterised by two regulatory peculiarities. Firstly, the GDPR contains a provision on its territorial scope of application. Secondly, the GDPR forms part of the uniform substantive law of the European Union. Both characteristics have in common in turn that they do not exclusively exist in the GDPR, but rather represent fundamental regulatory mechanisms. A comprehensive analysis of the conflict of laws of data

protection therefore also needs to analyse the conflict-of-laws implications of these two regulatory mechanisms.

In accordance with these regulatory mechanisms, the following analysis is divided into three parts. The first part will take a closer look at the provisions on the territorial scope of application provided for in the GDPR and the general significance of provisions on the territorial scope of application regarding conflict of laws. The second part will shed more light on the conflict of laws in relation to the substantive uniform law of the European Union and the effects of the presence of a provision on the territorial scope of application in these legal acts. Finally, the third part will analyse the significance of the GDPR for identifying the law applicable to data protection claims and how the law applicable in this respect is to be specified.

To be able to consider the significance of the provisions on the territorial scope of application in conflict of laws in more detail in the first part, it will first be established how precisely the GDPR defines its territorial scope of application. Based on these findings, the relationship between the scope of application and the applicable law will be examined in detail. It will also be explored what significance the categorisation as a provision of public law or private law holds for the assessment of the applicable law to a private-law situation.

In the second part, the prerequisites for the application of provisions of the substantive uniform law of the European Union will be investigated more closely. Based on these findings, the role of the uniform substantive law of the European Union in the conflict of laws of the European Union will be examined. It will also be analysed how this function is performed for individual legal acts of substantive uniform law of the European Union. To this end, it is first necessary to investigate the conflict-of-laws significance attributed to the individual legal acts. Subsequently, it will be ascertained whether this classification is consistent with the findings obtained in the first part on the relationship between the scope of application and the applicable law. Finally, the relevance of the general conflict-of-laws rules in areas governed by substantive uniform law of the European Union will be analysed.

The third part explores the impact of the GDPR on the designation of the law applicable to data protection claims. For this purpose, it will first be considered how data protection claims are to be categorised under conflict of laws and which conflict-of-laws rules they are subject to from a European perspective. Afterwards, the extent to which the provisions of the GDPR modify the determination of the applicable law will be explored. Finally, it will be analysed whether there is from a European perspective *de lege ferenda* a necessity to adopt a dedicated conflict-of-laws provision for data protection claims and how such a provision should be structured. To

this end, it is also essential to examine what data protection regulations other countries have adopted.

III. Methodological Approach

Since, on the one hand, data protection law covers different areas of law and, on the other hand, its effective functioning may only be achieved by coordinating the different data protection laws worldwide, this analysis will rely on the methods of comparative law and of conflict of laws. When it comes to the legal nature of data protection law, it will be examined, to what extent the conflict-of-laws instrument of characterisation may be used to identify the law governing data protection claims. As far as the drafting of a conflict-of-laws rule for data protection claims is considered, the methods of functional comparative law are employed to compare the GDPR and data protection laws from other legal systems. Such a comparison is necessary in order to reflect the specific regulatory area of data protection law between public and private law. The comparison of data protection law in different legal systems ensures a uniform connection is established and the conflict-of-laws rule to be drafted provides comprehensive protection based on the functional classification of the respective data protection law.

Data and therefore also data protection law is omnipresent and hence becomes relevant in almost any field of law. This analysis therefore does not conclusively examine the conflict of laws on data protection. Rather, the present research is limited both on a factual and legal level. On a factual level, only the protection of data with a link to a person and stored in digital form will be addressed. This analysis therefore does not include any data unrelated to a person. Further, the collecting, processing, and storing of personal data in a cross-border situation might sometimes happen without digital data involved. However, this concerns only a negligible proportion of data operations. Thus, for the following legal analysis of data protection the cross-border protection of data not stored in digital form will not be examined. Hence, as far as this analysis refers to personal data, only digital personal data are considered.

Although the title of this analysis suggests a comprehensive consideration of international data protection law, at the legal level international data protection law is only examined to the extent to which private-law relationships are affected. In particular, neither the issue of the applicable law in case of intervention by state supervisory authorities nor the issue of the competence of a supervisory authority and the possible scope of its decisions is addressed. As far as general conflict of laws is concerned, the analysis will be limited to data protection in contractual relationships and non-contractual data protection. Especially aspects of property law as well as

the European regulations on matrimonial and inheritance law are excluded. Procedural issues also remain largely untouched. Furthermore, substantive data protection law is only addressed to the extent it affects the identification of the applicable law and is limited to EU data protection law. This also applies to further, more general substantive provisions under which legal positions and thus possibly also personal data are protected.

A. Rules of the GDPR

The GDPR is of fundamental importance for data protection law in the European Union at a substantive level. It might therefore also take on a central position as a starting point for a conflict-of-laws analysis. In this regard, the GDPR is peculiar in that – like a multitude of legal acts of the European Union – it comprises provisions on its territorial scope of application. These provisions could also be relevant for situations relating to countries outside the European Union.

Therefore, in order to approach the question of how the conflict of laws on data protection is solved, it is first necessary to examine to what extent the GDPR itself defines its territorial scope of application. It further needs to be assessed how this definition affects the applicability of the GDPR also in relation to cases with a link to states outside the European Union. For this purpose, it is required to examine the provisions on the territorial scope of application of the GDPR and their relationship to one another in detail (I.). Since the GDPR primarily consists of provisions of substantive law, the significance and the relation of such a provision on the territorial scope of application in substantive law to the conflict of laws will be analysed subsequently (II.).

I. The GDPR on their Scope of Territorial Application

The scope of application of the GDPR is defined in a number of ways (1.). However, particularly extensive regulations can be found with regard to the territorial scope of application of the GDPR. The GDPR essentially contains provisions in two sections which potentially shape the territorial scope of application of the GDPR. Such a regulation might be found in Article 3 GDPR (2.) and Articles 44 et seq. GDPR (3.). In particular, the relationship between the provisions of Article 3 GDPR and Articles 44 et seq. GDPR needs to be analysed in more detail (4.).

1. The Different Ways of Defining the Scope of Application of a Legal Act

In determining the scope of a rule, four dimensions can regularly be identified which allow the rule to limit its applicability to certain situations: the temporal, substantive, personal and territorial scope. The GDPR regulates explicitly its scope of application in Articles 2, 3 and 99(2) GDPR. While Articles 2 and 99(2) GDPR concern the substantive and temporal scope of application, Article 3 GDPR is addressing the territorial scope of application.

The substantive scope of application is designed to delimit the facts which are to be covered by the regulation, irrespective of their localisation. The temporal scope of application determines

the point in time from which situations are subject to the GDPR and thus separates it from the predecessor regulation of the GDPR – the Data Protection Directive (DPD). The DPD is only applicable to situations that occurred before 25 May 2018.[22]

There is no explicit separate provision in the GDPR regarding the question of the personal scope of application. This raises the question of how the personal scope of application of the GDPR is defined. It can be seen from the individual provisions of the GDPR that subject to the regulation of the GDPR are data subjects, i.e. at least identifiable persons[23]. By contrast, the GDPR obliges data controllers and data processors without stipulating additional requirements beyond their function in the data processing.[24]

The territorial scope of application specifies which requirements the Regulation imposes on the territorial link of a situation to the territory of the European Union. Only if this territorial link is established, the legislator considers its applicability to be appropriate. According to its wording, Article 3 GDPR regulates the applicability of the GDPR in relation to a data processing. When determining the territorial scope of application, it has thus to be checked for each person dealing with data and each data processing separately whether the requirements of Article 3 GDPR are met.[25]

a) The Regulation of the Territorial Scope of Application in Cross-Border Situations

Since the fact of a cross-border situation having no influence on the temporal or substantive scope of application, specific issues for the scope of application of the GDPR in cross-border situations arise only for the territorial scope of application of the GDPR. In addition, for the applicability of the GDPR in cross-border situations, only the territorial scope of application can be used as a differentiation criterion, as the substantive and temporal scope of application are not suitable to allow for a differentiation of legal systems of different legislatures. Therefore, to determine the applicability of the GDPR in cross-border cases, in the following it will be examined which requirements Article 3 GDPR places on the territorial scope of application in detail. This is also necessary because a distinction from other data protection laws under conflict of laws is only worthwhile if the data protection law deemed applicable by the conflict of laws declares itself applicable at the substantive level. Otherwise, data protection

22 Article 94(2) GDPR.

23 Article 4(1) GDPR.

24 For the definition of data controller and data processor, see Article 4 No. 7, 8 GDPR.

25 See also Els Kindt, 'Why research may no longer be the same: About the territorial scope of the New Data Protection Regulation' (2016) 32 CLS Rev 729, 737 et seq.; European Data Protection Board, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3) – Version 2.0 (2019)' <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en> accessed 10 December 2023, 14; Gerrit Hornung, 'Art. 3' in Spiros Simitis, Gerrit Hornung and Spiecker genannt Döhmann (eds), *Datenschutzrecht* (Nomos 2019) para 32.

law would possibly be given a role by a foreign conflict-of-laws rule which the legislator of the data protection law had not intended to assign to this law.

b) Criteria by Which the Territorial Applicability of the GDPR is Determined

In principle, three physical criteria might be relevant in data processing: The nationality of the parties, the localisation of each of the parties and the place of data processing. When it comes to Article 3 GDPR, the applicability of the GDPR is based on the existence of a physical territorial element in the territory of the European Union. Either the person to whom the data relate or an establishment of the data controller or data processor must be located in the European Union.[26] To the extent of the regulation relying for its application on the presence of the person whose data are processed in the European Union, this presence as such is not sufficient.[27] Rather, an additional element in the form of a market targeting or a behavioural monitoring is required.

Hence, according to the concept of the European legislature, the European legislator relies primarily on two criteria: the establishment of the data controller or the data processor[28] on the one hand and the location of the person, whose data are processed, in connection with a "targeting"[29] on the other hand.[30]

In determining the territorial scope of application the GDPR, the question may arise as to the relevant point in time for determining the requirements of the territorial scope of the GDPR. Since this question depends to a large extent on the specific provision on which the territorial applicability of the GDPR is based in the individual case, it will be discussed in the context of the respective alternative.

2. The "Territorial scope" of the GDPR

Article 3 GDPR contains a provision entitled "Territorial scope", which is divided into three paragraphs. Each of these paragraphs specifies when "[t]his Regulation applies". Paragraph 1 is linked to the establishment of the data processor or controller in the European Union (a). Paragraph 2 presupposes the data subject to be resident in the European Union (b). Paragraph

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26 Emphasising the relevance of the location of the data subject Kimberly A. Houser and W. Gregory Voss, 'GDPR: The End of Google and Facebook or a New Paradigm in Data Privacy?' (2018) 25 Richmond Journal of Law & Technology 1, 61.

27 Also Paul de Hert and Michal Czerniawski, 'Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context' (2016) 6 International Data Privacy Law 230, 238.

28 Article 3(1) GDPR.

29 Article 3(2) GDPR.

30 European Data Protection Board, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3) – Version 2.0 (2019)' <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en> accessed 10 December 2023, 3.

3 extends the territorial scope of the GDPR under recourse to public international law (c). Also, the relationship between the various provisions of Article 3 GDPR must be analysed (d).

a) Processing in the Context of Activities of an Establishment of a Controller or a Processor in the Union (Article 3(1) GDPR)

The GDPR applies firstly to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not. [31]

When interpretating this rule, the legal definition of the terms "personal data", "controller", "processor", "processing" in Article 2(1),(7),(8),(2) GDPR needs to be considered. Moreover, there is extensive case law on the territorial scope of application of European data protection law. In the context of the interpretation of Article 3(1) GDPR, it is therefore initially questionable to what extent the case law of the ECJ in the area of data protection law may be relied upon. This is particularly doubtful in light of the fact of the case law being issued on the DPD, whose territorial scope of application differed and the ECJ having solely ruled on matters without a connection to a third country (1). Subsequently, the core statements of the ECJ decisions relevant to Articles 3(1) GDPR will be summarised (2). Finally, the implications of these decisions for the interpretation of Article 3(1) GDPR will be examined (3).

(1) The Relevance of the ECJ's Case Law in the Interpretation of Article 3(1) GDPR

Since most of the terms of Article 3(1) GDPR are expressly defined in Article 4 GDPR, the main controversial issue in the interpretation of Article 3(1) GDPR revolves around the question of when data processing happens "in the context of activities". Further, the requirements placed on an establishment within the meaning of Article 3(1) GDPR are disputed. Accordingly, with regard to the issue of the scope of Article 3(1) GDPR and its predecessor regulation, the ECJ has primarily dealt with the question of what is to be understood by "context" on the one hand and "activities" on the other hand. The ECJ has expressed its views on these issues in the *Google Spain*[32], *Immowelt*[33] and *Amazon*[34] rulings.

Admittedly, these decisions were still rendered on the predecessor regulation of Article 3(1) GDPR, Article 4(1) lit. a) DPD. This case law of the ECJ is assumed as being influenced by the marketplace principle.[35] The marketplace principle is, however, now codified in Article 3(2)

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31 Article 3(1) GDPR.

32 ECJ, C-131/12 *Google v AEPD* [2014] ECLI:EU:C:2014:317.

33 ECJ, C-230/14 *Weltimmo v Nemzeti* [2015] ECLI:EU:C:2015:639.

34 ECJ, C-191/15 *Verein für Konsumenteninformation v Amazon* [2016] ECLI:EU:C:2016:612.

35 Gerrit Hornung, 'Art. 3', in Spiros Simitis, Gerrit Hornung and Spiecker genannt Döhmann (eds), *Datenschutzrecht* (Nomos 2019) para 30.

GDPR.[36] The case law of the ECJ on Article 4 DPD is therefore, according to one view, not to be considered in order to distinguish clearly between the scopes of application of Article 3(1) GDPR and Article 3(2) GDPR.[37] It should be noted, though, that the distinction between Article 3(1) GDPR and Article 3(2) GDPR is already sufficiently clear from the requirements set out by the respective provisions. Article 3(1) GDPR still requires a however small physical connection between the data processor or data controller and the European Union according to the case law of the ECJ. In contrast, Article 3(2) GDPR is based solely on the fact of the data processor or data controller directing its activities towards a member state. This may lead to situations in which the requirements of both Article 3(1) GDPR and Article 3(2) GDPR are met. However, it is not clear why this should require a narrower interpretation of Article 3(1) GDPR. This is especially true since the European legislator itself wanted to achieve the most comprehensive protection possible for data subjects being located within the European Union.[38] It also has to be taken into account that the wording of Article 3(1) GDPR has remained identical, the relevant recitals are also identical in content and the European legislator regards the GDPR as the genuine successor to the DPD[39]. The considerations relating to Article 4(1) lit. a) DPD can hence also be applied to Article 3(1) GDPR.[40] This view is also shared by the ECJ, which in its first decision on Article 17 GDPR quotes the provisions of the GDPR and DPD in parallel, refers to case law on the DPD and interprets the terms in the GDPR in the same way as those of the DPD.[41]

With regard to the ECJ's decisions *Weltimmo* and *Amazon*, it must be taken into account that these cases exclusively related to different member states and therefore did not concern the applicability of European data protection law in relation to other data protection regimes. They rather addressed the relationship of national data protection regimes within the scope of the DPD. It is therefore doubtful to what extent these rulings are also to be taken into account for the interpretation of Article 3(1) lit. a) GDPR in relation to third countries. In favour of such a transfer of the case law argues, nevertheless, the fact of the ECJ, in particular in its ruling on

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36 Marit Hansen, 'Data Protection by Design and by Default à la European General Data Protection Regulation', in Anja Lehmann, Diane Whitehouse, Simone Fischer-Hübner, Lothar Fritsch and Charles Raab (eds), *Privacy and Identity Management* (Springer 2016) 27, 29.

37 Gerrit Hornung, 'Art. 3', in Spiros Simitis, Gerrit Hornung and Spiecker genannt Döhmann (eds), *Datenschutzrecht* (Nomos 2019) para 30.

38 Recital 10, 11 GDPR.

39 See Recital 9, 10, 171, Article 174 GDPR.

40 As a result, this is also stated by Merlin Gömann, 'The New Territorial Scope of EU Data Protection Law: Deconstructing a Revolutionary Achievement' (2017) 54 Common Market Law Review 567, 575; see also Paul de Hert and Michal Czerniawski, 'Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context' (2016) 6 International Data Privacy Law 230, 238.

41 ECJ, C-507/17 *Google LLC v Commission nationale de l'informatique et des libertés* [2019] ECLI:EU:C:2019:772, para 48-50, 51, 62.

Weltimmo, readily referring to the considerations in *Google Spain*. The ECJ did – in particular – in any of these decisions on the DPD emphasise the differences between situations only relating to member states of the European Union and those with a connection to third countries. Furthermore, *Google Spain*, *Weltimmo* and *Amazon* do not only address the territorial scope of application itself, but also provide insights into the self-understanding of the application of European data protection law in cross-border situations.

(2) The Essential Statements of the ECJ on the Territorial Scope of DPD

In *Google Spain*, the ECJ ruled that the activity of the establishment itself does not have to be directly related to data processing if the establishment carries out an activity which supports and is inseparable from the data processing. In this specific case, the activities concerned were economic activities designed to make data processing profitable.[42]

In *Immowelt*, the ECJ has addressed the precise interpretation of establishment within the meaning of Article 3(1) GDPR. Further, the ECJ eased the requirements regarding the required context between data processing and the activities of the establishment. In its ruling, the ECJ concluded that a flexible approach to the concept of establishment is required. The interpretation of establishment is closely related to that of activity within the meaning of Article 3(1) GDPR. In accordance with Recital 22 an effective and real exercise of activity through stable arrangements is required for an establishment.[43] The degree of stability of the arrangements and the effective exercise of activities must thereby be interpreted in the light of the specific nature of the economic activities and the provision of services concerned.[44] According to Recital 10, the GDPR also serves to protect the fundamental rights and freedoms of natural persons and must therefore be interpreted broadly. The concept of "establishment" is therefore to be extended to any real and effective activity – even a minimal one – exercised through stable arrangements.[45] As far as the context between data processing and activities of the establishment is concerned, the ECJ waived in *Immowelt* the inseparability of both still required under *Google Spain.*[46] The ECJ also ruled in *Immowelt* that this activity does not necessarily have to be carried out by the establishment itself. It is sufficient if the activity is pursued by a data controller or data processor and targeted to the state in which the

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42 See ECJ, C-131/12 *Google v AEPD* [2014] ECLI:EU:C:2014:317, para 55, 56.

43 ECJ, C-230/14 *Weltimmo v Nemzeti* [2015] ECLI:EU:C:2015:639, para 28.

44 ECJ, C-230/14 *Weltimmo v Nemzeti* [2015] ECLI:EU:C:2015:639, para 29.

45 ECJ, C-230/14 *Weltimmo v Nemzeti* [2015] ECLI:EU:C:2015:639, para 29-31. As is clear from the wording of Article 3(1) GDPR, it is not important for the establishment to be legally established in the European Union. It is sufficient that it "is in the Union".

46 ECJ, C-230/14 *Weltimmo v Nemzeti* [2015] ECLI:EU:C:2015:639, para 34-38.

establishment is located.[47] As a result, neither the processing of personal data nor the activity in the context of which the processing takes place must be carried out by the establishment.[48]

In *Amazon*, the ECJ clarified the requirements for the establishment and emphasised that the mere accessibility of a website does not constitute an establishment in the country from which the access is made.[49]

In *Wirtschaftsakademie*, the ECJ ruled on a data processing undertaking with several establishments in the European Union. According to the ECJ, in the context of determining the territorial scope by referring to an establishment, it is not relevant how the group has distributed responsibility for data processing internally.[50] In addition, the ECJ has ruled that a decision of a member state data protection authority does not in principle have a binding effect on data protection authorities of other member states.[51]

(3) The Application of the Case Law of the ECJ to Article 3(1) GDPR

In summary, it can therefore be said for Article 3(1) GDPR, taking into account the case law of the ECJ, that Article 3(1) GDPR corresponds to Article 4(1) DPD and is in general understood as a codification of the establishment principle.[52] Contrary to what one might assume on the basis of the term "establishment principle",[53] the applicability of the GDPR does, however, not result from the mere existence of an establishment in the territory of the European Union but from the fact of data being processed in the context of the activities of an establishment. In contrast to Article 3(2) GDPR, the location of the data subject is irrelevant for the applicability of Article 3(1) GDPR. Data subjects who are not present in the European Union are therefore also within the scope of application of Article 3(1) GDPR as far as the requirements of Article

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47 ECJ, C-230/14 *Weltimmo v Nemzeti* [2015] ECLI:EU:C:2015:639, para 38, 32, 33; although this is not explicitly stated by the ECJ, the reference in para 38, which refers specifically to paragraph 32 and not 33, is clear.

48 In contrast, the literature partly requires the activity to be an activity performed by the establishment (See Carlo Piltz, 'Art. 3', in Peter Gola and Dirk Heckmann (eds), *Datenschutzgrundverordnung, Bundesdatenschutzgesetz* (3rd edn, C.H. Beck 2022) para 20; Manuel Klar, 'Art. 3' in Jürgen Kühling and Benedikt Buchner (eds), *Datenschutz-Grundverordnung/BDSG* (4th edn, C.H. Beck 2024) para 2).

49 ECJ, C-191/15 *Verein für Konsumenteninformation v Amazon* [2016] ECLI:EU:C:2016:612, para 75-77.

50 ECJ, C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH* [2018] ECLI:EU:C:2018:388, para 51-60, 63, 64.

51 ECJ, C-210/16 *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH* [2018] ECLI:EU:C:2018:388, para 65-70.

52 Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 22.

53 This term is for example used by Schmidt, 'Art. 3 DSGVO', in Jürgen Taeger and Detlev Gabel (eds), *DSGVO – BDSG – TTDSG* (4th edn, Fachmedien Recht und Wirtschaft 2022) para 8; Gerrit Hornung, 'Art. 3', in Spiros Simitis, Gerrit Hornung and Spiecker genannt Döhmann (eds), *Datenschutzrecht* (Nomos 2019) para 18; Stefan Ernst, 'Art. 3 DS-GVO', in Boris P. Paal and Daniel A. Pauly (eds), *Datenschutz-Grundverordnung Bundesdatenschutzgesetz* (3rd edn, C.H. Beck 2021) para 5; Matthias Berberich and Malgorzata Steiner, 'Blockchain Technology and the GDPR – How to Reconcile Privacy and Distributed Ledgers?' (2016) EDPL 422, 423.

3(1) GDPR are met. Under this provision, it is also irrelevant whether at the time of the concrete data processing the establishment actually exists, as long as the processing is only related to activities having a connection to the establishment. This already follows from the broad wording of Article 3(1) GDPR ("in the context of").

Under Article 3(1) GDPR, the connection of the activity to the establishment is thereby solely an attempt to make the activity physically tangible and link it to a specific law. The fact of the legislator having primarily focused on the activity and less on the establishment as such also follows from the second sentence of Recital 22. According to this Recital the connection to the establishment ensures the effective and real exercise of the activity through stable arrangements. As becomes clear especially from the *Immowelt* ruling, also the ECJ reduces the requirements for the establishment under Article 3(1) GDPR quite considerably. The fact of the ECJ setting such low requirements for an establishment is proof of the ECJ's understanding of the activity being the decisive factor for determining the territorial scope of application. Thus, due to the broad wording and the extensive interpretation by the ECJ, the scope of application according to Article 3(1) GDPR requires merely a physical connection, however small, in the form of an establishment in the EU and an activity of the data controller or data processor which is related to this establishment.[54]

This finding is not only the coincidental result of a far-reaching and developing interpretation by the ECJ, but is already laid down in the wording of the provision and is necessary in view of its matter of regulation. Already the last half sentence of Article 3(1) GDPR clarifies the place of data processing not being relevant for the applicability of the GDPR. The reliance on this place would have been reasonable from the point of view of enforcement, since only physical access to the data would have ensured the highest possible success of enforcement.[55] This approach, however, is contradicted by the factual problem of determining the location of the data processing[56]: Is this the place where the data is physically stored or the place where the computer is located on which the necessary computing operations are carried out? Might it be the place where the person who controls the processing is located? In addition, individual fragments of data can be stored at many different places around the world. The question of whether and how a single law is determined in these cases would considerably complicate the

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54 So in the end also Merlin Gömann, 'The New Territorial Scope of EU Data Protection Law: Deconstructing a Revolutionary Achievement' (2017) 54 Common Market Law Review 567, 574.

55 This aspect is also emphasised by Benjamin Greze, 'The extra-territorial enforcement of the GDPR: a genuine issue and the quest for alternatives' (2019) IDPL 109, 110 et seq. and Els Kindt, 'Why research may no longer be the same: About the territorial scope of the New Data Protection Regulation' (2016) 32 CLS Rev 729, 745.

56 See also Liane Colonna, 'Article 4 of the EU Data Protection Directive and the irrelevance of the EU–US Safe Harbor Program?' (2014) IDPL 203, 213.

determination of the applicability of a law. Furthermore, with the GDPR the European legislator strives to achieve a consistent and homogenous application of the rules for the protection of the fundamental rights and freedoms of natural persons throughout the Union.[57] In doing so, the GDPR is not based on data processing but on the protection of natural persons.[58] For this reason too, it seems sensible to consider the territorial applicability of the GDPR irrespective of the place of data processing.

The focus on the activity allows for an objective, uniform and simple assessment of the territorial applicability of the GDPR. This is in the interest of the data subject, the data controller and data processor as well as the public authorities. For the data controller and data processor, the applicable law is predictable, as the applicability presupposes an establishment in the respective state. The data subject, in turn, is not deprived of the European level of protection by the fact of the data processing taking place in a country with a particularly low level of data protection. For the public authorities, linking the applicability of the GDPR to an activity has the advantage that it is not competent in any case, but can take actions in such cases in which the sovereign interests of the respective state are affected.

b) Offers to and Monitoring of Data Subjects Located in the EU (Article 3(2) GDPR)

Under Article 3(2) GDPR the GDPR is also applicable to the processing of personal data of data subjects who are located in the EU, where the processing activities are related to the offering of goods and services to such data subjects in the EU or the monitoring of their behaviour as far as their behaviour takes place within the EU.

Article 3(2) GDPR contains probably the most significant difference with regard to the territorial scope of the GDPR compared to the DPD. In Article 3(2) lit. a) GDPR it codifies the so-called marketplace principle. This principle is already widely used in competition law and is in this context labelled as effect doctrine.[59] Article 3(2) GDPR is based on the non-existence of an establishment in the European Union and a presence of the data subject in the European Union, whereby an additional criterion is required for the GDPR to apply.[60] This additional

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57 Recital 10 sentence 2 GDPR.

58 See also Recital 10 sentence 1 GDPR.

59 Matthias Herdegen, *Principles of International Economic Law* (2nd edn, Oxford University Press 2016) 102; for an evaluation of the legal systems using the effects doctrine, see David J. Gerber, 'Beyond Balancing: International Law Restrains on the Reach of National laws' (1984) 10 YaleJIL 185, 201 et seq.; Adèle Azzi, 'The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation' (2018) 9 Journal of Intellectual Property, Information Technology and E-Commerce Law 126, 131.

60 This is also stated by Kimberly A. Houser and W. Gregory Voss, 'GDPR: The End of Google and Facebook or a New Paradigm in Data Privacy?' (2018) 25 Richmond Journal of Law & Technology 1, 64; rather focussing on the location of the data subject and critical on the additional criterion Els Kindt, 'Why research may no longer be the same: About the territorial scope of the New Data Protection Regulation' (2016) 32 CLS Rev 729, 737.

criterion serves, firstly, to ensure a sufficient reference to the law of the European Union. Secondly, it protects the data processor and data controller from the application of such legal systems which it was unable to foresee by requiring a conscious activity by the data processor and data controller.[61] Therefore, the applicability of the GDPR under Article 3(2) GDPR at least partly also depends on the subjective intentions of the data processor or data controller. Since corresponding subjective intentions cannot always be determined objectively, this leads to uncertainties in determining the territorial scope of application.[62]

In the following, the various criteria of Article 3(2) GDPR will therefore be analysed in more detail. To this end, the requirements for the data subject (1), the absence of an establishment in the European Union (2), and the requirements for the link between the data processing and the activity (3) will be investigated more closely. In addition, an offering of goods or services (4) or monitoring of the data subject's behaviour (5) is required, the prerequisites for which are also to be clarified.

(1) The Location of the Data Subject

Concerning the location of the data subject in the European Union, it must be taken into account that Article 3(2) GDPR does not place any increased requirements on the presence of the data subject in the European Union. The simple presence of a data subject in the European Union is required but also sufficient. The original proposal, which required data subjects "residing" in the Union for the applicability of the GDPR,[63] was not incorporated into the final version of the GDPR. Also Recital 14 must be considered in this respect, as it emphasises the application of the GDPR regardless of the place of residence.[64] Hence, for the applicability of the GPDR under Article 3(2) GDPR, the nationality of the data subject and the duration or consolidation of his or her presence are irrelevant.[65] It is also irrelevant, therefore, whether or not presence in another state is legally established if there is a factual presence in the Union at the decisive

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61 Brendan van Alsenoy, 'Reconciling the (extra)territorial reach of the GDPR with public international law', in Gert Vermeulen and Eva Lievens (eds), *Data Protection and Privacy under Pressure* (Maklu 2017) 77, 95; Thomas Schultz, 'Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface' (2008) 19 EJIL 799, 817.

62 In this sense also Merlin Gömann, 'The New Territorial Scope of EU Data Protection Law: Deconstructing a Revolutionary Achievement' (2017) 54 Common Market Law Review 567, 586 et seq.

63 European Commission, Proposal for a General Data Protection Regulation COM(2012) 11 final, Article 3(2).

64 This point is also mentioned by Luís De Lima Pinheiro, 'Law Applicable to Personal Data Protection on the Internet: Some Private International Law Issues' (2008) 18 Anuario español de Derecho internacional privado 163, 172.

65 Recital 14; see also European Data Protection Board, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3) – Version 2.0 (2019)' <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en> accessed 10 December 2023, 14.

point of time.[66] This broad approach follows from the European legislator's intention to achieve a consistent and high level of protection of natural persons[67] and an effective protection of personal data throughout the Union[68] by creating the GDPR. As under Article 3(1) GDPR, according to the wording of Article 3(2) GDPR the specific place of data processing has no significance.

Insofar as Article 3(2) GDPR is based on the mere presence, the question however arises as to what point in time is relevant for this presence (a). Furthermore, it has to be clarified whether the presence of the data subject must have been identifiable for the data controller or the data processor (b).

(a) Decisive Point in Time for Determining the Location of the Data Subject

With regard to the relevant point in time, firstly, the temporal connection between the presence in the European Union and the offering or monitoring needs to be specified.[69] Secondly, the temporal connection between the data processing and the presence in the European Union must be examined.

When it comes to an offering or monitoring, those must coincide in time with the location of the data subject in the European Union.[70] Otherwise, it would not be possible to ensure the foreseeability of the application of the GDPR for the data processor. At the same time, the data subject may legitimately rely on the applicability of the GDPR only in these cases, as the applicability of the GDPR would otherwise be detached from its actual location. However, this result would be incompatible with the wording of Article 3(2) GDPR, which is based on the mere presence of the data subject.

With respect to the temporal relationship between the data processing and the presence of the data subject, the point in time at which the data are processed for the first time in the form of data collection could be decisive. Alternatively, the point in time at which the specific data processing takes place could also be relied upon. This point in time coincides with the first time of a data collection as long as the data processing is confined to the mere collection of data.

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66 This is questioned by Liane Colonna, 'Article 4 of the EU Data Protection Directive and the irrelevance of the EU–US Safe Harbor Program?' (2014) IDPL 203, 214.

67 See Recital 10 GDPR.

68 See Recital 11 GDPR.

69 This question is also raised by Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 28 et seq.

70 European Data Protection Board, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3) – Version 2.0 (2019)' <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en> accessed 10 December 2023, 15; Brendan van Alsenoy, 'Reconciling the (extra)territorial reach of the GDPR with public international law', in Gert Vermeulen and Eva Lievens (eds), *Data Protection and Privacy under Pressure* (Maklu 2017) 77, 85 et seq.

Deviations occur, however, if the data were collected at a time when the data subject was in the European Union, but the data subject is located outside the European Union when it comes to a further processing. Only if the relevant point in time is at least also based on the point in time of data collection, further processing would fall inside the scope of the GDPR. Moreover, the question whether the GDPR is applicable also arises *vice versa* if the data were collected when the data subject was located outside its territorial scope and further processing takes place at a time when the data subject is located in the European Union.

According to the wording, the time of each respective data processing is decisive. Article 3(2) GDPR does not refer to the collection of data but to data processing in general and the location of the data subject at this time. This view is also shared by the European Data Protection Board (EDPB), which is not differentiating between the collection of data and any further form of data processing.[71] However, there are strong arguments in favour of a uniform reference to the time of data collection for future data processing with these collected data. This approach is supported by the fact that the applicability of the GDPR depending on the location of the data subject when the respective data processing occurs is purely incidental and is foreseeable by neither the data subject, the data processor or the data controller. Furthermore, a uniform and consistent level of data protection is guaranteed by the uniform connection to the presence of the data subject during the data collection. Nor would this lead to an excessive and unforeseeable burden on the data processor or data controller, since they can recognise the applicability of the GDPR when the data were collected. For the reasons mentioned above, it hence is reasonable to assess the applicability of the GDPR based on the location of the data subject at the time of data collection for all further data processing.[72]

(b) The Need for Identifiability of the Data Subject's Presence

The criterion of presence also raises a further issue. In this respect, the question arises as to how exactly the place where the data subject is present is to be determined. Does this place depend on the actual physical location of the data subject or on the place as it is assessable by the data processor and data controller?[73] This becomes particularly relevant if the parties to the data processing are not located in the same state and therefore it is not readily apparent to the data processor or data controller in which state the data subject is located. In such cases, if the

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71 European Data Protection Board, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3) – Version 2.0 (2019)' <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en> accessed 10 December 2023, 15, 16.

72 See also Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 29 and Sanjay Sharma, *Data Privacy and GDPR Handbook* (Wiley 2020) 57.

73 This question is also raised by Maja Brkan, 'Data Protection and Conflict-of-laws: A Challenging Relationship' (2016) 2 EDPL 324, 339.

location of the data subject is derived by the presence identifiable to the data processor or data controller, the data subject could conceal its location. It could further pretend being in the European Union and therefore within the territorial scope of application of the GDPR.

In favour of relying on the presence of the data subject identifiable by the data controller and data processor argues, that the data processor or data controller is regularly not able to identify where the data subject is in fact located. Since they hence cannot determine with certainty which data protection law applies, they are thus unable to meet the requirements established by this data protection law. However, there are numerous arguments against relying on the presence identifiable by the data controller and data processor and in favour of the relevance of the actual presence of the data subject. First, the data subject would otherwise be able to open up the territorial scope of application of the GDPR and thus subject itself to its protection by purporting its location within the European Union. Further, the GDPR would potentially be applicable to any natural person in the world. However, it cannot be assumed of the European legislator wanting to create such a far-reaching regulation without any physical limitation. The applicability of the GDPR only to those data subjects physically located in the European Union finally also follows from the clear wording of Article 3(2) GDPR, which refers to the presence of the data subject in particular.[74] For these reasons, the application of the GDPR must thus be limited to those persons who are in fact physically present in the European Union.

Based on these premises, the reliance of Article 3(2) GDPR on the mere presence of the data subject has two major consequences. Firstly, also those persons who are only temporarily or even only transitively within the scope of the GDPR are covered by Article 3(2) GDPR as long as they are located in the European Union. Secondly, data subjects who are in general within the territorial scope of application of the GDPR are not protected by the GDPR as soon and as long as they leave the European Union at least with regard to data collected during the period of their absence. In both cases this may result in the data processor or data controller obtaining, for a single data subject, personal data protected by the GDPR and personal data not covered by it. In practice, the data processor regularly has no choice in these cases but to process all data uniformly in accordance with the GDPR to use the data effectively and to avoid a complex separation of several data sets. This problem is exacerbated by the impossibility for the data processor or data controller to clearly identify the current whereabouts of the data subject. In particular, when processing data over the Internet, it is easily possible for the data subject to conceal its actual location, whether unintentionally or intentionally. It can also pretend to be

[74] This issue is also addressed by Mistale Taylor, 'Permissions and Prohibitions in Data Protection Jurisdiction' (2016) 2 Brussels Privacy Hub Working Paper <https://brusselsprivacyhub.eu/BPH-Working-Paper-VOL2-N6.pdf> accessed 10 December 2023, 19.

localised within the European Union, without the data processor or data controller being able to assess its real location.

Therefore, although the connection to a mere presence is comprehensible from a legislative perspective, it leads to considerable uncertainties and potential burdens on the part of the data processor and data controller.

(2) Lack of an Establishment in the European Union

The second common requirement under Article 3(2) GDPR is the lack of an establishment in the European Union. This additional prerequisite has to be read in conjunction with Article 3(1) GDPR, the applicability of which presupposes the existence of such an establishment. This criterion is problematic in cases where there is an establishment in the European Union but there is no activity in the context of this establishment within the meaning of Article 3(1) GDPR. In this case, according to a literal and purely systematic interpretation of Article 3 GDPR the requirements of Article 3(1) GDPR would not be met due to the lack of a contextual activity. This also applies to the requirements of Article 3(2) GDPR, since according to this provision an establishment in the European Union must not exist. To avoid a possible gap of protection and to take sufficient account of the comprehensive data protection strived for by the European legislator[75], a limiting interpretation of this criterion is thus required. Hence, "not established" within the meaning of Article 3(2) GDPR is to be understood as requiring the prerequisites of Article 3(1) GDPR to be not met.[76]

(3) Relationship between the Activities and the Data Processing

Thirdly, the data processing must be "related to" the activities listed in Article 3(2) lit. a), b) GDPR. In this respect, it is not necessary for the data processing to target data subjects in the European Union. Further, the connection between the data processing and the activities listed in Article 3(2) lit. a), b) GDPR does not have to be particularly close and must therefore be understood in the same way as the "context" required by Article 3(1) GDPR. This is also evident from the fact that an amendment[77] suggested by the Committee on Civil Liberties, Justice and

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75 Recital 10 GDPR.

76 Pointing out this gap and proposing a similar solution Merlin Gömann, 'The New Territorial Scope of EU Data Protection Law: Deconstructing a Revolutionary Achievement' (2017) 54 Common Market Law Review 567, 584.

77 Committee on Civil Liberties, Justice and Home Affairs Draft Report on the proposal for a regulation of the European Parliament and of the Council on the protection of individual with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)), PE501.927v02-00 <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/922/922387/922387en.pdf> accessed 10 December 2023, 62.

Home Affairs to change "related to" in Article 3(2) GDPR to "aimed at" has not been incorporated into the final version.

(4) Offering of Goods or Services to the Data Subject

In addition to the common requirements described above, Article 3(2) lit. a) GDPR and Article 3(2) lit. b) GDPR contain each an additional criterion, which must be given alternatively. According to Article 3(2) lit. a) GDPR, the data processing must be related to the offering of goods or services to data subjects in the European Union. In principle, an offering within the meaning of Article 3(2) lit. a) GDPR is given if it is apparent, that the data controller or data processor envisages offering services to data subjects in one or more member states of the European Union.[78] From the wording of Article 3(2) lit. a) GDPR ("to") also follows the need of the offering to be directed just as well at the future data subject.

It is unclear, however, what is to be understood by the term "offering". Some authors refer for the interpretation of "offering" within the meaning of Article 3(2) lit. a) GDPR to the case law of the ECJ on "directs" within the meaning of Article 6(1) lit. b) Rome I Regulation and Article 17(1) lit. c) Brussels I*bis* Regulation.[79]

In favour of such an understanding it might be argued that Recital 23 GDPR and the relevant case law of the ECJ on the Rome I and Brussels I*bis* Regulations are mentioned in the Guidelines 3/2018 of the EDPB. These Guidelines in particular also affect the interpretation of Article 3(2) lit. a) GDPR. To this extent, the EDPB also stresses the helpfulness of this case law in determining whether goods or services are offered to a data subject in the European Union.[80] An argument in favour of a parallel interpretation also follows from the same purpose served by this additional requirement. In all three regulations this additional requirement is intended to ensure predictability to the actor.[81]

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78 Recital 23 GDPR.

79 Pascal Schumacher, 'Scope of Application of the GDPR', in Daniel Rücker and Tobias Kugler (eds) *New European General Data Protection Regulation* (C.H. Beck, Hart, Nomos 2018) para 197; Maja Brkan, 'Data Protection and Conflict-of-laws: A Challenging Relationship' (2016) 2 EDPL 324, 338; Dan Jerker B Svantesson, 'Extraterritoriality and targeting in EU data privacy law: the weak spot undermining the regulation' (2015) 5 IDPL 226, 231 demonstrates that this may well have been the intention of the European legislator.

80 European Data Protection Board, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3) – Version 2.0 (2019)' <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en> accessed 10 December 2023, 17.

81 For the Brussels I*bis* Regulation, see Peter Mankowski and Peter Arnt Nielsen, 'Article 17 Brussels I*bis* Regulation', in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law*, vol. I (ottoschmidt 2016) para 65. For the GDPR – according to Recital 23 – the applicability of Article 3(2)(a) GDPR requires an assessment of whether an intention of the controller or processor to offer services to data subjects in one or more member states of the EU is evident. Its subjective intentions are therefore decisive.

This approach, however, cannot be followed.[82] Reasons against a parallel interpretation of those provisions can be found in the wording of Article 3(2) lit. a) GDPR (a) as well as the regulatory purposes underlying Article 3 GDPR (b).

(a) The Wording of Article 3(2) lit. a) GDPR

Despite its statements in the Guidelines, to which the proponents of a parallel interpretation refer, also the EDPB emphasises the differences in the wording of Article 3 GDPR ("offering") and Article 6(1) lit. b) Rome I Regulation and Article 17(1) lit. c) Brussels I*bis* Regulation ("directs"). Offering is, according to its mere wording, a broader term than directing[83] and thus opens up a wider territorial scope of application. This argument is even more important since in an earlier draft of Article 3 GDPR, a wording was proposed for Article 3 GDPR according to which it would have been decisive whether "the processing activities are directed to such data subjects".[84] Thus, if the legislator had wanted a uniform interpretation of these regulations, it would have retained this identical wording.

But it is not just a matter of the terms used being different, which requires a different assessment of the GDPR on the one hand and the Rome I Regulation and Brussels I*bis* Regulation on the other hand. The necessity of a different assessment is also reflected in the fact of the object of targeting diverging significantly in two respects. Firstly, according to Article 3(2) lit. a) GDPR the offering is addressed to data subjects "in the Union". Thus, the applicability of the GDPR solely depends on the addressing of data subjects in the European Union. However, it is irrelevant whether a specific legal system within the European Union is targeted. In contrast, under the Rome I Regulation and the Brussels I*bis* Regulation, the country respectively the member state is the relevant point of reference. Correspondingly, the indications pointing to a respective intention of the data processor or the data controller must be determined differently. Secondly, "offering" within the meaning of Article 3(2) lit. a) GDPR does not have to refer precisely to the respective data subject, but rather it must be examined by type whether the offering is aimed at "such data subjects" in the European Union.

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82 Also critical and opting for a broader interpretation Mistale Taylor, 'Permissions and Prohibitions in Data Protection Jurisdiction' (2016) 2 Brussels Privacy Hub Working Paper <https://brusselsprivacyhub.eu/BPH-Working-Paper-VOL2-N6.pdf> accessed 10 December 2023, 18; see also Luís De Lima Pinheiro, 'Law Applicable to Personal Data Protection on the Internet: Some Private International Law Issues' (2008) 18 Anuario español de Derecho internacional privado 163, 173.

83 This is also noted by Paul M. Schwartz, 'Information Privacy in the Cloud' (2013) 161 University of Pennsylvania Law Review 1623, 1643.

84 European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) Version 56 (29/11/2011) <http://statewatch.org/news/2011/dec/eu-com-draft-dp-reg-inter-service-consultation.pdf> accessed 10 December 2023, Article 2(2).

(b) Regulatory Purpose of Article 3 GDPR

Further, Article 3 GDPR, Article 6 Rome I Regulation and Article 17 Brussels I*bis* Regulation pursue different regulatory purposes. The Rome I Regulation is concerned with determining the applicable law, i.e. choosing between different legal systems. In contrast, Article 3 GDPR addresses the issue of whether the GDPR is applicable and thus whether any data protection law applies at all. For the interpretation of a provision, however, it makes a considerable difference whether it is merely a question of determining the law most closely connected to the facts of the case or whether it is a question of granting legal protection *per se*. Because of this different starting point, the interpretation of the provisions is based on different interests – protection of fundamental rights on the one hand,[85] finding the appropriate law on the other hand. Those different interests argue against a uniform cross-regulation interpretation. In addition, when interpreting Article 3 GDPR, the function of this provision of limiting the scope of application in relation to laws of other legislators must be considered. Such a limitation is not the subject of conflict of laws, since it is precisely the task of conflict of laws itself to draw a distinction between the various laws and therefore to coordinate the applicable laws.

Furthermore, the GDPR strives in principle for a comprehensive and uniform protection by referring to fundamental rights,[86] while Article 6(1) lit. b) Rome I Regulation and Article 17(1) lit. c) Brussels I*bis* Regulation seek for the protection of a special group of persons, the consumer. Indeed, according to the concept followed by the European legislator, the consumer is in principle worthy of protection due to its inferior position.[87] Article 6(1) lit. b) Rome I Regulation may, however, lead to a lower level of protection if the law applicable according to Article 6(1) lit. b) Rome I Regulation provides for such a lower level of protection than under the otherwise according to Article 4 Rome I Regulation applicable law. Thus, Article 6(1) lit. b) Rome I Regulation and Article 17(1) lit. c) Brussels I*bis* Regulation are not intended to ensure a certain substantive level of protection, but to compensate for a typically inferior position at the level of private international law. This contrasts with the concept of a comprehensive protection under the GDPR.[88]

Also, it follows from the structure of the Rome I Regulation and the Brussels I*bis* Regulation for Article 6 Rome I Regulation and Article 17 Brussels I*bis* Regulation to be exceptions to

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85 Recital 10 GDPR.

86 *Ibid*.

87 Michael Wilderspin, 'Article 6 Rome I Regulation', in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 1; Peter Mankowski and Peter Arnt Nielsen, 'Introduction to Articles 17-19', in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law*, vol. I (ottoschmidt 2016) para 3.

88 Recital 11 GDPR.

protect a specific group of persons which, however, require justification. In contrast, Article 3 GDPR regulates the opening of the territorial scope of application as such.

Thus, certain parallels between Article 6(1) lit. b) Rome I Regulation, Article 17(1) lit. c) Brussels I*bis* Regulation and Article 3(2) lit. a) GDPR exist. However, these provisions serve different purposes, have their own role in the regulatory framework and can therefore not be interpreted uniformly. This does not, however, result in the case law of the ECJ on Article 6(1) lit. b) Rome I Regulation and Article 17(1) lit. c) Brussels I*bis* Regulation having to be disregarded altogether. Rather, it might nevertheless indicate the criteria to be considered when assessing whether an "offering" within the meaning of Article 3(2) lit. a) GDPR is given in a specific case. However, the differences and particularities of Article 3(2) lit. a) GDPR must be given appropriate consideration.

(5) Monitoring of a Behaviour

To apply the GDPR according to Article 3(2) lit. b) GDPR, the data processor or data controller must monitor a behaviour in addition to the previously mentioned requirements[89]. To this extent, the behaviour monitored must first relate to a data subject in the European Union and, cumulatively, the monitored behaviour must take place within the territory of the European Union.[90]

Three main issues arise in interpreting the term "monitoring". On an objective level, it needs to be clarified what is meant by the term "monitoring" and whether it must meet a threshold in terms of a certain period or intensity (a). On a subjective level, it is questionable whether – similar to Article 3(2) lit. a) GDPR – a targeted monitoring of data subjects in the European Union is required under Article 3(2) lit. b) GDPR. Furthermore, it is also unclear whether a mere monitoring as such is sufficient or whether the personal data must be collected for a specific purpose (b).[91] In addition to the notion of monitoring, it is also unclear when "behaviour takes place within the Union" (c).

(a) Objective Requirements for Monitoring

The concept of monitoring is very broad. It covers any tracking on the Internet and potential subsequent use of personal data processing techniques. Such techniques may consist of profiling a natural person, particularly in order to take decisions concerning her or him or for

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89 See above A.I.2.b)(1)-(3).

90 European Data Protection Board, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3) – Version 2.0 (2019)' <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en> accessed 10 December 2023, 19.

91 The uncertainties in the application of Article 3(2)(b) GDPR also emphasising Brendan van Alsenoy, 'Reconciling the (extra)territorial reach of the GDPR with public international law', in Gert Vermeulen and Eva Lievens (eds), *Data Protection and Privacy under Pressure* (Maklu 2017) 77, 97.

analysing or predicting her or his personal preferences, behaviours and attitudes.[92] Such a broad understanding is necessary because it is not readily apparent why the territorial scope of the GDPR should be limited beyond the criterion of presence of the data subject in the Union.[93] This is particularly true in view of the fact that the European legislator intends to protect all people in the European Union with the GDPR and thereby takes account of their fundamental European rights.[94]

In contrast, some argue for a narrower interpretation of the concept of monitoring and exclude from the definition of monitoring certain initial steps of data processors taking place before they make decisions about a specific person.[95] Such a limitation is, however, not convincing. In this respect, it is missed that the scope of application of the GDPR is often already not opened up for other reasons. This may be illustrated by the example according to which the rejection of unsafe browsers by a server should not fall within the concept of monitoring.[96] In this example, however, there is regularly no processing of personal data as personal data do not exist, which might potentially be processed. The mere disclosure of the browser used does not allow for the identification of an individual person. Such a possibility of identification is, however, required for the GDPR to apply according to Article 4(1), 2(1) GDPR. This example also highlights the option for a data controller or data processor, by selecting the data collected, to dispose to some extent over the applicability of the GDPR. Thus, the data processor or data controller deliberately collects data which allow identification and thereby potentially fulfils the requirements of the scope of application of the GDPR. In these situations, it is difficult to justify why this data processor or data controller should not be obliged to comply with the requirements of the GDPR.

If therefore, in principle, a monitoring is given, the question arises as to whether a monitoring requires a significant degree of intensity to be covered by Article 3(2) lit. b) GDPR. In this respect, one might argue for a certain temporal or – with regard to the type or amount – content threshold of the data collected. The existence of such a threshold is underlined by Recital 24

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92 Recital 24 sentence 2 GDPR; it could even be assumed that monitoring is not limited to tracking, but should be understood more comprehensively. According to such an understanding the second sentence of Recital 24 is only supposed to serve as an example. Given the clear wording of the Recital which leaves no room for such an interpretation, this cannot be agreed.

93 Els Kindt, 'Why research may no longer be the same: About the territorial scope of the New Data Protection Regulation' (2016) 32 CLS Rev 729, 737.

94 Recital 4 Sentence 3, 13, 14 GDPR.

95 Recital 1, 2, 13 GDPR.

96 Paul M. Schwartz, 'Information Privacy in the Cloud' (2013) 161 University of Pennsylvania Law Review 1623, 1652.

GDPR, which explicitly mentions internet tracking and profiling techniques.[97] These behaviours require either a certain length of time (tracking) or a certain amount of data collected (profiling).[98] However, under Recital 24 GDPR profiling is described as a subset of tracking. By using both terms in this specific relation and in view of the different requirements, it becomes clear that the European legislator did not intend to emphasise by Recital 24 GDPR the existence of any minimal requirements for a monitoring within the meaning of Article 3(2) lit. b) GDPR.

For the issue of the existence of a particular threshold, however, the specific interest situation to be regulated by the GDPR must also be considered. According to its Recitals, the GDPR serves especially the protection of the European fundamental rights of the data subject and the rights of the data processor and data controller.[99] Whether there is an infringement of the rights either of the data subject or the data processor and data controller, is assessed by a balancing of those rights. There is no reason why this balancing is not also relevant when determining the scope of application of the GDPR.[100] Therefore, firstly, not every infringement, and thus not every monitoring, however small, activates the regulatory regime of the GDPR. Secondly, in determining whether the threshold has been reached, the time and content dimensions of monitoring are interrelated.

Thus, within the process of the balancing, the intensity with which the monitoring is carried out, on the one hand, and the duration, i.e. the intensity in terms of time, on the other, must be considered. Thus, even a short-term or even a selective observation may in principle be suitable for constituting a monitoring within the meaning of Article 3(2) lit. b) GDPR if it is particularly intensive. This is the case, for example, if the monitoring comprises a large amount of personal data or particularly sensitive personal data.[101] Conversely, in case of a monitoring over a longer period of time, a reduced intensity regarding the type and amount of data collected suffices to reach the threshold. Hence, also the mere collection of personal data may constitute a monitoring within the meaning of Article 3(2) lit. b) GDPR, if it is of a certain duration.[102]

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97 Brendan van Alsenoy, 'Reconciling the (extra)territorial reach of the GDPR with public international law', in Gert Vermeulen and Eva Lievens (eds), *Data Protection and Privacy under Pressure* (Maklu 2017) 77, 96.

98 Article 4(4) GDPR defines profiling as any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person. A certain duration is therefore not required under this definition; this broad approach is criticised by Paul M. Schwartz, 'Information Privacy in the Cloud' (2013) 161 University of Pennsylvania Law Review 1623.

99 See Recital 4 sentence 3 GDPR.

100 See also Recital 4 sentence 2 GDPR.

101 Cf. Article 9(1) GDPR.

102 Paul M. Schwartz, 'Information Privacy in the Cloud' (2013) 161 University of Pennsylvania Law Review 1623, 1652.

(b) Subjective Requirements for Monitoring

At the subjective level, for Article 3(2) lit. b) GDPR the question arises, firstly, whether the data processor or data controller must collect the data for another purpose or whether the GDPR already applies to the collecting of personal data as such. It is assumed that such a purpose is needed.[103] This view is supported by the second sentence of Recital 24 GDPR. According to this Recital, the existence of monitoring is determined by whether natural persons are tracked on the Internet. Recital 24 GDPR thus equates monitoring with profiling.[104] It therefore might be derived from Recital 24 GDPR that monitoring under Article 3(2) lit. b) GDPR is only such a collecting of personal data, which is by the time of the monitoring supposed to serve a further use.

However, a specific further use of the collected data at the time of the monitoring cannot be required. The non-necessity of such a further use is already apparent from the wording of Article 3(2) lit. b) GDPR itself. This provision does not stipulate the requirement of a further use.[105] Moreover, the second sentence of Recital 24 solely refers to the mere possibility of a further use ("potential") without requiring such use. Furthermore, the data subject is worthy of protection while it is monitored, regardless of whether the collected data is later used for other purposes. For the compliance with the level of data protection under the GDPR during a monitoring, any possible further use is also irrelevant for the data processor and data controller. For them it is not necessarily foreseeable whether there might be such further use of the data when the personal data are collected. Therefore, the potential further use of the data collected by means of monitoring is not relevant for the definition of monitoring within the meaning of Article 3(2) lit. b) GDPR.

A broad interpretation of the term monitoring includes that Article 3(2) lit. b) GDPR, in contrast to Article 3(2) lit. a) GDPR, also does not require the data processor or data controller to target its monitoring at data subjects in the European Union.[106] In other words, under Article 3(2) lit.

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103 European Data Protection Board, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3) – Version 2.0 (2019)' <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en> accessed 10 December 2023, 20; Kurt Wimmer, 'Free Expression and EU Privacy Regulation: Can the GDPR Reach U.S. Publishers?' (2018) 68 Syracuse Law Review 547, 555.

104 Paul M. Schwartz, 'Information Privacy in the Cloud' (2013) 161 University of Pennsylvania Law Review 1623, 1644.

105 This interpretation is mentioned by Liane Colonna, 'Article 4 of the EU Data Protection Directive and the irrelevance of the EU–US Safe Harbor Program?' (2014) IDPL 203, 215.

106 See also Brendan van Alsenoy, 'Reconciling the (extra)territorial reach of the GDPR with public international law', in Gert Vermeulen and Eva Lievens (eds), *Data Protection and Privacy under Pressure* (Maklu 2017) 77, 88, 89; different view European Data Protection Board, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3) – Version 2.0 (2019)' <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en> accessed 10 December 2023, 21; without further explanation Paul de Hert and Michal Czerniawski, 'Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation

b) GDPR it does not matter whether the data processor or data controller does not intend to monitor data subjects specifically in the European Union. It is sufficient that such data subjects are covered by the monitoring activities and that this could have been foreseen by the data controller or data processor.[107] Unlike Article 3(2) lit. a) GDPR, such targeted activity is also not implied by the wording of Article 3(2) lit. b) GDPR.[108] Even though the concept of monitoring itself may already presuppose a certain degree of intention,[109] this has no impact on whether the monitoring must target data subjects in the European Union. While, according to its wording, the activity of monitoring itself requires an intentional conduct, the concept of monitoring does not presuppose that the selection of the observed targets is actually made consciously. Rather, this selection precedes the monitoring and is therefore not part of it. The need to consciously select the targets to be monitored therefore cannot be derived from the concept of monitoring.

(c) Identification of the Place where the Behaviour Occurs

In addition to the problems associated with determining the existence of a monitoring, establishing the scope of the GDPR under Article 3(2) lit. b) GDPR is subject to other considerable uncertainty.[110] Especially, it is unclear when a behaviour will "take place in the Union" within the meaning of Article 3(2) lit. b) GDPR. In particular, the question arises whether the presence of a person in the European Union – which is generally required under Article 3(2) GDPR – and the taking place of a behaviour in the European Union can actually diverge.

According to the second sentence of Recital 24 GDPR, Article 3(2) lit. b) GDPR refers exclusively to behaviour occurring on the Internet.[111] This restriction of the scope of application

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in its wider context' (2016) 6 International Data Privacy Law 230, 239 and Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 26.

107 Klar, 'Art. 3', in Jürgen Kühling and Benedikt Buchner (eds), Datenschutz-Grundverordnung/BDSG (4th edn, C.H. Beck 2024) para 101; Kurt Wimmer, 'Free Expression and EU Privacy Regulation: Can the GDPR Reach U.S. Publishers?' (2018) 68 Syracuse Law Review 547, 555.

108 Recital 23 GDPR, which concerns the interpretation of the terms offering goods or services in Article 3(2) lit. a) GDPR emphasises the crucial importance of the intention of the data processor or controller, by using the terms "envisages" and "intention".

109 This argument is mentioned by Brendan van Alsenoy, 'Reconciling the (extra)territorial reach of the GDPR with public international law', in Gert Vermeulen and Eva Lievens (eds), *Data Protection and Privacy under Pressure* (Maklu 2017) 77, 95.

110 Christopher Kuner, 'The European Commission's Proposed Data Protection Regulation: A Copernican Revolution in European Data Protection Law' (2012) 11 Bloomberg BNA Privacy and Security Law Report 1, 4.

111 "In order to determine whether a processing activity can be considered to monitor the behaviour of data subjects, it should be ascertained whether natural persons are tracked on the internet […]" (Recital 24 sentence 2 GDPR); despite the clear wording other types of network or technology involving personal data processing considering European Data Protection Board, 'Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3) – Version 2.0 (2019)' <https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en> accessed 10

of Article 3(2) lit. b) GDPR has been intended by the European legislator. In the legislative procedure, the Parliament initially deleted the restriction to the Internet in Recital 24 GDPR and justified this by extending the scope of application beyond the Internet.[112] The Parliament's amendment at first reading, which had provided for this corresponding deletion and adaptation of the Recital, has however not been included in the final draft regulation.[113]

A specific place of action for the Internet usually cannot be determined. For example, the place where the person is physically present or the place where the server is located may be considered as the place of action. Against this background, the "place in the Union" within the meaning of Article 3(2) lit. b) GDPR must be understood as the place where this behaviour has its effect in the Union. This is underlined by the wording of the French and German language versions of Article 3(2) lit. b) GDPR, which argues in favour of this understanding. According to the German version, it is decisive where the behaviour "erfolgt". Under the French version, the behaviour must "il s'agit". These two verbs are used to describe a conduct rather than a state. They hence have a meaning which in English is most similar to the term "occur". However, the term "occur" is also used in other regulations, where it has an unambiguous meaning. Under Article 4(1) Rome II Regulation, this term is used to determine the law applicable to non-contractual obligations. The term "occur" within the meaning of Article 4(1) Rome II Regulation refers to the effects of the conduct and not to the conduct as such.[114] The French and German language versions of Article 3(2) lit. b) GDPR are thus based rather on the result of conduct than on the conduct as such. They indicate that "takes place in the Union" refers to the direct effects of the conduct.

This interpretation of "takes place in the Union" is also supported by the fact that otherwise the second half sentence of Article 3(2) lit. b) GDPR is superfluous. The presence of the data subject in the European Union is already a requirement for the application of Article 3(2) GDPR. If the location of the data subject were also relevant under Article 3(2) lit. b) GDPR, a

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December 2023, 19; also considering offline monitoring Gerrit Hornung, 'Art. 3', in Spiros Simitis, Gerrit Hornung and Spiecker genannt Döhmann (eds), Datenschutzrecht (Nomos 2019) para 58.

112 Committee on Civil Liberties, Justice and Home Affairs Draft Report on the proposal for a regulation of the European Parliament and of the Council on the protection of individual with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)), PE501.927v02-00 <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/922/922387/922387en.pdf> accessed 10 December 2023, 15, 63; this point is also emphasised by Paul M. Schwartz, 'Information Privacy in the Cloud' (2013) 161 University of Pennsylvania Law Review 1623, 1643 Fn. 110.

113 See Recital 21 European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [2017] OJ C 378/399.

114 Cf. Article 4(1) Rome II Regulation.

differing assessment of these two requirements would not be possible.[115] Basing the interpretation on the physical location of the data subject[116] disregards the potential unpredictability of the location of the data subject to the data processor or data controller. In contrast, the data subject may typically foresee where its behaviour will have an impact. The data subject is therefore less worthy of protection in this respect.

This understanding of Article 3(2) lit. b) GDPR is also supported by its consistency with the interpretation of Article 3(2) lit. a) GDPR. Article 3(2) lit. a) GDPR can be understood as a manifestation of the effects doctrine.[117] Also, the phrase "the behaviour that takes place in the Union" is not a mere declaratory addition without any independent meaning. This results not least from the fact that this last half sentence of Article 3(2) lit. b) GDPR has not been included in the initial draft legislation and has been introduced at a late stage of the legislative process.[118] However, such an addition can only be explained by the fact that it provides an independent and additional meaning. Otherwise, such an addition would not have been necessary.

c) Member State law by virtue of Public International law (Article 3(3) GDPR)

Under Article 3(3) GDPR, the GDPR further applies to the processing of personal data by a controller not established in the Union, but in a place where member state law applies by virtue of public international law.

As follows from the wording of Article 3(3) GDPR, Article 3(3) GDPR stipulates the requirement that the data controller is established in a place where the law of a member state is applicable by virtue of public international law. However, the scope of application of Article 3(3) GDPR remains unclear. According to Recital 25 GDPR, the GDPR is applicable to data controller without establishment in the Union, where member state law applies by virtue of public international law. One could conclude from this the intention of Article 3(3) GDPR, as a general clause, to establish the applicability of the GDPR whenever public international law deems the law of a member state to be applicable. However, from the term "place" in Article 3(3) GDPR follows that Article 3(3) GDPR is not intended to establish the applicability of the

115 Also Paul de Hert and Michal Czerniawski, 'Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context' (2016) 6 International Data Privacy Law 230, 239 emphasise that the last half-sentence of Article 3(2)(b)) GDPR considerably limits the territorial scope of the GDPR.

116 Mitrou, 'The General Data Protection Regulation: A Law for the Digital Age?', in Synodinou, Jougleux, Markou and Prastitou (eds), *EU Internet Law: Regulation and Enforcement* (Springer 2017) 19, 32.

117 Dan Jerker B Svantesson, 'The Extraterritoriality of EU Data Privacy Law - Its Theoretical Justification and Its Practical Effect on U.S. Businesses' (2014) 50 Stanford Journal of International Law 53, 85 et seq.; see also Sanjay Sharma, *Data Privacy and GDPR Handbook* (Wiley 2020) 56.

118 See Article 3(2) lit. b) European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [2017] OJ C 378/399.

GDPR to any situation in which the law of a member state is applicable on the basis of public international law. Rather, the applicability of the GDPR under Article 3(3) GDPR is only justified if – based on public international law – member state law applies specifically at the place of establishment of the data controller outside the territory of the member states. Therefore, Article 3(3) GDPR relies precisely and solely on the establishment of the data controller. Other criteria, like the nationality of the data controller and the data subject or the effects of the data processing are thus irrelevant. Accordingly, as examples for the opening of the scope of application under Article 3(3) GDPR, the GDPR mentions member state's diplomatic mission or consular post.[119] In addition, ships are also covered by Article 3(3) GDPR.[120]

Article 3(3) GDPR refers exclusively to a data controller which is not located in the European Union. For data processors located outside the European Union, the applicability of the GDPR cannot be justified under Article 3(3) GDPR. Thus, for data processor located outside the European Union, the applicability of the GDPR can only result from Article 3(2) GDPR.

d) Relationship between Article 3(1) GDPR and Article 3(2) GDPR

It remains to be seen whether and how the ECJ will delimit the scope of Article 3(1) GDPR and Article 3(2) GDPR from each other. The ECJ has not commented on this relationship in its *CNIL* decision. An indication can be derived from the system of the GDPR: It follows from Article 27 GDPR that only in the cases of Article 3(2) GDPR a representative must be appointed. This already follows from the fact that a physical link is already required to apply Article 3(1) GDPR. Therefore, an appointment of such a representative would be unnecessary in the cases of Article 3(1) GDPR. The additional requirement following from Article 27 GDPR is hence only meaningful, if there is otherwise no physical connection.

Article 3(2) GDPR is hence in principle superseded by Article 3(1) GDPR, since otherwise a representative would have to be appointed under Article 27 GDPR even if an establishment in the European Union existed. Conversely, this also shows that the mere existence of a representative in the European Union according to Article 27 GDPR cannot suffice to assume an establishment according to Article 3(1) GDPR. Otherwise, Article 3(2) GDPR would not have any dedicated scope of application.

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119 Recital 25 GDPR.

120 This was noted by the Article 29 Working Party for Article 4(1) lit. b) DPD, which has the same content as Article 3(3) GDPR (Article 29 Data Protection Working Party, 'Opinion 8/2010 on applicable law', WP179, <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp179_en.pdf> accessed 11 December 2023, 29).

Like Article 3(2) GDPR, Article 3(3) GDPR requires the lack of an establishment of the data controller in the European Union. Therefore, the relationship between Article 3(1) GDPR and Article 3(3) GDPR and the interpretation of these terms is governed by what has been outlined above regarding the relationship of Article 3(1) GDPR and Article 3(2) GDPR.[121]

3. Article 44 GDPR

An additional reason to give effect to the GDPR might be found in Articles 44 et seq. GDPR. Those provisions determine the conditions under which data may be transferred from the European Union to a third country or an international organisation. They further regulate when these data may be transferred from a third country onwards to another country.

When interpreting Article 44 GDPR, the significant extension of the territorial scope of the GDPR under Article 3 GDPR compared to the DPD must be taken into account. In particular, Article 3(2) GDPR leads to an extension of the application of European data protection law to data processors or data controllers who are not established in the European Union. According to Recital 56 DPD, as well as according to Recital 101 sentence 3 GDPR, the restriction of data transfers to these data processors and controllers under Articles 25, 26 DPD and Articles 44 et seq. GDPR serves to protect the rights of the individual.[122] However, by extending the scope of territorial application under Article 3 GDPR, these data processors and controllers are now increasingly subject to the provisions of the GDPR directly. A restriction of the data transfer to them to the extent set out in Articles 25, 26 DPD to maintain the level of protection of the DPD is therefore no longer necessary. Articles 44 et seq. GDPR is thus of a different and in this relation also of lesser importance than Articles 25, 26 DPD. When drawing on the case law issued on Articles 25, 26 DPD and on the interpretation developed in the literature, this difference must be taken into account despite the largely identical wording.

To determine the specific scope of application of Articles 44 et seq. GDPR, three questions have to be answered: What is a transfer within the meaning of Articles 44 et seq. GDPR (a), when does a transfer occur "to a third country or to an international organisation" (b) and who is the addressee of Articles 44 et seq. GDPR (c)?

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121 The French version of Article 3(3) GDPR also requires the data controller to be not established in the Union. The German version – which refers to data processing not in the Union – must therefore be a translation error (see also Gerrit Hornung, 'Art. 3', in Spiros Simitis, Gerrit Hornung and Spiecker genannt Döhmann (eds), *Datenschutzrecht* (Nomos 2019) para 67).

122 See also Julian Wagner, 'The transfer of personal data to third countries under the GDPR: when does a recipient country provide an adequate level of protection?' (2018) 8 International Data Privacy Law 318, 319, 320.

a) Transfer

Regarding the first question, two issues have to be addressed. First, it is to be clarified what is meant by a transfer within the meaning of Articles 44 et seq. GDPR (1). Second, the legal nature of the transfer needs to be clarified (2).

(1) The Notion of Transfer within the Meaning of Articles 44 et seq. GDPR

In general, the concept of transfer has to be interpreted very broadly.[123] A transfer is therefore any submitting of data out of the territory of the European Union.[124] In this respect, it is questionable whether the mere providing of data on the Internet is sufficient to constitute a transfer within the meaning of Article 44 GDPR if the data are provided by a person established in the European Union. This has been rejected by the ECJ[125] and is still the subject of discussion.[126] Rightly, also for Articles 44 et seq. GDPR the mere making available of data is not sufficient to constitute a transfer within the meaning of Articles 44 et seq. GDPR. Merely making data available is only a first intermediate step to ensure the data actually reach a third country or an international organisation. In addition, especially in connection with the Internet, the making available of data often depends only on a subjective component: the will of the data processor or data controller to grant access to a third-country data processor or an international organisation. However, the determination of such a subjective element is associated with difficulties and leads to considerable legal uncertainty. Also, the specific requirements to be placed on this subjective component remain unclear. In addition, such an extension of the term "transfer" is not necessary. In any event, a transfer occurs at the moment the data is accessed by a third-country data processor or an international organisation. From this point in time the requirements of Articles 44 et seq. GDPR must be met. Furthermore, the ECJ argued in relation to the DPD that by making private data available on the Internet, access from any third country is in principle possible. However, the absence of an adequacy decision in relation to only one third country would in this case result in the making available of the data being inadmissible at all.[127] This argumentation is also convincing for the GDPR.

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123 See for a comprehensive explanation dealing with the DPD W Kuan Hon and Christopher Millard, 'Data Export in Cloud Computing – How can Personal Data be Transferred Outside the EEA? The Cloud of Unknowing, Part 4' (2012) 9 SCRIPTed 25, 34.

124 Alexander Zinser, 'International Data Transfer out of the European Union: The Adequate Level of Data Protection According to Article 25 of the European Data Protection Directive' (2003) 21 John Marshall Journal of Computer & Information Law 547, 550.

125 ECJ, C-101/01 *Lindqvist* [2003] ECLI:EU:C:2003:596, para 71.

126 See Christopher Kuner, *Transborder Data Flow and Data Privacy Law* (Oxford University Press 2013) 12-13; W Kuan Hon and Christopher Millard, 'Data Export in Cloud Computing – How can Personal Data be Transferred Outside the EEA? The Cloud of Unknowing, Part 4' (2012) 9 SCRIPTed 25, 35 et seq.

127 ECJ, C-101/01 *Lindqvist* [2003] ECLI:EU:C:2003:596, para 69.

(2) Legal Nature of the Transfer

The transfer of personal data might constitute a data processing within the meaning of Article 4(2) GDPR. The assessment of the legal nature of the transfer is necessary to fully understand the concept of protection under the GDPR and the relation between Article 3 GDPR and Articles 44 et seq. GDPR. It must therefore first be analysed whether a transfer always constitutes a data processing (a). The relationship between transfer and data processing is subsequently explored in more detail (b).

(a) The Transfer as a Type of Data Processing

As the English language version of the GDPR implies, the transfer of data does not constitute a "processing".[128] In Article 4(2) GDPR, where "processing" is defined, the European legislator uses the term "disclosure by transmission". In contrast, in Articles 44 et seq. GDPR and even in the relevant recitals the term "transfer" is consistently used. This distinction is also consistently adhered to in the French version of the GDPR. Such a systematic distinction between transfer and disclosure by transmission only serves a purpose if the "transfer" is not to be considered a data processing within the meaning of Article 4(2) GDPR. Otherwise, the legislator could have used the term disclosure by transmission or transfer uniformly. This is especially true since the term "transfer" is always used in connection with "to third countries and international organisations" anyway. Thus, even when the term "transfer" is used uniformly, a distinction between intra-European transfer and transfer within the meaning of Article 44 GDPR would be possible.

Also, no clarifying amendments regarding the characterisation of the transfer as a processing were added in the legislative procedure, although the European Parliament in particular proposed comprehensive changes to Article 4 GDPR. This is all the more significant as the at least misleading use of those terms already existed in Articles 2 lit. b), 25, 26 DPD.

Additionally, the fact that Article 48 GDPR refers in its title to "Transfers or disclosures" and using this pair of terms also in the corresponding provision speaks in favour of this argumentation. By using the term "or", the European legislator has expressed its view of

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128 This was handled differently by the ECJ for Article 2(b), 25, 26 DPD but without further reasoning (ECJ, C-362/14 *Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650, para 45) and by the European Commission (European Commission, 'Commission Decision of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC, 2001/497/EC' [2001] OJ L 181/19, Recital 7) as well as the Article 29 Data Protection Working Party (Article 29 Data Protection Working Party, 'Opinion 1/2001 the Draft Commission Decision on Standard Contractual Clauses for the transfer of Personal Data to third countries under Article 26(4) of Directive 95/46', WP38, < https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2001/wp38_en.pdf> accessed 11 December 2023, 3); see also W Kuan Hon and Christopher Millard, 'Data Export in Cloud Computing – How can Personal Data be Transferred Outside the EEA? The Cloud of Unknowing, Part 4' (2012) 9 SCRIPTed 25, 30.

"transfer" and "disclosure" as being in an alternative relationship. Thus, according to the will of the European legislator, a "disclosure by transmission" cannot be equated with a "transfer". Furthermore, if the transfer were in fact a processing, the restriction in Article 44 GDPR to data "which are undergoing processing or are intended for processing after transfer" would not be necessary, since this requirement would always be met in view of the transfer. The enumeration in Article 4(2) GDPR is only exemplary ("such as") and in principle covers "any operation or set of operations which is performed on personal data or on sets of personal data". However, the use of the various terms implies a transfer should also not be covered by the general definition of processing since the term disclosure by transmission is not mentioned in any other provision of the GDPR.

Moreover, in Articles 13(1) lit. c), 14(1) lit. c) GDPR the "purposes of the processing" and in Articles 13(1) lit. f), 14(1) lit. f) GDPR the intend to transfer personal data to a third country are separately enumerated. If the European legislator had assumed that the transfer also constitutes a processing, this additional enumeration would not have been necessary. This is emphasised further by mentioning two additional information between the purpose of the processing and the intend to transfer personal data, which are subject to the obligation to provide information. The European legislator thus seems not to assume a particular close relationship between the processing and the transfer of data. Further, an explicit reference to the transfer was not included in the predecessor provision of Articles 13, 14 GDPR, Articles 10, 11 DPD. This suggests the intention of the European legislator to emphasise the independent significance of the transfer compared to data processing. Admittedly, Article 44 GDPR also refers to the other provisions of the GDPR. These regularly require a processing to take place. If the transfer as such were not a processing, the reference in Article 44 GDPR would hence be largely superfluous. However, from the Commission's draft explanatory memorandum follows the intention of the legislator of Article 44 GDPR to ensure compliance with Articles 45 et seq. GDPR.[129] A reference in the memorandum to the general provisions is missing, although this reference was already previously contained in the text. Therefore, the European legislators foremost interest was not the application of the other provisions of the GDPR, but the obligations set out in Articles 45 et seq. GDPR.

Furthermore, the rules concerning the data transfer to third countries have been separated from the general rules which must be observed in the context of data processing. In particular, they have been placed behind the rights of the data subject. If the European legislator had assumed

[129] European Commission, Proposal for a General Data Protection Regulation COM(2012) 11 final, 3.4.3.2. Explanatory Memorandum.

the transfer constituting a "processing" within the meaning of Article 3 GDPR, it would have placed these rules in Chapter II.

Also, the purpose of Articles 44 et seq. GDPR argues in favour of differentiating between a transfer and a processing. On the one hand, Articles 44 et seq. GDPR are intended to ensure that the level of protection of the GDPR is not to be undermined in the case of a transfer to a data processor or data controller in a third country.[130] On the other hand, a too extensive application of the GDPR to the transfer of personal data could be perceived as exceeding the regulatory competence of the European Union.[131] In order to counter this potential criticism, a limitation of the requirements for the transfer to the requirements stipulated in Articles 44 et seq. GDPR is a suitable means. By excluding the transfer from processing, the European legislator thereby reflects the special interests involved in a data transfer to a third country.

The transfer therefore does not constitute a processing within the meaning of Article 4(2) GDPR. It is an *aliud*, being in general only subject to the requirements enumerated in Articles 44 et seq. GDPR. Its sole purpose is the regulation of the transfer of personal data to a third country or to an international organisation.

(b) The Relation of Transfer and Data Processing

However, this does not exclude the possibility that a transfer of data is at the same time a disclosure by transmission and thus constitutes a data processing within the meaning of Article 4(2) GDPR. The possibility of such a duality of an act relating to personal data is supported by the fact that the mere transfer of data to a third country cannot free the data processor or data controller transferring the data from the requirements set out in Articles 5 et seq. GDPR. These requirements balance the specific situation resulting out of a data processing. Articles 44 et seq. GDPR take only account of the interests involved when it comes to a data transfer to a third country or an international organisation. They do not, however, require a data processing and therefore do not differentiate between a mere transfer and a transfer constituting also a data processing. Articles 44 et seq. GDPR are only intended to ensure the level of protection under

130 Recital 101 sentence 3 GDPR.

131 See Paul de Hert and Michal Czerniawski, 'Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context' (2016) 6 International Data Privacy Law 230, 240 et seq.; Omer Tene and Christopher Wolf, 'Overextended: Jurisdiction and Applicable Law under the EU General Data Protection Regulation' (2013) <https://fpf.org/wp-content/uploads/2013/01/FINAL-Future-of-Privacy-Forum-White-Paper-on-Jurisdiction-and-Applicable-Law-January-201311.pdf> accessed 11 December 2023; Christopher Kuner, 'Extraterritoriality and regulation of international data transfers in EU data protection law' (2015) 5 International Data Privacy Law 235, 239 et seq.; Gloria González Fuster, 'Un-mapping Personal Data Transfers' (2016) 2 European Data Protection Law Review 160, 168 even states "a persistent Transatlantic disagreement on whether EU data protection law is or is not extraterritorial in scope".

the GDPR not to be undermined as a result of the transfer to a third country.[132] But as it becomes clear by the structure of the GDPR, which requires a data processing for most of its provisions to apply, the European legislator regarded this difference as being of a crucial nature. Therefore, the provisions concerning data processing have to be obeyed regardless of whether the transfer happens within the Union, to a third country or to an international organisation.

Admittedly a transfer to a third country or an international organisation regularly fulfils also the requirements of a data processing. However, something different applies, for example, for a transfer to a data processor. If data are transferred to a data processor, this does not constitute a data processing within the meaning of Article 4(2) GDPR and thus the obligations under Articles 5 et seq. GDPR are not to be met.[133] If the data processor is located in a third country, however, the requirements of Articles 44 et seq. GDPR must be met. A transfer to a data processor in a third country is hence subject to the Articles 44 et seq. GDPR but not to the Articles 5 et seq. GDPR. It therefore has to be examined in each individual case whether the transfer constitutes at the same time a data processing.

b) To a Third Country or to an International Organisation

When it comes to the scope of application of the GDPR, it secondly must be dealt with the question when the transfer occurs „to a third country or to an international organisation". In view of this requirement, it is not clear whether it concerns the data itself or the recipient of the data transfer. In this respect it could, on the one hand, be decisive whether the recipient is not subject to the GDPR according to Article 3 GDPR. On the other hand, it may also be required to remove the data from the territory of the European Union.[134] For the applicability of Articles 44 et seq. GDPR, the decisive factor is whether the recipient of the data transfer is covered by its territorial scope.

A data transfer within the territory of the European Union might be addressed to a data controller and data processor who is out of scope of the GDPR. In contrast, a data transfer occurring outside the territory of the European Union may also take place between data processors or data controllers subject to the GDPR. Under Article 3(2) GDPR, the GDPR also

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132 Recital 101 sentence 3 GDPR.

133 This is heavily discussed in the German literature but seems to be the prevailing view, see Holger Lutz, 'Art. 28 DSGVO', in Jürgen Taeger and Detlev Gabel (eds), *DSGVO – BDSG – TTDSG* (4th edn, Fachmedien Recht und Wirtschaft 2022) para 8 et seq.; Nikolaus Bertermann, 'Art. 28 DSGVO', in Eugen Ehmann and Martin Selmayr (eds), Datenschutz-Grundverordnung (2nd edn, C.H. Beck 2018) para 4 et seq.; Jürgen Hartung, 'Art. 28 DSGVO', in Jürgen Kühling and Benedikt Buchner (eds), *Datenschutz-Grundverordnung/BDSG* (4th edn, C.H. Beck 2024) para 15 et seq.

134 See on this question with a focus on international organisations Ioannis Ntouvas, 'Exporting personal data to EU-based international organizations under the GDPR' (2019) 9 International Data Privacy Law 272, 273.

applies to data processor and data controllers without any territorial nexus to the European Union. Additionally, Article 3(1) GDPR emphasises the irrelevance of the actual place of data processing for the applicability of the GDPR. Situations may therefore arise in which the data is located outside the territory of the European Union but the GDPR is applicable and, conversely, situations may also occur in which the data is located in the European Union but the GDPR is not applicable. Thus, situations may occur where the location of the transferred data and the territorial scope of application of the GDPR according to Article 3 GDPR fall apart. The reasoning underlying Articles 44 et seq. GDPR, however, emphasises the relevance of the data processor or data controller being subject to the GDPR. Articles 44 et seq. GDPR are intended to prevent an undermining of the level of protection achieved by the GDPR.[135] However, there is only a danger of such an undermining if the data are transferred out of the scope of the GDPR. Further, the GDPR does not attach any relevance to the location of the data as such, as is made clear in particular by the last half sentence of Article 3(1) GDPR.

For the interpretation of "transfer to a third country or an international organisation" within the meaning of Articles 44 et seq. GDPR it is therefore solely decisive whether the recipient of the data is covered by the scope of Articles 44 et seq. GDPR.[136] In contrast, the application of Articles 44 et seq. GDPR is independent of the physical location of the data after the transfer.

c) The Relation between Article 3 GDPR and Articles 44 et seq. GDPR

For the scope of application of Articles 44 et seq. GDPR it is thirdly at issue to what extent the recipient of the transfer is also bound by Article 44 GDPR in case of an onward transfer. This issue depends crucially on the relationship between Article 3 GDPR and Articles 44 et seq. GDPR. The application of Articles 44 et seq. GDPR might presuppose the territorial scope of application according to Article 3 GDPR being opened up also for the onward transfer of the data. Thus, Articles 44 et seq. GDPR would only apply to an onward transfer of a data controller or data processor situated in a third country if the requirements set out in Article 3(2),(3) GDPR are also met. If the applicability of Article 3 GDPR were not required, Articles 44 et seq. GDPR would apply on every onward transfer.

The question of the scope of addressees of Articles 44 et seq. GDPR must not be mixed up with the issue of the general applicability of the GDPR. The rules provided in Articles 44 et seq. GDPR in general do not independently establish the applicability of the GDPR. They rather presuppose its applicability, and particularly the opening of the territorial scope of application

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135 Recital 101 sentence 3 GDPR.

136 At least when it comes to international organizations, Christopher Kuner, 'International Organizations and the EU General Data Protection Regulation' (2019) 16 International Organization Law Review 158, 174 seems to assume that the territorial borders of the European Union are decisive.

according to Article 3 GDPR.[137] Hence, if the initial data collection or the further processing of data does not fall within the scope of application of the GDPR, the GDPR and especially Articles 44 et seq. GDPR are not applicable to the transfer of the data. Irrespective of these situations, however, it is unclear whether Article 44 GDPR only applies to those addressees of a data transfer who fall within the scope of application of the GDPR and are thus also covered by Article 3 GDPR. In contrast, Article 44 GDPR might also address data processor or data controller located in a third country. The latter would have the consequence of Article 44 GDPR imposing obligations on data processors and data controllers beyond the scope of Article 3 GDPR. In contrast to the issue of the temporal relationship in the context of Article 3 GDPR[138], the question at stake here is whether the subsequent change by the transfer of data to another data processor or data controller may have an influence on the applicability of the initially applicable GDPR. In other words, it is not the factual situation of the object – the data subject – that changes, but that of the subject – the data processor or data controller.

The question therefore arises whether Article 44 GDPR is directed only at the data processor or data controller within the scope of Article 3 GDPR and obliges them exclusively. In contrast, Article 44 GDPR may also bind data processor or data controller falling outside the scope of Article 3 GDPR.[139] In favour of the first approach argues the reference of Article 44 GDPR to "any" data transfer as the subject matter of its regulation. Also, its legal consequences apply without distinction between the transfer of data from the European Union to a third state and from a third state to another third state. This might be an indication of Article 44 GDPR not intending to differentiate in this respect at least according to its wording.

In contrast, however, it could be argued firstly that – at least in the English language version – Article 44 GDPR is "subject to the other provisions of this Regulation". This might lead to the conclusion that Article 44 GDPR is only applicable if the further requirements under the GDPR are met as well. However, this restriction might also be understood to require only compliance with the other requirements under the GDPR – in particular Article 5 GDPR and Article 6 GDPR – to the extent they are applicable. Further, nothing can be drawn from Article 44 GDPR taking an *ex-ante* perspective on the data transfer and stipulating such a transfer "shall not" take

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137 Sylvia Juarez,'Art. 44 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg, *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 33; Christian Schröder, 'Art. 44', in Jürgen Kühling and Benedikt Buchner (eds), *Datenschutz-Grundverordnung/BDSG* (4th edn, C.H. Beck 2024) para 2.

138 See e.g. above A.I.2.b)(1)(a) and A.I.2.a)(3).

139 This question is also addressed by Peter Schantz, 'Art. 44 DSGVO', in Spiros Simitis, Gerrit Hornung and Spiecker genannt Döhmann (eds), *Datenschutzrecht* (Nomos 2019) para 30.

place. The legal consequences of Article 44 GDPR may be directed precisely also at the data processor or data controller in the third country who wishes to transfer the data.

From a systematic point of view, the chapter in which Article 44 GDPR is located, is entitled with "Transfers of personal data to third countries or international organisations". Therefore, the title of the chapter does not refer to the data processor or data controller, but to the transfer as such. It further does not differentiate between data transfers form a data processor or data controller within the scope of the GDPR and those transfers between data processors and data controllers outside the scope of the GDPR. Also, nothing different can be derived from Article 3 GDPR and the reasoning underlying its scope of application. Article 3 GDPR regulates the territorial scope of application of the GDPR only with respect to the "processing of personal data". However, as has been shown, the transfer does not necessarily constitute a processing within the meaning of Article 3 GDPR.

Furthermore, the European legislator has – compared to Article 4 DPD – considerably extended the scope of application of European data protection law by introducing Article 3(2) GDPR. For the first time, European data protection law also addresses explicitly those data processors or data controllers who have no establishment in the European Union. Accordingly, it seems reasonable that by extending Article 44 GDPR to onward transfers, the European legislator also intended to extend the scope of European data protection law to data processor and data controller in third countries. Additionally, the third sentence of Recital 101 GDPR prohibits an undermining of the level of protection provided in the European Union in case of a transfer to third countries. An effective protection can, however, only be guaranteed if the third-country data processor or data controller is also obliged to comply with the requirements set out in Articles 44 et seq. GDPR. To this extent, the legislature has explicitly recognised the danger of competing data protection laws and intends to remedy this by means of increased cooperation.[140] The applicability of Articles 44 et seq. GDPR to third-country data processor or data controller in the event of an onward transfer cannot be countered by the difficulties in enforcing the rules in these cases.[141] As already follows from the introduction of Article 3(2) GDPR, these difficulties must have been identified, but were considered of secondary importance by the European legislator. As can be seen in particular from Recital 4 GDPR and

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140 See Recital 115 GDPR.

141 The European Commission even emphasised that possible practical enforcement problems should not deter the EU from laying down clear rules on the rights, see Council of the European Union, Note on Proposal for a regulation of the European Parliament and of the Council on the protection of individual with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), 16529/12, <https://data.consilium.europa.eu/doc/document/ST-16529-2012-INIT/en/pdf> accessed 11 December 2023, 43 fn. 47.

the third sentence of Recital 101 GDPR, the European legislator, when reforming the rules on data transfers, was concerned precisely with the maintenance of the European level of data protection also when transferring data outside the Union.[142]

Article 44 GDPR must therefore be interpreted as applying independently of Article 3 GDPR. It hence also applies to data processors and data controllers outside the European Union transferring personal data.[143] Thus, Article 44 GDPR extends the territorial scope to data processors and data controller in third countries or international organisations to which data have been transferred. They must meet the requirements of Articles 44 et seq. GDPR when data from a data controller or data processor subject to Article 3 GDPR have been transferred. Additionally, the GDPR remains also applicable if this data processor or data controller transfers the data to another data processor outside the European Union, regardless of whether this receiving data processor is itself subject to the GDPR under Article 3(2),(3) GDPR.[144]

In interpreting Article 44 GDPR it is unclear whether the obligations under Article 44 GDPR for onward transfers from one third country to another third country is incumbent on the data processor or data controller who first transferred the data from the European Union to a third country. This obligation, however, apply only to the data processor or data controller who transfers the data onwards from one third country to another third country.

4. Legal Consequence of the GDPR

The legal consequences of the GDPR depend on the provision under which the GDPR is applicable. Insofar as the requirements of any of the rules in Article 3 GDPR are alternatively met, the GDPR applies in its entirety. Irrespective of this, the applicability of Articles 44-50

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142 The ECJ has already developed this idea in its decision ECJ, C-362/14 *Schrems v Data Protection Commissioner* [2015] ECLI:EU:C:2015:650, para 71-74 from Art. 25 DPD.

143 See also Thomas Zerdick, 'Art. 44', in Eugen Ehmann and Martin Selmayr (eds), *Datenschutz-Grundverordnung* (2nd edn, C.H. Beck 2018) para 15; Moritz Karg, 'Gegenwart und Zukunft der Angemessenheit des Datenschutzniveaus im außereuropäischen Datenverkher' (2016) Verbraucher und Recht 2016, 457, 458; Christopher Kuner, 'International Organizations and the EU General Data Protection Regulation' (2019) 16 International Organization Law Review 158, 182 et seq.; Christopher Kuner, *Transborder Data Flow and Data Privacy Law* (Oxford University Press 2013) 47; dealing with the predecessor rules in the DPD Christopher Kuner, 'Extraterritoriality and regulation of international data transfers in EU data protection law' (2015) 5 International Data Privacy Law 235, 241; different view Sylvia Juarez,'Art. 44 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg, *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 33; Bianka Makso, 'Exporting the Policy - International Data Transfer and the Role of Binding Corporate Rules for Ensuring Adequate Safeguards' (2016) Pécs Journal of International & European Law 79, 82; so also to the DPD Daniel Cooper and Christopher Kuner, 'Data Protection Law and International Dispute Resolution' (2015) 382 Recueil des Cours 9, 127.

144 See also Christopher Kuner, 'The European Commission's Proposed Data Protection Regulation: A Copernican Revolution in European Data Protection Law' (2012) 11 Bloomberg BNA Privacy and Security Law Report 1, 10.

GDPR is determined exclusively by whether the conditions of Article 44 GDPR are met, i.e. whether data are transferred to a third country or an international organisation.[145]

The rules applicable to a data processing or a transfer in each individual case are also influenced by the numerous opening clauses within the GDPR. These allow member states to establish their own rules which must be complied with if the respective national data protection law applies.[146] Hence, by adding further requirements for data transfers to third countries and international organisations and by allowing different national regulations through opening clauses, the GDPR does not establish a completely uniform data protection regime throughout the Union.[147]

Insofar as Article 44 GDPR subjects data processor or data controller, who are not subject to the GDPR under Article 3 GDPR, to Article 44-50 GDPR, two issues arise. Firstly, it must be clarified which rules of the GDPR are to be applied to these data processors and data controllers (a). Secondly, it is to be assessed which activities of the data processor and data controller are covered by the GDPR (b).

a) Applicable Provisions to Third-Country Data Processor and Data Controller Outside the Scope of the GDPR

For data processor or data controller located outside the scope of the GDPR, it is firstly to be determined to what extent the provisions of the GDPR apply. This is relevant since Articles 44 et seq. GDPR also address data processors and data controllers who are not subject to Article 3 GDPR.[148] Further, a mere data transfer constitutes not in any event a data processing within the meaning of Article 4(2) GDPR. The question therefore arises as to which provisions of the GDPR are applicable to them.

In principle, there are two options for applying the provisions of the GDPR to data processors and data controllers established in a third country who are not subject to any of the rules of Article 3 GDPR. Firstly, the applicability of the GDPR could be limited to the provisions of Chapter V (Articles 44-50 GDPR). Secondly, the GDPR might apply to its full extent once the requirements of Article 44 GDPR are met.

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145 See above A.I.3.

146 The opening clauses within the GDPR amount to 69; see for a comprehensive list of all opening clauses Kristina Yuliyanova Chakarova, 'General Data Protection Regulation: Challenges Posed by the Opening Clauses and Conflict of Laws Issues' (2019) EU Law Working Papers No. 41, Stanford-Vienna Transatlantic Technology Law Forum <https://law.stanford.edu/publications/no-41-general-data-protection-regulation-challenges-posed-by-the-opening-clauses-and-conflict-of-laws-issues/> accessed 11 December 2023, 11.

147 In this respect, the objective set out in Recital 13 GDPR has not been achieved.

148 See above A.I.3.c).

For a limitation to the application of the provisions found in Chapter V, it could be argued for Articles 44 et seq. GDPR describing a very special situation and having therefore been regulated in a separate chapter. Also, many provisions of the GDPR refer to the processing of personal data or the position as a data processor or data controller.[149] Pursuant to Article 4(7),(8) GDPR, however, only the person who processes data or determines the purposes and means of the processing is a data processor or data controller. According to their wording, these provisions require hence a data processing. Yet, a data processing is not necessary to constitute a data transfer within the meaning of Articles 44 et seq. GDPR. This argument can be refuted, however, by the fact of a data transfer may also fulfil the requirements for a data processing.[150] Therefore, it is not excluded for a data transfer to fulfil the requirements for the application of the other provisions of the GDPR in any event. In contrast, the opening of the scope of application of the GDPR according to Article 3 GDPR always depends on the presence of a data processing. Yet, such a data processing is not at any event required for the application of at least some provisions of the GDPR.

Further, pursuant to Recital 146 GDPR damages shall only be awarded under Article 82 GDPR for damage resulting from data processing. According to the intention of the European legislator, a transfer was hence not supposed to invoke damages claims under Article 82 GDPR. However, Article 82 GDPR does not contain such a limitation to data processing, but rather applies by its wording to any "infringement of this Regulation", i.e. also of Articles 44 et seq. GDPR. Moreover, Recital 146 only requires the "resulting" of damages from a data processing. "[R]esulting" does not require the connection between a data processing and a damage to be strictly causal. A loose connection is also sufficient. As follows from the broad wording of Article 82 GDPR, the legislator wanted to provide a comprehensive liability norm.

Moreover, also Article 44 GDPR recourses to the terms data processor and data controller. However, the data transfer does not necessarily constitute a data processing. Hence, the European legislator – contrary to the definition in Article 4(7),(8) GDPR – has not consistently associated the terms data processor and data controller with a data processing. Also, Article 44 GDPR refers to the "other provisions of this Regulation" and mentions the onward transfer explicitly. This implies the intention of the legislator for the provisions in Chapter V being not supposed to be a conclusive regulation.

However, the massive widening of the scope of application of the GDPR associated with such an extension of the obligations to all obligations of the GDPR for third-country data processors

149 See e.g. Article 79(2), 82 GDPR or Article 5, 6 GDPR.
150 See above A.I.3.a)(2).

or data controllers not falling within the scope of Article 3 GDPR militates against such an expansion. Personal data which were subject to the GDPR even once would also be subject to the same obligations stipulated by the GDPR for all future data processing. This would, however, run counter to the differentiated system of the GDPR. In particular, it would render the provisions set out in Articles 44 et seq. GDPR superfluous, as any processing of this data in a third country would also have to fully comply with the GDPR.

Hence, for a data processor or data controller outside the scope of Article 3 GDPR, only the provisions of Chapter V of the GDPR are applicable to a transfer in a third country or to an international organisation.[151]

b) Data Processing of the Recipient of the Personal Data Subject to the GDPR

Separate from this question, it must be examined for which processing of the transferred data the provisions of the GDPR must be observed by the recipient in the third country or the international organisation. Article 44 GDPR exclusively deals with the transfer of data as such.[152] Thus, contrary to its slightly misleading wording, Article 44 GDPR does not subject all data processing by the receiving data processor or data controller to the GDPR. The other provisions of the GDPR must therefore only be complied with insofar as they deal with the transfer of the data. The obligation to comply with the GDPR is hence limited to the duties stipulated in Articles 44 et seq. GDPR.[153] Compliance with the other provisions of the GDPR is only required if the recipient of the data itself falls within the scope of the GDPR.

This interpretation of Article 44 GDPR also follows from Recital 101 GDPR. According to the second sentence of Recital 101 GDPR, in the case of a data transfer from a third country to another third country, the maintenance of a consistent level of protection should always be guaranteed if the transfer has its origin in the European Union. Additionally, the third sentence of this Recital requires that, notwithstanding this ("in any event"), the regulations of the GDPR must be always observed with respect to the transfer of data. The European legislator therefore intended the level of protection under the GDPR to always apply to a data transfer regardless of its origin, provided the data once fell within the scope of application of the GDPR. In this way and in tandem with Article 3(2) GDPR, the European legislator ensures personal data

151 See also Daniel A. Pauly, 'Art. 44 DS-GVO', in Boris P. Paal and Daniel A. Pauly (eds), *Datenschutz-Grundverordnung Bundesdatenschutzgesetz* (3rd edn, C.H. Beck 2021) para 14.

152 See also Daniel A. Pauly, 'Art. 44 DS-GVO', in Boris P. Paal and Daniel A. Pauly (eds), *Datenschutz-Grundverordnung Bundesdatenschutzgesetz* (3rd edn, C.H. Beck 2021) para 15.

153 Spiros Simitis, 'Art 44 DSGVO', in Spiros Simitis, Gerrit Hornung and Spiecker genannt Döhmann (eds), *Datenschutzrecht* (Nomos 2019) para 31.

having been subject to the protection of the GDPR once may not be subsequently withdrawn from this protection by transferring the data to a third country.[154]

This also follows from Article 44 GDPR, as Articles 45 et seq. GDPR would be largely superfluous if the GDPR were fully applicable to any data processing by a data recipient in a third country or an international organisation. Further, Articles 44 et seq. GDPR allow an onward transfer under the requirements set out in Articles 45-47 GDPR. Therefore, data processing by the recipient in a third country or by an international organisation does not require strict compliance with the GDPR, but only compliance with Articles 45-47 GDPR.

Thus, the provisions of the GDPR only have to be observed by a data processor or data controller in a third country or an international organisation outside the scope of the GDPR when it comes to an onward transfer. However, this also leads to an extension of the scope of application of the GDPR beyond Article 3 GDPR since the transfer of a third country data processor or data controller to another third country data processor or data controller is sometimes not covered by Article 3 GDPR.

5. Interim Conclusion

Hence, the GDPR may in principle be applied in two different ways. Firstly, Article 3 GDPR opens up the scope of application of the GDPR in its entirety. Secondly, Article 44 GDPR leads to the partial application of the GDPR to data transfers in situations in which the connection to the European Union is clearly loosened. Pursuant to Article 44 GDPR, the GDPR is partly also applicable if data are transferred onwards from a third country or an international organisation. This leads to a considerable extension of the scope of the GDPR, as parts of it apply directly to any further data transfer. The effects of the GDPR extend far beyond this, however. Indirectly, Articles 45-47 GDPR often ensure a level of protection comparable to the level provided by the GDPR. Moreover, Article 45 GDPR in particular causes other legislators to adjust their legislation to the level of data protection laid down in the GDPR when creating their own data protection laws.

All in all, the newly established criteria stipulated in Article 3(2) GDPR and the explicit inclusion of the onward transfer in Article 44 GDPR emphasise an extension of the scope of application of the GDPR. They highlight the intention of the European legislator to explicitly address firstly situations in which the data subject and the data processor or data controller are located in different countries. Secondly, the scope of application of European data protection

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154 See for Article 3(2) GDPR Michèle Finck, 'Blockchains and Data Protection in the European Union' (2018) 4 European Data Protection Law Review 17, 27.

law should also be extended to such situations, where the personal data are located outside the European Union. This extension of the scope of application of the GDPR also clarifies the concept of the "territorial scope of application" not being defined in a way merely following territorial criteria.[155] Rather, it serves the legislator's self-restriction in relation to the legal systems of other jurisdictions on the legal consequences. The rules in Articles 3 and 44 GDPR illustrate the European legislator's assumption of the GDPR's applicability in cross-border situations, provided there is a sufficient connection to the European Union.

II. Scope of Application and the Applicable Law

Thus, Articles 3, 44 GDPR contain rules which, with reference to territorial elements, regulate the applicability of at least parts of the GDPR. According to its title, however, Article 3 GDPR only addresses the territorial scope of the GDPR. The territorial scope determines under which territorial requirements the GDPR assumes its own applicability. In contrast, it leaves unanswered the question when the GDPR as such is applicable in relation to the laws of other jurisdictions. Especially, it does not address the conditions to be met in order for Article 3 GDPR in turn to decide on the applicability of the GDPR.[156]

Not every rule on the territorial scope of application is intended by the national legislature to provide at the same time a rule on the relationship with other legal provisions, in particular those laws of other legislators. A similar issue arises for the Air Passengers Rights Regulation[157], a legal act of the European Union. Article 3 Air Passengers Rights Regulation also defines the territorial scope of the Regulation. However, the relationship between the Regulation and the conflict of laws and the requirements under which the Regulation applies are also addressed in the literature.[158]

If the issue arises as to whether the GDPR applies to a cross-border situation, two questions need to be answered. First, it must be examined to what extent the GDPR itself can be relied upon to determine when it applies in such cross-border situations. To tackle this question, it must first be determined whether and to what extent the territorial element of a situation might generally affect the application of a law in cross-border cases (1.). In the following, the legal

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155 The use of the term "territorial scope" is also addressed by Mistale Taylor, 'Permissions and Prohibitions in Data Protection Jurisdiction' (2016) 2 Brussels Privacy Hub Working Paper <https://brusselsprivacyhub.eu/BPH-Working-Paper-VOL2-N6.pdf> accessed 10 December 2023, 13.

156 See also Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 220 et seq.

157 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L 46/1.

158 Björn Steinrötter and Stefan Bohlsen, 'Art. 3', in Jan Dirk Harke (ed), *beck-online.GROSSKOMMENTAR Fluggastrechte-VO* (C.H. Beck 2023) para 134 et seq.

nature of data protection law will be examined and to what extent the legal nature influences the determination of the applicable data protection law for claims under private law (2.). Subsequently, the issue is addressed as to the means by which the conflict of laws determines the applicable law and the role the conflict of laws attributes to substantive legal acts containing provisions on their territorial scope of application (3.).

1. The Spatial Element in the Application of the Law

In order to assess the relevance of the territorial scope of application of Articles 3, 44 GDPR with respect to the conflict of laws, the significance of the spatial element of a provision must be analysed. Three general dimensions at which a spatial element of a provision may become relevant can be identified. Firstly, the territorial element may be important in determining the applicable law. Moreover, it may also influence the definition of the territorial scope of application of a provision as well as the territorial extent of the legal consequences. In the following, it will be examined in detail what is meant by these dimensions and how they influence the application of a law (a). Afterwards, the relationship between provisions determining the territorial scope of application and provisions regulating the applicable law is to be defined. In addition, the relationship between the applicable law and the territorial scope of application and the legal consequences permissible under this law will be addressed (b). The detailed examination of these different dimensions is particularly relevant since the reach of a legal system can only be assessed from the interplay between the applicable law and the territorial scope of application on the one hand and the legal consequence on the other hand.

a) The Scope of the Law

The scope of application is a legal mechanism allowing the legislator to define situations which are subject to and those which are not covered by a specific law. Typically, a regulation on the scope of application consists of but also requires two elements on the facts side and one element on the legal consequences side. On the facts side, a regulation on the scope of application first states the provision or the set of provisions for which the regulation dealing with the scope of application provides a rule. This provision or set of provisions is the object of regulation. Besides this, the regulation on the scope of application requires a factual situation which serves as a differentiating criterion for the applicability of the object of regulation. The legislator may hereby in principle take recourse to four different criteria when describing the required factual situation: It can link the applicability of the law to certain temporal, personal, substantive or spatial requirements. Irrespective of the precise design of the criteria in detail, the definition of a scope of application limits in any event the applicability of the object of regulation. The

respective provision addressed by the regulation on the scope of application is only applicable if the requirements of the scope of application are met. On the legal consequences, regulations on the scope of application decide on the applicability or non-applicability of the specific object of regulation.

The definition of the scope of application of a provision or of a set of provisions may have two fundamentally different effects on the legal system of a state. The definition may shift the scope of application of the rules within the legal system. It may, however, also change the scope of the entire legal system. Firstly, the definition of the scope of application may lead to the application of the law defined by this scope instead of another rule of the same legal system. In these cases, the scope of application therefore results in rules applying to the situations covered by the scope which deviate from the general rules of this legal system. Secondly, the definition of the scope of application may also result in a legal system being applied to situations to which this legal system would not be applicable according to the otherwise applicable, more general rules. In contrast, the definition of a scope of application may also render facts outside the defined scope of application unregulated by this legal system. In such cases, the fulfilment of the requirements of the scope of application results in the facts of the case being governed by this specific legal system.

In principle, the legislator is free to define the scope of application of a law. The scope of application may expand to those facts which would not be covered if the legislator had refrained from defining the scope of application. For example, a regulation on the temporal scope of application may order the application of the law also to facts which took place before the law came into force. The territorial scope of application can also be defined in such a way to cover situations outside the territory of the state and thus outside the initial regulatory framework.[159] Provisions on the scope of application may thus both extend and restrict the scope of the general provisions of a legal system. Whether such a regulation of the scope of application is compatible with national and international law is however a question that must be answered seperately.

With regard to the legal consequences, a regulation on the scope of application decides on the applicability of a specifically defined provision or set of provisions. It therefore does not answer the question of which provision or law is to be applied to a situation, but rather whether a situation is regulated by a specific provision or set of provisions. It neither contains any explicit statement regarding the applicability or non-applicability of other laws or legal systems.

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159 Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 5.

b) The Applicability of the Law as a Requirement for Determining the Scope of the Law

The legislator may hence determine the requirements under which a regulation is supposed to apply by regulating the scope of application of a provision. However, the provision does not apply in any situation once its scope is given. Admittedly, the order to apply a provision by the legislator is in general mandatory. A provision is thus to be applied if its scope of application has been opened up and the parties have not made any deviating agreement, or a deviating agreement is not allowed.

However, the scope of application of a law does not answer the question of which legal system the facts as such are subject to. As analysed above, the scope of application determines exclusively whether the provisions of the respective law should apply to the facts of the case. However, the scope of application by itself does not indicate the applicability of this legal system to a particular case. As seen, in the absence of the requirements set out by the scope of application, the general rules of the same legal system which do not contain any provisions on the scope of application might also apply. Further, the legislator could have deliberately refrained from establishing a provision despite its legal system being applicable potentially resulting in an unregulated situation. These implications of the territorial scope are particularly relevant if the territorial scope of application of the laws of several legal systems is opened up simultaneously. In these cases, the rules on the scope of application may not provide an answer to the question of which legal system governs the matter. Thus, the scope of application of a law in principle does not provide any information on the applicability of a legal system as such. First of all, it hence needs to be identified which of the legal systems is to apply. For private-law relationships, this function is performed by the conflict of laws.[160]

(1) Determining the Applicable Law with Recourse to Public International Law

Nor can it be argued in this respect for a determination of the applicable law in isolation from conflict of laws. An approach might be conceivable in which the applicable law is determined by means of two stages. Following this approach, in a first stage, it would be examined whether the territorial scope of a provision has been opened up. In a second stage, it would need to be assessed whether the respective legislator is allowed to regulate the facts in question at all under public international law. Specifically, it would have to be examined whether the territoriality

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160 Dominique Bureau and Horatia Muir Watt, *Droit international privé, Tome 1* (5th edn, puf 2021) para 16; Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 7; Christian v. Bar and Peter Mankowski, *IPR, Band I* (2nd edn, C.H. Beck 2003) § 1 para 1, 3; this method represents a functional approach. As far as can be seen, a formal approach is not supported by anyone.

principle under public international law does not preclude the application of the law to the respective cross-border situation.[161]

The reliance on principles of public international law to determine the law applicable in these situations has two fundamental shortcomings. First, it confuses the question of legal capacity with that of lawfulness under public international law. The mere fact of a legislature being not permitted under public international law to regulate a situation does not automatically limit its ability to establish a regulation for this situation. In other words, the mere violation of public international law by creating a rule does not prevent a legislature from establishing this rule.[162] Even if provisions are to be interpreted in accordance with public international law in individual cases, the legislature cannot be prevented from claiming a more extensive scope of regulation for its rules.

Secondly, due to its objectives and addressees, public international law is also not suited to determine the applicable law in private-law relationships. Even though public international law addresses not only states, it is mainly focussed on the relation between states and the limitation of their power. Rights to individuals are granted only on an exceptional basis.[163] Against this backdrop, the considerations governing public international law do not primarily take the perspective of the individual but of states into account. Public international law therefore deals primarily with the question of how far a state's laws might reach.[164] It thus serves to restrict the exercise of state authority beyond the territory of a state.[165] By contrast, private international law does not focus on limits but is supposed to determine the law most suitable to the facts, to provide predictability to legal relationships, do justice to their legitimate interests and foster

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161 See on the influence of the territoriality principle (which is also referred to as territory principle) Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015) 42-84; see for the relation of public international law and private international law Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009).

162 Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015) 47 et seq.; see also Gerrit Betlem and André Nollkaemper, 'Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14 European Journal of International Law 569, 573, 576 et seq. stressing that the applicability of international law sometimes requires transposition into national law and that the principle of consistent interpretation is limited to the text of the national law; different probably however Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009) 244 according to whom conflict-of-laws rules are shaped by public international law.

163 Simone Gorski, 'Individuals in International Law', *Max Planck Encyclopedia of Public International Law* (August 2013) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e829> accessed 11 December 2023 para 19-43.

164 Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford University Press 2015) 6, 48.

165 Menno T Kamminga, 'Extraterritoriality', *Max Planck Encyclopedia of Public International Law* (September 2020) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1040> accessed 11 December 2023 para 7.

due process.[166] The different orientation of public and private international law is also reflected in the manner in which public international law coordinates the relationship between the various legal systems. In public international law, there is no assumption as to the situation being regulated only once. Therefore, situations with multiple jurisdictions frequently arise in public international law. The consequences of multiple laws applying to the same facts are hence managed rather than avoided by public international law.[167] Unlike private international law, public international law therefore is not meant for determining a single applicable law. Instead, it accepts the simultaneous applicability of several legal systems. It does not strive for the law that best suits the interests of the parties involved in resolving a dispute. Hence, public international law may establish only the outer limits to legal systems if they apply their law to facts to which this legal system does not have any link at all.[168] Within these limits, conflict of laws is supposed to determine the most suitable law.[169] Therefore, public international law is based on different considerations, which renders public international law inappropriate for determining the applicable law in a private-law relationship.

For these reasons, approaches which attempt to derive the applicable law to a private-law relationship from public international law are scarcely followed today. The principles underlying public international law are nowadays only relied on occasionally and as just one criterion among many when determining the applicable law.[170]

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166 Lucas Roorda and Cadric Ryngaert, 'Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction in Civil Matters', in Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction* (Brill 2021) 74, 75.

167 James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 440.

168 Thomas Pfeiffer, 'Private International Law', *Max Planck Encyclopedia of Public International Law* (January 2008) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1458> accessed 11 December 2023, para 3; see also Alex Mills, 'Public international law and private international law', in Jürgen Basedow, Klaus J. Hopt and Reinhard Zimmerman (eds), *Max Planck Encyclopedia of European Private Law*, vol 2 (Oxford University Press 2012) 1450 et seq.

169 This understanding of the relation of public and private international law with regard to jurisdiction is also advocated for by the European Court of Human Rights (ECtHR), see ECtHR, *Naït-Liman v Switzerland* App no 51457/07 (ECtHR, 15 March 2018) and Lucas Roorda and Cadric Ryngaert, 'Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction in Civil Matters', in Serena Forlati and Pietro Franzina (eds), *Universal Civil Jurisdiction* (Brill 2021) 74, 76, 84, 85; also the Fourth Restatement is heading in a similar direction arguing that states often limit their jurisdiction to a greater extent than necessary under public international law and that this limitation is primarly rather an expression of comity than of public international law, see Restatement of the Law, Fourth: Foreign Relations Law of the United States (American Law Institute 2018) reporters' note 1 Section 422.

170 Alex Mills, 'Public international law and private international law', in Jürgen Basedow, Klaus J. Hopt and Reinhard Zimmerman (eds), *Max Planck Encyclopedia of European Private Law*, vol 2 (Oxford University Press 2012) 1449 et seq.; Thomas Pfeiffer, 'Private International Law', *Max Planck Encyclopedia of Public International Law* (January 2008) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1458> accessed 11 December 2023, para 3-4; however, the so called political school still plays an important role in the USA, see on this question comprehensively Giesela Rühl, 'Private international law, foundations', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 1387 et seq.

(2) Categorisation of Provisions on the Scope of Application as Conflict-of-Laws Rules

To determine the legal consequences following from a given set of facts, it is therefore necessary to first identify the law applicable to the legal question. Only then the specific legal consequences may be determined in a further step. At a first glance, substantive provisions and conflict-of-laws provisions seem to have fundamentally different functions. According to the conventional distinction, substantive and conflict-of-laws provisions may already be distinguished linguistically by means of a formal criterion based on their wording. Substantive rules provide a decision on the merits of the case, whereas conflict-of-laws rules refer to another rule. This formal difference is reflected in the function of conflict of laws in substantive terms. Conflict of laws is characterised by the fact of not regulating the merits of the matter, but rather stipulating the application of a national substantive rule.[171]

According to these conventional distinctions, Articles 3, 44 GDPR would have to be classified as a conflict-of-laws rule. Article 3, 44 GDPR itself does not provide any substantive rule but only declares substantive rules – the GDPR – to be applicable. They are therefore provisions of conflict of laws from both a formal and a substantive point of view. However, it is unclear whether these definitions are suitable for conclusively characterising conflict-of-laws provisions, particularly with regard to provisions on the scope of application. As we have seen, a rule which distinguishes the applicable provision or set of provisions according to factual criteria within a legal system is to be categorised as a rule which regulates the scope of application. By contrast, a conflict-of-laws rule is characterised by regulating the relationship between the rules of different legal systems rather than the relationship between the rules of one legal system.[172] Therefore, the absence of a specific substantive legal consequence in a provision is not a suitable criterion for categorising provisions on the scope of application as a conflict-of-laws rule.

Against this backdrop, the categorisation of Articles 3, 44 GDPR as conflict-of-laws rules is unclear. According to their wording, Articles 3, 44 GDPR could at first glance only distinguish between data processing which is subject to the provisions of the GDPR and other data processing which is subject to a more general regulation or no regulation at all under the same

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171 Katharina Boele-Woelki, 'Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws' (2016) 340 Recueil des Cours 285, 289; see also Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 3; on these two different approaches to define conflict-of-laws rules see Gerhard Kegel, 'Die selbstgerechte Sachnorm', in Erik Jayme and Gerhard Kegel (eds), *Gedächtnisschrift für Albert A. Ehrenzweig (1906-1974)* (C.F. Müller 1976) 51, 75-77.

172 See above A.II.1.b).

legal system. Furthermore, it cannot be derived immediately from the wording of these provisions whether they additionally require the GDPR as such to be applicable. Articles 3, 44 GDPR may also render the provisions of the GDPR applicable in relation to other legal systems if the conditions of Articles 3, 44 GDPR are met. Hence, on the one hand, Articles 3, 44 GDPR might merely serve to distinguish the legal consequences within the same legal system. On the other hand, Articles 3, 44 GDPR may also not only distinguish the legal consequences within the same legal system but also from the legal consequences of other legal systems. A particular argument in favour of this latter interpretation might be that Articles 3, 44 GDPR, according to their wording, do not presuppose the applicability of European law as such. Articles 3, 44 GDPR could thus be read as being the only requirement necessary for the application of the GDPR. In this case, Articles 3, 44 GDPR would provide also an interjurisdictional or – to use conventional terminology – a conflict-of-laws regulation.

Articles 3, 44 GDPR is exemplary for a legal question relevant to a multitude of provisions regulating the scope of a legal instrument. For these provisions it is unclear, when a provision on the scope of application is limited to regulate the territorial scope of application and when such a provision in addition determines the law applicable in relation to the law of other legal systems. In view of the large number of provisions dealing with the regulation of the scope of application, a uniform answer to this question is impossible. This is all the more true as these provisions belong to the most diverse areas of law and are structured very diversely in detail. In the following, this question will therefore primarily be addressed with regard to Articles 3, 44 GDPR. However, it will also be considered to which extend the conclusions drawn can be extended to other provisions on the scope of application.

Provisions on the territorial scope of application therefore first have to be rendered applicable by the conflict of laws. This task may also be assigned to the provision on the territorial scope of application itself. However, the categorisation of provisions on the territorial scope of application as conflict-of-laws rules is fraught with difficulties. This issue arises not only, but also for Articles 3, 44 GDPR.

2. The Determination of the Applicable Data Protection Law by Means of Conflict of Laws

When assessing how the applicable data protection law is determined, the first question arising is whether conflict of laws is at all an appropriate means for determining the applicable data protection law.[173] This could be doubted since data protection law is a legal matter being subject

[173] This question is raised by Daniel Cooper and Christopher Kuner, 'Data Protection Law and International Dispute Resolution' (2015) 382 Recueil des Cours 9, 155, 157.

to both public and private law.[174] Especially the GDPR contains some provisions which typically serve to regulate private-law relationships, such as the rights under Articles 13 et seq. GDPR or the right to compensation under Article 82(1) GDPR. However, the GDPR also serves to regulate the relation between an individual and the authorities. It thus also protects public interests. An expression of this are Articles 83, 84 GDPR, which provide for fines and administrative sanctions. Further, Article 6(1) lit. e) GDPR authorises processing of personal data necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. These types of provisions are typical public-law rules.

However, the combined presence of public and private-law rules in a single legal act is not a peculiarity of data protection law. Also in international labour law and the so-called international economic law, which are both characterised also by public-law rules, the question arises to what extent the applicable law is determined by conflict of laws.[175] This issue arises also in the area of international antitrust tort law, which is governed by Article 6 Rome II Regulation. It is especially disputed, whether Article 6(3) Rome II Regulation only determines the applicable antitrust tort law, while the applicable market rules are determined separately. In contrast, Article 6(3) Rome II Regulation might also regulate the applicable law conclusively.[176] In addition, also preliminary questions concerning public law may arise in private-law relationships. This applies, for example, to the question of nationality as a preliminary issue. Also a breach of conduct in a private-law relationship may be derived from a violation of a public-law rule. In addition to the diversity of areas in which public law may become relevant to conflict of laws, the range of issues which may arise at the interface between public law and conflict of laws is also manifold.[177] Whether the applicability of public law can be determined by means of conflict of laws will therefore only be considered in more detail with regard to the aspect relevant here. The decisive factor for the conflict of laws of data protection is the extent to which, in a legal dispute between private parties based on claims

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174 Lee A. Bygrave, 'Determining Applicable Law pursuant to European Data Protection Legislation' (2000) 16 Computer Law & Security Report 252; Daniel Cooper and Christopher Kuner, 'Data Protection Law and International Dispute Resolution' (2015) 382 Recueil des Cours 9, 58.

175 Olaf Deinert, *International Labour Law under the Rome Conventions* (C.H. Beck, Nomos, Hart 2017) section 1 para 32, 34, 36; Karl-Heinz Fezer and Stefan Koos, *Staudinger Internationales Wirtschaftsrecht* (De Gruyter 2019) Einleitung para 4; see on the different conceptions of International Economic Law Sergei A. Voitovich, *International Economic Organizations in the International Legal Process* (Martinus Nijhoff 1995) 6 et seq.

176 Comprehensively Stéphanie Francq and Wolfgang Wurmnest, 'International Antitrust Claims under the Rome II Regulation' in Jürgen Basedow, Stéphanie Francq and Laurence Idot (eds), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart Publishing 2012) 91, 107 et seq.

177 See on this F. A. Mann, 'Conflict of Laws and Public Law' (1971) 132 Recueil des Cours 107.

among them, provisions of public law governing the existence and scope of the claim can be referred to by conflict of laws.

Thus, it is unclear to what extent conflict-of-laws rules as such are at all appropriate to provide guidance on the law applicable to data protection.[178] In other words, it is doubtful whether conflict of laws, which according to its alternative wording "private international law" seems to address exclusively private law, is at all suitable to determine the applicable data protection law. However, this question cannot be limited to a simple yes or no answer. Rather, it is to be established if the applicable data protection law is determined by the means of conflict of laws. It is then to be investigated how conflict of laws identifies the applicable data protection law. Therefore, three issues arise in this context: First of all, it has to be examined whether conflict of laws is at all suitable to determine the applicable data protection law (a). Then it must be analysed whether data protection law is covered by the general conflict-of-laws rules (b) and how this is established (c).

a) The Determination of the Applicable Public Law by Means of Conflict of Laws

Firstly, it is to be analysed whether the applicable data protection law can be determined at all by taking recourse to the rules of conflict of laws, given its strong ties to public law.[179] It could be argued for the applicable data protection law not to be subject to conflict of laws because of its relation to public law, but to be determined according to its own rules.[180] In particular, it is partly assumed of conflict of laws exclusively determining the applicability of rules of private law, whereas the applicable public law is assessed by its own conflict-of-laws rules.[181] It is also

178 See on this issue already Daniel Cooper and Christopher Kuner, 'Data Protection Law and International Dispute Resolution' (2015) 382 Recueil Des Cours 9, 150 et seq.

179 In the United States in particular, this discussion is held under the term "public law taboo". However, it is questionable what can be drawn from this for the debate in the context of European private international law. This is especially true since the "public law taboo" deals exclusively with the court's jurisdiction to rule on foreign public law (Hannah L. Buxbaum, 'Remedies for Foreign Investors under U.S. Federal Securities Law' (2012) 75 Law & Contemporary Problems 2012, 161, 174 et seq.). In addition, the public law taboo in the United States seems also to be on the retreat (William S. Dodge, 'Breaking the Public Law Taboo' (2002) 43 Harvard International Law Journal 161, 185).

180 Felix Zopf, 'Two Worlds Colliding – The GDPR in Between Public and Private Law' (2022) 8 European Data Protection Law Review 210, 212 et seq., 216 et seq.; Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 1.22.

181 Kurt Lipstein, 'The Hague Conventions on Private International Law, Public Law and Public Policy' (1959) 8 International and Comparative Law Quarterly 506, 517 with further references; Allan Philip, 'Mandatory Rules, Public Law (Political Rules) and Choice of Law in the E.E.C. Convention on the Law Applicable to Contractual Obligations' in Peter M. North (ed), *Contract Conflicts* (North-Holland 1982) 81, 85 but already different David Jackson 'Mandatory Rules and Rules of "Ordre Public"' in Peter M. North (ed), *Contract Conflicts* (North-Holland 1982) 59, 60; Insofar as the authors address the predecessor provisions in the 1980 E.E.C. Convention on the Law Applicable to Contractual Obligations, it should be noted that although the wording was partially changed, no substantive change was intended (Jonathan Harris, 'Mandatory Rules and Public Policy under the Rome I Regulation' in Franco Ferrari and Stefan Leible (eds), *Rome I Regulation* (sellier 2009) 269, 271 fn. 10); see for a historical summary of the discussion Ivana Kunda, 'Defining Internationally Mandatory Rules in European Private International Law of Contracts' (2007) 4 Zeitschrift für Gemeinschaftsprivatrecht 210, 212; see on a

argued for public law pursuing objectives which differ significantly from private law. While private law serves the individual interests of the parties, public law is a mean to pursue the interests of the state. A uniform approach under conflict of laws balancing the interests of the parties would not take sufficient account of the interests of the states involved in applying the law.[182]

(1) The Difficulties in the Distinction between Public and Private law

However, a complete exclusion of public law and hence also at least of parts of data protection law from the scope of conflict of laws would cause some difficulties. In general, the distinction between private law on the one hand and public law on the other hand is too formalistic. Further, it is handled differently in the various jurisdictions.[183] Also, this distinction does not take adequate account of the special interests underlying conflict of laws.[184] Some are even calling for the separation between private and public law to be abandoned.[185] This is all the more relevant as public law with effects on private-law relationships has become more and more widespread in recent years, thereby influencing the legal assessment of private-law relationships.[186] The expansion of public law leads to an increased intermingling of public and private regulatory interests in a single regulation. A strict differentiation between public and private law is thus increasingly complicated. Nowadays, some even argue for the existence of provisions of a jointly public and private law nature.[187] Additionally, a strict differentiation

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similar discussion for the conflict-of-laws of antitrust torts Stéphanie Francq and Wolfgang Wurmnest, 'International Antitrust Claims under the Rome II Regulation' in Jürgen Basedow, Stéphanie Francq and Laurence Idot (eds), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart Publishing 2012) 91, 108 et seq.

182 Kreuzer, *Ausländisches Wirtschaftsrecht vor deutschen Gerichten* (C.F. Müller 1986) 81 et seq.

183 Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 80; Ulrich Magnus, 'Art 9 Rom I-VO', in Christian Armbrüster, Werner F. Ebke, Rainer Hausmann and Ulrich Magnus (eds), *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 50; see also Ralf Michaels, 'Public and Private International Law: German Views on Global Issues' (2008) 4 JPIL 2008, 121, 123; Burkhard Hess, 'The Private-Public Divide in International Dispute Resolution' (2018) 388 Recueil des Cours 49, 73. For the United States see George A. Bermann, 'Public Law in the Conflict of Laws' (1986) 34 American Journal of Comparative Law Supplement 157; Symeon C. Symeonides, *Codifying Choice of Law Around the World* (Oxford University Press 2014) 293; on the historic development in the US see Symeon C. Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism General Course on Private International Law' (2017) 384 Recueil des Cours 9, 101 et seq.

184 See also Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 14-004 dealing with a judgment of the German Federal Court who denied the applicability of a provision on fixed rates due to its public law nature.

185 See the reference cited by Burkhard Hess, 'The Private-Public Divide in International Dispute Resolution' (2018) 388 Recueil des Cours 49, 77 fn. 41.

186 F. A. Mann, 'Conflict of Laws and Public Law' (1971) 132 Recueil des Cours 107, 117.

187 See e.g. the Air Passengers Rights Regulation establishing on the one hand claims for damages and compensations in the relation between the airline and the passenger but also obliges the member state on the other hand to introduce sanction in case of a breach (Article 16(1),(3) Air Passengers Rights Regulation); this is not only a phenomenon at European level, but is also being discussed, for example, with regard to §§ 63 et seq. German Securities Trading Act (WpHG); see on those provisions conclusively

requires a characterisation of public and private law. Such a characterisation, however, gets progressively difficult as state interest increases.[188] This effort would only be justified if potential differences between and specialities of public and private law could not otherwise be taken into account when determining the applicable law. The difficulties of unambiguously categorising a provision as public or private law weighs in favour of determining the applicable law by means of a single regulatory system. Any special features and needs of individual regulations may be taken into account under this regulatory system, regardless of their legal nature.

Additionally, irrespective of their legal nature, provisions often have effects under public and private law.[189] For example, it makes no difference to the invalidity of a contract under private law because of a statutory prohibition whether the prohibition is imposed by a provision of public or private law. It is unclear, however, why the applicability of a provision, which is by its legal nature public law, should not be determined by conflict of laws with regard to its legal consequences under private law. In this respect, the provision does not differ from any private law provision.

(2) The Subject Matter of Conflict of Laws

Further, one must not lose sight of the subject matter of conflict of laws. This legal area does not regulate which private-law provisions are applicable to the facts of the case.[190] The conflict of laws rather strives to determine – at least as it is the case for the conflict of laws of the European Union – the law applicable to a private-law relationship.[191] As it is regularly stated by the conflict-of-laws rules not only of the European Union, the conflict of laws applies to civil and commercial matters.[192] Conflict of laws, when determining the applicable law in a

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Kay Rothenhöfer, 'Vor §§ 63 ff. WpHG', in Eberhard Schwark and Daniel Zimmer (eds), Kapitalmarktrechts-Kommentar (5th edn, C.H. Beck 2020) para 9 et seq., 11, who however rejects the assumption of such a dual legal nature.

188 David Jackson, 'Mandatory Rules and Rules of "Ordre Public"' in Peter M. North (ed), *Contract Conflicts* (North-Holland 1982) 64.

189 Abbo Junker, *Internationales Arbeitsrecht im Konzern* (Mohr Siebeck 1992) 117 et seq. on regulations in relation of labour law.

190 See e.g. Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 1 (16th ed Sweet & Maxwell 2022) para 1-001, according to who "conflict of laws is that part of the law [...] which deals with cases having a foreign element" and similarly Hill and Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2015) para 1.1 "conflict of laws deals with cases […] which have connections with foreign countries."; different, however, the definition of Gerhard Kegel, 'Introduction', *International Encyclopedia of Comparative Law* (15 November 1985) I-33: "The rules of private international law determine which national private law applies."

191 See on this from a U.S. Common law perspective William S. Dodge, 'The Public-Private Distinction in the Conflict of Laws' (2008) 18 Duke Journal of Comparative & International Law 371, 393.

192 See e.g. Article 1(1) Rome I Regulation, Article 1(1) Rome II Regulation; such a limitation is not specific to European conflict-of-laws rules but is also used in the Hague Conventions; see e.g. Article 1(1) Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or

specific case, is thus not considering the legal nature of the provision to which it potentially refers. Rather, it defines its applicability based on the legal nature of the relationship from which the claim in question is derived.[193]

This wording in the respective conflict-of-laws acts is not a mere coincidence. Rather, it is an articulation of a particular method of determining the applicable law. It corresponds namely to the multilateral view of European conflict of laws, as developed and shaped especially by Friedrich Carl von Savigny. The previously prevailing statutists theories determined the applicable law by analysing the specific provisions whose applicability is in question.[194] The approach developed by Savigny, in contrast, seeks the seat of a legal relationship and regularly refers to all provisions being part of the legal system designated by the conflict-of-laws rule.[195]

(3) The Ban on the Enforcement of Foreign Public Law

Lastly, the assessment of the applicable public law by means of conflict of laws is also not precluded by the so called "public law taboo". This principle is discussed in particular in common law but also in other jurisdictions. According to this principle foreign public law may not be enforced by the courts.[196] Regardless of how relevant this principle may still be in the present day, this principle does not in any event preclude mere applying or taking account of foreign public law.[197]

The irrelevance of the public law taboo is evidenced by the Swiss IPRG. Article 13 Swiss IPRG expressly states the applicability of the law referred to regardless of its legal nature. Further, the application of a provision of foreign law is not excluded merely because it is ascribed the character of public law. Even though this provision has only direct effect to the Swiss legal

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Commercial Matters and Article 1 Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

193 Consequently, this does not cover the assertion of such claims in which sovereign claims as can only arise in the relationship between a sovereign and a private party are raised. This also applies if these claims are asserted by private parties. See Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (2011) 348 Recueil des Cours 9, 241. But different Jürgen Basedow, 'The Law of Open Societies – Private Ordering and Public Regulation of International Relations' (2013) 360 Recueil des Cours 9, 324 et seq., who seems to assume the general possibility to pursue this type of claim in foreign civil courts.

194 Giesela Rühl, 'Private international law, foundations', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 1385 et seq.

195 Frank Vischer, 'General Course on Private International Law' (1992) 232 Recueil des Cours 15, 166.

196 Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 1 (16th ed Sweet & Maxwell 2022) 8R-001 et seq.; Adrian Briggs, *The Conflict of Laws* (4th edn, Oxford University Press 2019) 183 et seq.

197 See on this exhaustively Anatol Dutta, *Die Durchsetzung öffentlichrechtlicher Forderungen ausländischer Staaten durch deutsche Gerichte* (Mohr Siebeck 2006) 28 et seq.; this point is also made by Adrian Briggs, *The Conflict of Laws* (4th edn, Oxford University Press 2019) 187-190.

system, it underlines the conflict of laws' potential ability of declaring public law provisions applicable.

(4) Interim Conclusion

As seen, the point of reference of European conflict of laws is thus precisely not the respective foreign regulation and its legal nature but the nature of the legal relationship which underlies the respective claim. From the reasons mentioned above also follows that the distinction between the formal categories of private and public law for conflict of laws is impossible. It is also not a category which could contribute to the identification of the applicable law.[198] The distinction between public and private law for conflict of laws is therefore not reflected in European conflict-of-laws rules.[199] This is specifically evident in Swiss conflict of laws, which expressly emphasises the irrelevance of the legal nature of the law referred to in Article 13 Swiss IPRG. Therefore, in a private-law relationship, public international law is limited to regulating the extent to which an individual state is allowed to adopt regulations. In contrast, conflict of laws determines when the corresponding regulations apply to a private-law relationship which is based on a cross-border situation.[200]

b) The Determination of the Applicable Public law by the General Conflict-of-Laws Rules

Thus, the applicable data protection law, irrespective of its legal nature, is determined by the conflict of laws for claims based on a genuinely private-law relationship. However, the subsequent issue arises whether conflict of laws grants special treatment to the provisions of data protection law merely on account of their legal nature.[201]

This issue must not be confused with the extent to which public law being not part of the *lex fori*, *lex causae*[202] or *lex loci solutionis* may apply to a private-law situation. The latter issue does not address to what extent the applicable public law is determined on the basis of the general rules of conflict of laws. Rather, it is a matter of whether additional rules may be applied

198 Similar Sonnenberger with regard to mandatory rules Hans-Jürgen Sonnenberger, 'Eingriffsrecht – Das trojanische Pferd im IPR oder notwendige Ergänzung' (2003) Praxis des Internationalen Privat- und Verfahrensrechts 104, 105.

199 Already Ole Lando, 'The EEC Convention on the Law Applicable to Contractual Obligations' (1987) 24 Common Market Law Review 159, 211 stated that the "Rome Convention does not distinguish between rules of private and public law".

200 F. A. Mann, *Studies in International Law* (Oxford University Press 1973) 12.

201 This problem is also seen by Ole Lando, 'The EC Draft Convention on the Law Applicable to Contractual and Non-contractual Obligations' (1974) 38 Rabels Zeitschrift für ausländisches und internationales Privatrecht 6, 36.

202 The legal system of the *lex fori* is the entire law of the court seized, while that of the *lex causae* is the legal system applicable according to the conflict of laws of the *lex fori*.

despite the absence of a reference by a conflict-of-laws rule.[203] In this respect, the ECJ has ruled in favour of these provisions not to be considered as law, but to be taken into account on a factual level by the designated law.[204]

For the identification of the applicable data protection law, separate conflict-of-laws rules may be required. The determination of the applicable data protection law is subjected to the rules of conflict of laws. However, such provisions, which are at least partially of a public law nature, might be excluded from the regular reference of the conflict of laws to the applicable law.[205] In this respect, it might also be argued instead for provisions of a public-law nature to be subject to special rules under the conflict of laws.

(1) The Scope of Reference in European Conflict of Laws

For the scope of the regular reference of conflict of laws, it is irrelevant whether a provision is formally categorised as a provision of public or private law – either by the respective legislator or by way of interpretation.[206] Such a limitation of the regular reference by conflict of laws is already opposed for European conflict of laws by Article 3, 6, 8, 9 Rome I Regulation and Article 16, 17 Rome II Regulation.[207] These provisions illustrate European conflict of laws not

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203 See on these cases exhaustingly Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-035 et seq.; Michael Hellner, 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles' (2009) 5 Journal of Private International Law 447, 447-450.

204 ECJ, C-135/15 *Nikiforidis* [2016] ECLI:EU:C:2016:774, para 51.

205 Insofar as some authors equate "public law rules" and "overriding mandatory rules", this approach is sometimes called "Sonderanknüpfungslehre"; see Jürgen Basedow, 'The Law of Open Societies – Private Ordering and Public Regulation of International Relations' (2013) 360 Recueil des Cours 9, 331; Karsten Thorn, 'Art. 9 Rom I-VO', in Thomas Rauscher (ed) *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band III* (5th edn, ottoschmidt 2023) para 78; Karsten Thorn, 'Art. 12 Rom I-VO', in *Grüneberg Bürgerliches Gesetzbuch* (83th edn, C.H. Beck 2024) para 1; it is however unclear whether this theory is supposed to establish the applicability of public law rules, which are not part of the *lex causae* or whether this approach simultaneously excludes public law rules from the general reference to the *lex causae*, see F. A. Mann, 'Conflict of Laws and Public Law' (1971) 132 *Recueil des Cours* 107, 158; see, on the problem of insisting on the separation of public and private law in determining the applicable law, Christian v. Bar and Peter Mankowski, *IPR, Band I* (2nd edn, C.H. Beck 2003) § 4 para 52 et seq.; see also Kurt Lipstein, 'Conflict of Public Laws – Visions and Realities' in Ronald H. Graveson, Karl F. Kreuzer, Andre Tunc and Konrad Zweigert (eds), *Festschrift für Imre Zajtay* (Mohr Siebeck 1982) 357, 364 and Frank Vischer, 'General Course on Private International Law' (1992) 232 Recueil des Cours 15, 150 et seq., 178, 179; a comprehensive summary on the development of public law in international labour law in Europe is delivered by Olaf Deinert, *International Labour Law under the Rome Conventions* (C.H. Beck, Nomos, Hart 2017) section 10 para 113, 116.

206 Hans W. Baade, 'The Operation of Foreign Public Law' (1995) 30 Texas International Law Journal 429, 495; Dieter Martiny, 'Art. 9 Rom I-VO', in Jan v. Hein (ed) *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 13* (8th edn, C.H. Beck 2021) para 12; Adrian Briggs, *The Conflict of Laws* (4th edn, Oxford University Press 2019) 190; see already Institut de Droit International, *Annuaire*, Tome 56 (S. Karger 1975) 550 et seq.

207 This discussion is also made more difficult by a partly different understanding of the terms. For example, Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (2011) 348 Recueil des Cours 9, 241 et seq. generally excludes "public law" form a general reference of private international law, but at least partly refers in his footnotes to such authors who only deal with mandatory rules or lois d'application immediate. It is hence unclear, whether Bogdan is dealing with "public law" or overriding mandatory rules.

being based on the formal categories of public law and private law. This applies both to determining whether the applicability of provisions of public law is determined by means of the conflict of laws and whether these provisions are subject to the regular references of the conflict of laws. Rather, these provisions show that European conflict of laws distinguishes on the basis of the mandatory or overriding mandatory nature of a provision. Crucial is therefore the intention of the legislator to apply a provision regardless of a deviating agreement by the parties or the otherwise applicable law, and the subject matter of the specific provision.[208] This follows from the fact that the provisions addressed in Articles 3(3), 6(2), 8(1), 9, 12 Rome I Regulation and Articles 16, 17 Rome II Regulation may be categorised by the national legislator as both public- and private-law provisions.[209] Further, according to Recital 40 Rome I Regulation and Recital 35 Rome II Regulation, the European legislator is striving for most uniform conflict-of-laws rules. This recital favours a presumption according to which the scope of reference of a conflict-of-laws rule is assumed to be as broad as possible. Therefore, good reasons for an exclusion from this scope of reference are required. This also shifts the burden of proof for the exclusion of a provision from the scope of such a reference.

(2) The Suitability of Conflict-of-Laws Rules and the Ability of Avoiding Mandatory Law

When it comes to the scope of general conflict-of-laws rules regarding public-law provisions, two arguments may be raised. Due to diverging interests, the general conflict-of-laws rules might be assumed to be inappropriate to determine the applicability of public law. Furthermore, the parties could then choose the public-law provisions applicable according to the conflict of laws. However, these provisions are typically not dispositive in purely domestic situations. Yet, these arguments are not convincing in the end.

(a) The Suitability of Conflict-of-Laws Rules

Against an inclusion of public law into the scope of regular conflict-of-laws provisions, one might argue for conflict-of-laws rules being typically based on a multilateral approach which

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208 The reason for this was already identified in Queen's Bench Division (Commercial Court), *Attorney-General of New Zealand v Ortiz* [1982] 3 W.L.R. 570: "The kinds of law which would be comprised in such a wide class are so many and so various, that some should properly be enforced in this country while others perhaps should not".

209 See Allan Philip, 'Mandatory Rules, Public Law (Political Rules) and Choice of Law in the E.E.C. Convention on the Law Applicable to Contractual Obligations' in Peter M. North (ed), *Contract Conflicts* (North-Holland 1982) 81, 84 et seq., 87; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 61; Mario Giuliano and Paul Lagarde, 'Report on the Convention on the law applicable to contractual obligations' [1980] OJ C 282/1, 25; David Jackson 'Mandatory Rules and Rules of "Ordre Public"' in Peter M. North (ed), *Contract Conflicts* (North-Holland 1982) 61, 64.

requires the courts to apply a single law to private-law relationships.[210] This approach, however, would not fit public-law rules. Yet, the concept of overriding mandatory rules allows for a sufficient – although not always comprehensive – adjustment in this respect. It takes the existence of substantive provisions into account, which at least also serve to pursue the genuine interests of a state.[211] Frequently raised and more specified is the objection of rules of public law being based on different considerations compared to rules of private law, which is why the rules of conflict of laws do not suit them.[212] However, these objections must be refuted for various reasons.

Firstly, as seen, public-law rules like some of the provisions of the GDPR at least partly also serve private interests. It is therefore uncertain what exactly is meant by the concept "public law interests" and what kind of interests are dedicatedly public. Further, the European legislator has acknowledged the special nature of some substantive rules. Based on this, it has at least partially adapted its provisions, as is shown by Articles 3(3),(4), 6(2), 8(1), 9, 12(2) Rome I Regulation and Articles 6, 14(2), 16, 17 Rome II Regulation. However, at least according to the wording of these provisions, this special nature is not rooted in the categorisation as a rule of public law. It rather follows from a variety of reasons. Yet, none of these reasons is based solely on the public-law nature of a provision. Therefore, the European legislator also found no need to create a general conflict-of-laws rule to determine the applicable public law, even if it took public-law provisions into account in principle when creating conflict-of-laws rules. Moreover, insufficient attention is given in this context to the fact that conflict of laws is exclusively concerned with the legal consequences of a public-law provision on a private-law relationship. These consequences under private law typically only account for a fraction of the scope of regulation intended by the national legislator with the public-law provision. Therefore, it is doubtful to what extent these provisions are based on a different assessment which requires different conflict-of-laws rules.

Finally, the aforementioned reasons also illustrate why conflict of laws does not regularly rely on the categories of public and private law. Instead, it employs the category of mandatory

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210 The example frequently mentioned in this context and probably attributable to Frank Vischer (Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (2011) 348 Recueil des Cours 9, 242), is that it is not obvious why in a cross-border sales contract the export restrictions of the country in which the seller is domiciled must be observed, but not the import restrictions of the buyers country.

211 This applies at least under the Rome I Regulation and the Rome II Regulation, see Article 9 Rome I Regulation and Article 16, 17 Rome II Regulation.

212 See e.g. Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (2011) 348 Recueil des Cours 9, 242; Trevor C. Hartley, 'Mandatory Rules in international contracts: the common law approach' (1997) 266 Recueil des Cours 337, 374.

provisions, which may be both private- and public-law provisions[213]. The categorisation of a rule as being of a private- or public-law nature is not relevant to pursue the objective of European conflict of laws to determine the law spatially most appropriate to the facts. The decisive factor in conflict of laws is rather the extent to which the interests of a state must be considered in determining the spatially most appropriate law.

(b) Ability to Avoid Mandatory Provisions

Admittedly, if the scope of the regular conflict-of-laws rules also extends to public law, the parties have the ability to directly influence the applicable public law by a choice of law. This may result in the parties possibly relying on public-law provisions whose applicability was not provided for or not even considered by the respective legislator.[214] By a combined choice of court and choice of law, the parties may in some cases even avoid the application of overriding mandatory provisions which are partly of a public-law nature.[215] These objections become more and more relevant since the number of conflict-of-laws instruments allowing a choice of law by the involved parties is steadily increasing. The principle of party autonomy as a conflict-of-laws principle is nowadays accepted in most jurisdictions around the world.[216] However, the recognition of private autonomy is a foundational decision of European conflict of laws.[217] If one assumes public law to be subject to the rules of conflict of laws and being in principle referred to by the regular conflict-of-laws rules, the legislature must also have left the decision over the applicable public law to the parties' discretion.

Even if this objection is accepted in principle, the consequences of such a choice are nevertheless limited in several ways. Therefore, this argument can in any case only carry little weight. Firstly, conflict of laws concerns solely the assessment of the law applicable to a private-law relationship. Therefore, the parties' choice of law affects the applicable public law

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213 See on overriding mandatory rules, see Michael Hellner, 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles' (2009) 5 Journal of Private International Law 447, 459, 469; Andrea Bonomi, 'The Rome I Regulation on the Law Applicable to Contractual Obligations – Some General Remarks' (2008) 10 Yearbook of Private International Law 285, 293; Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 11.

214 Allan Philip, 'Mandatory Rules, Public Law (Political Rules) and Choice of Law in the E.E.C. Convention on the Law Applicable to Contractual Obligations' in Peter M. North (ed), *Contract Conflicts* (North-Holland 1982) 81, 88.

215 Trevor C. Hartley, 'Choice of law, choice of court and mandatory provisions' in Burkhard Hess, Erik Jayme and Heinz-Peter Mansel (eds), *Europa als Rechts- und Lebensraum* (Gieseking 2018) 171, 172 et seq.

216 Matthias Lehmann, 'Liberating the Individual from Battles between States' (2008) 41 Vanderbilt Journal of Transnational Law 381, 385; see also for the European conflict of laws Recital 11 Rome I Regulation.

217 See e.g. Recital 11 Rome I Regulation, Recital 31 Rome II Regulation; but the relevance of choice of law for private international law is not limited to the European private international law, see for a comprehensive overview Jürgen Basedow, 'The Law of Open Societies – Private Ordering and Public Regulation of International Relations' (2013) 360 Recueil des Cours 9, 164 et seq.

only to the extent as it is of relevance to the legal issues arising from this type of relationship between the parties.[218] The choice of law therefore does not have any influence on the public-law relationship between each of the parties and the authorities not involved in this relationship. Also, at least the European conflict-of-laws legislator seems to assume the possibility to opt out of public-law provisions by a choice of law and thus by a general conflict-of-laws rule. Under Articles 3(3),(4), 6(2), 8(1) Rome I Regulation, Article 14(2),(3) Rome II Regulation the effects of a choice of law by the parties are limited with regard to mandatory rules under specific circumstances. The status as a mere mandatory provision may therefore also limit a choice of law. Such a limitation would be pointless if a choice of law could not in principle also decide on the applicable mandatory law. The category of mandatory rules however includes both private- and public-law provisions. [219]

Secondly, the European conflict-of-laws rules generally restrict the effects of a choice of law when choosing a law unrelated to the facts of the case.[220] This limits the alleged risks arising from the choice of law to public law.[221] Additionally, the legislature of the chosen law itself may define the scope of application of its rules in a binding manner, in particular by defining a territorial scope of application. It may thus prevent its public law from applying to these situations by limiting the territorial scope of application of its public-law provisions. This restriction by the legislator is to be adhered to also if the parties choose the applicable law, as it is a substantive limitation of the territorial scope of public law. Also, the freedom of choice of law does not allow the parties to modify their chosen legal system in any way.[222]

Thirdly, the ability to avoid mandatory provisions through a choice of law is also limited by the legal institution of overriding mandatory provisions. The choice of law has no or only a limited influence on the applicability of overriding mandatory provisions, provided these are derived from a specific legal system.[223] By means of this legal institute, the national legislator may

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218 See on this also below A.II.2.c).

219 See above A.II.2.b)(2)(a).

220 See Jürgen Basedow, 'The Law of Open Societies – Private Ordering and Public Regulation of International Relations' (2013) 360 Recueil des Cours 9, 328.

221 See e.g. Article 3(3),(4) Rome I Regulation, Article 14(2),(3) Rome II Regulation, Article 6(2) RL 93/13/EWG.

222 For example, under European private international law, the parties are only allowed to choose the law of a state (Francesca Ragno, 'Art. 3', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 20, Gralf-Peter Calliess, 'Art. 3 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 20, 33); in the case of a partial choice of law, the European conflict-of-laws regulations contain provisions ensuring the application of mandatory provisions in cases having connections to just one jurisdiction, see Article 3(3) Rome I Regulation, Article 14(2) Rome II Regulation; besides a partial choice of law is only possible if the subject matter of the choice of law can be delimited, see Ulrich Magnus, 'Art 3 Rom I-VO' in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 108.

223 Cf. Article 9(2),(3) Rome I Regulation, Article 17 Rome II Regulation.

apply those provisions also of public law which it considers relevant. This is achieved by expressing the intention to apply these provisions internationally. Hence, it is thus up to the national legislator to safeguard the application of its legal rules where it considers them indispensable. In addition, under European conflict-of-laws rules of conduct are considered irrespective of the otherwise applicable law.[224]

Hence, a choice of law may admittedly result in the deselection of a legal system as such. Thus, even the provisions the parties are unable to dispose of in a situation without any connection to another jurisdiction may be deselected. However, a choice of law does not obviate the need to comply with any rules of public law. Especially, the choice of law has no influence on the significance of overriding mandatory provisions under Article 9(2),(3) Rome I Regulation, Article 16 Rome II Regulation.

(c) Absence of Impact of the Governing Conflict-of-Laws Rule on Public Law

By allowing a choice of law, the legislator further only loses control over the application of its law to the extent to which these provisions may not be applicable to situations to which they are intended to apply according to their scope of application. However, this is a situation potentially occurring regardless of whether the applicable public law is determined by conflict of laws or public international law. Rather, this limitation of the scope of application results purely from the fact of more than one jurisdiction being involved in this situation. Thus, provisions from more than one legal system are potentially applicable, but the legal issues raised must only be decided in accordance with one law. With regard to the interest of the legislator, a choice of law by the parties instead of determining the applicable law by means of objective criteria is therefore not to be assessed differently.

In this regard, it is equally insignificant whether the applicable law is determined by objective factors or by a choice of the parties. The determination of the applicable law by means of a choice of law rather than objective criteria does not alter the question of which rules of public law are applicable. Even in case of an objective connection, the merely mandatory provisions outside the *lex causae* are in principle not applied. It is therefore in line with the general concept of European conflict of laws that deviations from merely mandatory provisions are permitted to a greater extent in cross-border than in purely domestic situations.

(d) Interim Conclusion

The frequently made argument according to which public-law provisions cannot be part of the reference by the general conflict-of-laws rules because these provisions allow the parties to

224 Cf. Article 12(2) Rome I Regulation, Article 17 Rome II Regulation.

dispose of the applicable law is therefore not convincing. Hence, there are a number of sound reasons to assume that the law applicable to public-law issues within a private-law relationship is in principle determined by the regular conflict-of-laws rules. The objections typically raised against this assumption are at least not compelling. Therefore, it must generally be assumed for preliminary questions that they are, irrespective of their legal nature, assessed in accordance with the regular European conflict-of-laws rules.[225] Therefore, in private-law relationships, the applicable data protection law is to be determined by these regular conflict-of-laws rules.

c) The Scope of the Reference to the Applicable Public Law

Thus, also public-law provisions and therefore any of the provisions of the GDPR may in principle be referred to by the regular conflict-of-laws rules of European conflict of laws. The distinction between public-law and private-law provisions is hence – as seen – insignificant for determining the applicable law.

The question of whether public law is subject to the regular conflict-of-laws rules, however, bears a justified aspect if this question is understood as one of the scope of the reference. Yet, this issue is not to be resolved via the legal nature of the relevant provision. As already seen, it is in principle immaterial for the scope of the reference whether a provision belongs to public or private law.[226] Rather, the extent to which the specific provision is still to be regarded as part of the respective reference is decisive. Therefore, whether the rules of the GDPR are part of the reference made by the regular conflict-of-laws rule is determined solely by the extent to which the conflict-of-laws rules refer to the applicable law.[227]

However, this question must be distinguished from and should not be confused with the issue of different legal systems containing different legal solutions and therefore applying different substantive rules to the same facts.[228] In other words, the question arising here is not which substantive rules a law designated as applicable by the conflict-of-laws rules provides for a specific situation. Rather, it is a matter of the extent to which the conflict-of-laws rule determines the law applicable to the facts of the case. The issue is hence not about characterisation of provisions of the *lex causae* but about the factual questions encompassed by the reference.

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225 Kurt Lipstein, 'Conflict of Public Laws – Visions and Realities' in Ronald H. Graveson, Karl F. Kreuzer, Andre Tunc and Konrad Zweigert (eds), *Festschrift für Imre Zajtay* (Mohr Siebeck 1982) 364; this is also the conclusion of F. A. Mann, 'Conflict of Laws and Public Law' (1971) 132 Recueil des Cours 107, 195.

226 See above A.II.2.b)(2)(a).

227 For public law in general, this point has already been raised by Franco Mosconi, 'Exceptions to the Operation of Choice of Law Rules' (1989) 217 Recueil des Cours 9, 133 and F. A. Mann, 'Conflict of Laws and Public Law' (1971) 132 Recueil des Cours 107, 190.

228 A typical example is the participation in the heritage of the deceased spouse.

To determine if and to which extent data protection issues are subject to the scope of the reference, it needs to be considered first how conflict-of-laws rules typically assess their scope of reference. Two characteristic examples of provisions on the scope of reference under European conflict of laws are Article 12(1) Rome I Regulation and Article 15 Rome II Regulation. Both provisions share some characteristics specific of provisions on the scope of application. Neither provision contains an abstract description of the scope, but rather a list of subjects covered by the reference. By using the term "in particular", both provisions indicate the enumeration given in those provisions being not exhaustive.

(1) The Abstract Description of the Scope of the Reference

However, it is unclear how extensive the scope of reference actually is. In general, the assumption of a comprehensive reference to the *lex causae* provides a strong indication of a broad reference by the respective European conflict-of-laws act.[229] This is further emphasised by the express intention to avoid fragmentation of the applicable law by the European legislator.[230] Hence, there is broad agreement on the principle of the reference to the applicable law being understood as comprehensively as possible in European conflict of laws.[231] This applies to conflict-of-laws rules which do not themselves derogate from the conflict-of-laws rules[232] – as for example Article 6(2) 2, 8(1) 2, 9, 10(2), 11, 12(2) Rome I Regulation – and which are not replaced by specific conflict-of-laws rule outside the European conflict-of-laws acts[233]. For these rules, a legal issue is still part of the *lex causae* and thus within the scope of the reference if it directly shapes the relationship between the persons among whom the claim exists. Such an issue is given, for example, if it establishes or modifies certain rights and

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229 Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 764 even argues that Article 12 Rome I Regulation implies that all other issues are governed by the rules on the applicable law and the only exceptions are issues classified as ones of formal validity or incapacity.

230 Recital 40 sentence 1 Rome I Regulation and the identical Recital 35 sentence 1 Rome II Regulation.

231 Franco Ferrari, 'Art. 12 Rome I Regulation' in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 3; Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 14.02; Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 858; Franco Ferrari and Jan Lüttringhaus, 'Art. 12 Rome I', in Franco Ferrari (ed), *Rome I Regulation Pocket Commentary* (sellier 2015) para 4; Guillermo Palao Moreno, 'Art. 15 Rome II', in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 4 et seq.

232 Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 17.02; Franco Ferrari, 'Art. 12 Rome I Regulation', in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 46.

233 Article 23 Rome I Regulation, Article 27 Rome II Regulation.

obligations between these persons.[234] Others specify the scope of the reference according to whether the provision serves to directly protect the interests of the state.[235]

However, apart from the catalogues of Article 12 Rome I Regulation, Article 15 Rome II Regulation, there are currently no criteria to specify these abstract definitions. In particular, there are no guidelines to determine whether an issue still directly impacts on the relationship between the parties or when an issue serves to immediately protect the interests of the state. The absence of such criteria is not surprising, given the diversity of situations in which the issue of the scope of the reference to the *lex causae* arises. Nevertheless, two main factors may be identified which can serve as a benchmark for determining the scope of the reference in practice.

(2) Criteria to Specify the Scope of Reference

It is appropriate, firstly, to take account of the subject-matter of the conflict-of-laws rule referring to the *lex causae*. The narrower the scope of that rule, the broader the scope and the more provisions are covered by the reference. When creating a special conflict-of-laws rule by means of narrowly defined facts, the conflict-of-laws legislator had precisely the specific interests of the subject matter of regulation in mind. It was thus able to adjust the connecting factors and therefore the applicable law referring to it. Due to the limitation of the subject matter of the rule, it was also able to identify more clearly which types of *lex causae* provisions possibly could become applicable. For example, when creating Article 8 Rome I Regulation, the conflict-of-laws legislator must have realised the potential relevance of employment safety and health regulations for claims subject to this conflict-of-laws provision. In contrast, the rules on safety and conduct of the *lex causae* potentially to be taken into account when determining tortious liability under Article 4 Rome II Regulation might be very diverse.

Secondly, the proximity of the respective provision to the subject matter of the conflict-of-laws rule must be borne in mind. If a provision is primarily intended to serve other purposes and only covers the subject matter of the conflict-of-laws rule reflexively, it is rather far-fetched that reference was supposed to be made also to this provision.[236] For example, a rule prescribing general opening hours for shops will regularly not be intended to protect customers from being injured by the lack of adequate lighting in the shop. Such a provision would thus not be covered by a reference of Article 4 Rome II Regulation. By contrast, a provision which imposes

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234 Ulrich Magnus, 'Art 12 Rom I-VO', in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 14; similar Franco Mosconi, 'Exceptions to the Operation of Choice of Law Rules' (1989) 217 Recueil des Cours 1, 134 stating that a qualitative limitation of the reference is necessary when applying foreign public law.

235 Hilding Eek, *The Swedish Conflict of Laws* (Martinus Nijhoff 1965) 101 et seq., 205 et seq. who argues that this is not a question of the scope of reference but rather of the *ordre public* of the forum.

236 Similar on this point also Ulrich Magnus, 'Art 12 Rom I-VO', in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021).

obligations on the seller to provide information for the benefit of the buyer is typically also intended to influence the obligations imposed on the parties.

Therefore, it is manifestly impossible to determine the scope of a reference in the abstract. Conversely, the precise scope is determined based on the specific conflict-of-laws rule on the one hand and the relevant substantive rule on the other. Hence, to ascertain whether and to what extent data protection law is referred to by a conflict-of-laws rule, the respective conflict-of-laws rule and the specific data protection issue raised must be analysed. A sweeping statement regarding the conflict-of-laws rule determining the applicable data protection law is not possible in view of the absence of a dedicated European conflict-of-laws provision of data protection law. However, in light of the above, a conclusion may be drawn for cases where there would be a dedicated conflict-of-laws rule addressing exclusively the law applicable to data protection claims. The peculiarity of this provision would imply its reference to all provisions of the relevant data protection law, regardless of their legal nature and their subject matter in detail.

d) Interim Conclusion

Thus, in disputes between private parties based on a data protection private-law claim the applicable law, irrespective of its legal nature, is determined in principle by the rules of conflict of laws. Hence, to this extent the assessment of the applicable law to data protection claims does not differ from determining the law applying to any other legal issue arising out of a situation involving contacts with several jurisdictions. Once the applicable law is established, the scope of reference of the specific conflict-of-laws rule decides on whether a data protection law provision is covered by this reference. Whether this is the case depends, on the one hand, on the subject matter of the respective conflict-of-laws rule and, on the other hand, on the specific content of the substantive provision.

3. The Determination of the Applicable Law under Conflict of Laws

Thus, the rules on the scope of application contained in the GDPR and the rules on conflict of laws are fundamentally different in their design and perform different functions. Also, the applicable law in disputes between private parties based on a claim under private data protection law and with connections to more than one jurisdiction is – irrespective of the legal nature of data protection law – in principle to be determined by conflict of laws.

However, it is still unclear which specific conflict-of-laws rules in fact determine the law applicable to a data protection claim from a European perspective. Provisions on the territorial scope of application have different functions and purposes than conflict-of-laws rules and

cannot, in general, be interpreted in a manner in which they also contain a conflict-of-laws rule. Yet, it is unclear whether it is in general excluded that a regulation on the territorial scope of application at the same time also provides a conflict-of-laws rule.

In this respect, the mechanisms used by conflict of laws to determine the applicable law could also be relevant. If conflict of laws attaches no significance to substantive law and substantive interests, a provision of substantive law may also be irrelevant for identifying the applicable law. Moreover, Articles 3, 44 GDPR only specify when the GDPR itself applies, but not when a third country's data protection law is to apply. This particular feature might also preclude from the outset the possibility of these provisions comprising an element of conflict of laws.

To address these issues, it is therefore first necessary to analyse which approaches exist to determine the applicable law (a). Based on this, it is then necessary to examine under which conditions a provision generally comprises rules on the applicable law. This requires an analysis of the different ways in which the applicable law is determined and the types of rules existing to identify the applicable law. In the following, a closer look will therefore be taken at the manner in which the applicable law is determined (b). An unravelling of these rules is necessary because, as will be seen, the respective rules serve a different function in assessing the applicable law. It is then to be analysed how provisions of substantive law may influence the identification of the applicable law under a multilateral approach (c).

a) Two Possible Approaches to Conflicts of Laws

At present, there are basically two fundamental approaches to determine the law applicable to a private-law relationship. The first approach, whose adherents rely essentially on the teachings of Friedrich Carl von Savigny, is known as "multilateral" approach. According to this approach, the applicable law is determined by the law to which the legal relationship belongs, in which it has its "seat".[237] The seat of a legal relationship is assessed by means of abstract criteria – so-called connecting factors.[238] Under this approach, which is very widespread especially outside the United States, the applicable law is consequently determined based on the facts of the case and *en bloc*. Thus, in principle, a single legal system is regulating all legal questions connected to the facts. The approach, which to a certain extent runs counter to the multilateral approach, is named "unilateral" approach.[239] Under this approach, the applicable law is identified by

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237 Giesela Rühl, 'Methods and Approaches in Choice of Law: An Economic Perspective' (2006) 24 Berkeley Journal of International Law 801, 821 et seq.; Michael Hellner, 'Private International Enforcement of Competition Law' (2002) 4 Yearbook of Private International Law 257, 294.

238 Stéphanie Francq, 'The Scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the Other Way Around?' (2006) 8 Yearbook of Private International Law 333, 336.

239 Friedrich K. Juenger, 'American and European Conflicts Law' (1982) 30 American Journal of Comparative Law 117, 122.

assessing whether a specific regulation claims applicability for a certain situation involving foreign countries according to the interest of its legislator.[240] The unilateral approach is particularly popular in the USA since the second half of the 20th century.

However, both approaches are not completely opposite to each other. They share common features. An important common feature shared by both approaches is their fundamental acknowledgement of the possibility of pursuing national interests. These interests may differ from those pursued by substantive rules.[241] This common feature will also be important in the following analysis of the legal phenomenon of the self-limiting rule.

The admissibility of the pursuit of national interests is obvious for the unilateral approach. But the pursuit of national interests is also conceptually inherent in the multilateral approach focussing on the seat of the legal relationship.[242] This already follows from the considerable influence the legislator exerts on the law applicable in the individual case by choosing the relevant connecting factor.[243] Furthermore, by resorting to alternative or cumulative connecting factors, the legislator may even promote not only a conflicts interest, but also a specific substantive result.[244] This is typically the case with formal requirements.[245] Specific interests are also fostered by a recourse to conflict-of-laws rules, which alternatively rely on several connecting factors. Those rules designate connecting factors in a certain order of precedence or grant one of the parties the right to choose the applicable law.[246] Hence, also under a multilateral approach, conflict-of-laws rules do not generally have to be "neutral". They also do not necessarily solely serve a specific type of conflict-of-laws interests, which is completely detached from substantive interests or results.

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240 Thomas G. Guedj, 'The Theory of the Lois de Police, A Functional Trend In Continental Private International Law – A Comparative Analysis With Modern American Theories' (1991) 39 American Journal of Comparative Law 661; Otto Kahn-Freund, 'General Problems of Private International Law' (1974) 143 Recueil des Cours 144, 245; Giesela Rühl, 'Unilateralism PIL', in Jürgen Basedow, Klaus J. Hopt and Reinhard Zimmerman (eds), *Max Planck Encyclopedia of European Private Law*, vol 2 (Oxford University Press 2012).

241 In this context, it is suggested to differ between interest pursuing substantive law justice and those who serve private-international-law justice; see e.g. Symeon C. Symeonides, 'The American Choice-of-Law Revolution in the Courts: Today and Tomorrow' (2002) 298 Recueil des Cours 9, 397 and Julio D. González Campos, 'Diversification, Spécialisation, Flexibilisation et Matérialisation des Règles de Droit International Privé' (2000) 287 Recueil des Cours 9, 310.

242 Symeon C. Symeonides, *Codifying Choice of Law Around the World* (Oxford University Press 2014) 329; see also Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (2011) 348 Recueil des Cours 9, 77 et seq.

243 See Symeon C. Symeonides, *Codifying Choice of Law Around the World* (Oxford University Press 2014) 330 et seq.

244 Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (2011) 348 Recueil des Cours 9, 82.

245 See e.g. Article 11(1)-(3) Rome I Regulation, Article 18 Rome II Regulation, Article 27(1), 28 Regulation EU 650/2012, Article 1 Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.

246 See on the different techniques comprehensively Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (2011) 348 Recueil des Cours 9, 82 et seq.

Another similarity between the unilateral and the multilateral approach, which will have some relevance later on, is the reference to a legal system under the multilateral approach being not always made *en bloc*. For example, sometimes the applicable law is partly connected separately for certain individual legal issues and under recourse to deviating connecting factors.[247] To this extent, the multilateral approach bears a certain resemblance with the unilateral approach.

Thus, while at the outset the methodological concept of the unilateral and multilateral approach is very different, both share the promotion of national interests and the facilitation of a customised conflict-of-laws rule for particular legal issues. In principle, therefore, a provision of substantive law may also have relevance under both approaches to identify the applicable law.

b) The Instruments to Assess the Applicable Law

The extent to which the applicability of a provision in cross-border situations can be inferred from an expressly regulated scope of application, may be assessed differently for the unilateral and multilateral approaches.

For those who at the outset follow the unilateral approach and examine the intention of international application of the respective substantive rule, provisions with a territorial scope of application are to be handled like any other provision. Under this approach, the limitation of the territorial scope of application to a territory within the legislating state by a provision is ambiguous. It could express the extraordinary relevance for the legislator to regulate this situation and thus be an indicator for the international intention to apply this provision. In contrast, the limitation of the territorial scope of application may also be based on the principle of proportionality. A limitation of the scope of application for this reason would, if one were to comply with the principle of proportionality, be more in favour of a narrow interpretation. Thus, this would imply a lack of international applicability. However, neither of these conclusions is compelling. If, in contrast, the territorial scope of application covers also a situation outside the territory of the legislating state, this might be a strong hint for the legislator's intention to apply this rule internationally. Otherwise, the legislator would not have defined such a broad territorial scope.

Something different applies, however, if the applicable law is determined according to a multilateral approach on the basis of the proximity of the facts to a legal system. Under these approaches, the intention of the legislator expressed through the scope of application is not in itself a relevant factor for the assessment of the applicable law. However, the legislator's

247 See for example Article 11, 13 Rome I Regulation, Article 17 Rome II Regulation.

intention to apply this provision to explicitly defined situations – as it is the case with Articles 3, 44 GDPR – might also to be considered in relation to other legal systems. To further investigate this issue, the following section describes the instruments relied upon under a multilateral approach to assess the applicable law in each individual cases. It also examines the extent to which regulations on the scope of application may constitute such an instrument.

In identifying the specific characteristics of conflict-of-laws rules under a multilateral approach, and thus how they may differ from other areas of law, it should first be noted that there is no single type of conflict-of-laws rule. The legal area of conflict of laws is characterised by being outlined by a multitude of regulations of different types. In addition to different types of conflict-of-laws rules, a multilateral approach to conflict of laws provides various tools to influence the consequences resulting from the law declared applicable in a particular case. The common feature of these types of rules and tools is that they either serve to identify an applicable law or to specify or modify the application of this law in detail.

(1) General Structure of Conflict-of-Laws Rules

A conflict-of-laws rules may in principle, just like a rule regulating the territorial scope of application, be described in general and independently of its specific structure as containing two elements at the level of the facts and one element at the level of the legal consequences. At the level of the facts, a provision of conflict of laws consists of facts and a connecting factor.[248] The various types of conflict-of-laws provisions differ in terms of the structure of the connecting factors and the way in which the applicable law is determined in individual cases. On the legal consequences, the application of a legal system is stipulated regardless of the legal consequences this legal system provides for the specific case.[249]

To describe the specific structure of rules of conflict of laws in more detail, it is crucial to differentiate between the different types of conflict-of-laws provisions. Two fundamentally different types of conflict-of-laws rules may be distinguished. These types differ phenotypically in the manner in which they establish the law applicable in individual cases. Such rules are described as one-sided or unilateral and all-sided or multilateral conflict-of-laws rules.[250]

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248 Kurt Lipstein, 'The General Principles of Private International Law' (1972) 135 Recueil des Cours 97, 194 para 54; Arthur Nussbaum, *Principles of Private International Law* (Oxford University Press 1943) 73.

249 Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4 Journal of Private International Law 1, 11; Jeffrey A Talpis, 'Legal Rules Which Determine Their Own Sphere of Application: A Proposal for Their Recognition in Quebec Private International Law' (1982) 17 Revue Juridique Themis 201, 207.

250 See on this distinction F. A. Mann, 'Statutes and the Conflict of Laws' (1972-1973) 46 British Year Book of International Law 117 and Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4 Journal of Private International Law 1, 3 fn. 6, 7.

(2) Multilateral Conflict-of-Laws Rules

All-sided or multilateral conflict-of-laws rules may be characterised by their open formulation on the legal consequences. On the legal consequences, they do not consider any particular law to be applicable as soon as the requirements on the factual side are met. Rather, the connecting factor is not only decisive for whether the legal consequences materialise, but also for the precise legal consequences.[251] This is achieved by merging the facts of the case and the legal consequences in such a way as to link the legal consequences to the law of the country in which the connecting factor is spatially located. Contrary to the general structure of conflict-of-laws rules described above, the connecting factor in these rules therefore is not clearly assignable to the factual side or the legal consequences side, but is an element of both sides. The connecting factor is not only necessary to trigger the legal consequence, but also specifies the legal consequence itself.

It could therefore be said of the connecting factor in a multilateral conflict-of-laws rule to fulfil a dual purpose. Under this dual purpose the connecting factor must provide at least one territorial element.[252] Otherwise, the connecting factor would lack any indication for determining an applicable law.[253] For reasons of legal predictability – an objective of conflict of laws[254] – this dual purpose also requires an unambiguous assignment to just a single specific legal system. Therefore, only those factual circumstances may be used as a connecting factor which can be given only at one certain point in time.[255] Therefore, if the connecting factor refers to an element of a certain duration, a precise point in time must be specified – at least implicitly – which is decisive for the determination of the connecting factor.[256]

Thus, the connecting factor is of decisive importance for assessing the applicable law by means of a multilateral conflict-of-laws rule and serves a dual purpose within these conflict-of-laws rules. It describes the factual circumstances which also specify the applicable law in the individual case. The connecting factor thus determines not only whether the legal consequences

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251 Trevor C. Hartley, 'Mandatory Rules in international contracts: the common law approach' (1997) 266 Recueil des Cours 337, 347; A Thomson, 'A Different Approach to Choice of Law in Contract' (1980) 43 Modern Law Review 650, 663.

252 An obvious exception to this are accessory conflict-of-laws provisions, such as those found in Article 14 Rome I Regulation and Article 19 Rome II Regulation. However, since these are based on conflict-of-laws rules which themselves contain territorial connecting factors, they can nevertheless be attributed to connecting factors containing territorial elements.

253 Also emphasising the relevance of the connecting factor as a link to a specific legal system I F G Baxter, 'Choice of Law' (1964) 42 Canadian Bar Review 46, 48.

254 David F Cavers, 'A Critique of the Choice-of-Law Problem' (1933) 47 Harvard Law Review 173, 198; Friedrich K. Juenger, 'American and European Conflicts Law' (1982) 30 American Journal of Comparative Law 117, 180.

255 See e.g. Article 4(1) Rome II Regulation.

256 See e.g. Article 4(2) Rome II Regulation; Article 19(3) Rome I Regulation clarifies that for determining the habitual residence within the Rome I Regulation, the relevant point in time is the time of the conclusion of the contract.

are to apply but also the precise details of the legal consequences. For this purpose, it contains in any case a spatial and partly also a temporal element. This mode of operation of the connecting factor also implies that the law applicable by virtue of multilateral conflict-of-laws rules is not to be determined abstractly and *ex ante*. Rather, it is to be determined by the connecting factor based on the specific individual case.

(3) Unilateral Conflict-of-Laws Rules

In contrast to multilateral conflict-of-laws rules, one-sided or unilateral conflict-of-laws rules do not determine which legal system is applicable, but merely specify when a specific substantive provision or set of provisions is applicable.[257]

On the facts side, unilateral conflict-of-laws rules also consist of operative facts and a connecting factor. Regarding the legal consequences, however, unilateral conflict-of-laws rules differ from multilateral conflict-of-laws rules. Unilateral conflict-of-laws rules are structured in a way to determine the applicable law by reference to the law of an expressly named jurisdiction or by reference to the law of the state of the competent court.[258] Under this concept, the connecting factor provides only criteria to decide whether the law referred to by the legal consequences is applicable. Besides this function, it does not decide on which legal system is applied. The connecting factor hence does not form the legal consequences of a unilateral choice-of-laws provision. Therefore, unilateral conflict-of-laws rules allow for a clear distinction to be drawn between the facts and the legal consequences, with the connecting factor being only part of the facts.

Another special feature of unilateral conflict-of-laws rules is their tendency to regulate only the applicability of individual laws or very specific legal issues. However, this is not mandatory according to the general structure of a unilateral conflict-of-laws rule.[259] Yet, declaring a

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257 Christopher Forsyth, 'The Eclipse of Private International Law Principle - The Judicial Process, Interpretation and the Dominance of Legislation in the Modern Era' (2005) 1 Journal of Private International Law 93, 102 fn. 34; Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 1 (16th ed Sweet & Maxwell 2022) 1-042.

258 See e.g. Article 4(2),(3) Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations, Article 15(1) Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

259 For European law, this follows – in my view – from the fact that the multilateral conflict-of-laws rules are regarded as the general principle (Friedrich K. Juenger, 'American and European Conflicts Law' (1982) 30 American Journal of Comparative Law 117, 121) and the unilateral rule in turn defines the narrowly limited exceptions. For the US perspective, this results from the fact of the search for the most appropriate law being more focussed on the individual legal question, as it is oriented towards substantive law (Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 24).

particular law applicable is the reason why unilateral conflict-of-laws provision often appear foreign in the context of a multilateral conflict-of-laws approach.

Nevertheless, a recourse to unilateral conflict-of-laws rules is in principle not a departure from the multilateral conflict-of-laws approach. As seen, it is characteristic of the multilateral approach that it does not enquire which substantive law provision claims to be applicable. Rather, this approach identifies which law is to be applied from the perspective of the *lex fori*, irrespective of whether the rules of this law claim their unconditional validity.[260] Unilateral conflict-of-laws rules are an expression of unilateralism in the sense that they determine the scope of application of the law of the forum, without deciding on the hypothesis of application of foreign law.[261] However, the function of multilateral conflict-of-laws rules is also performed by unilateral conflict-of-laws rules, as the latter specify the applicable law and do not merely refer to the intention of the substantive legislator to apply the respective substantive-law rules.[262]

c) Provisions of Substantive Law Within the Multilateral Conflict-of-Laws Approach

Under the multilateral approach, the applicable law is not determined on the basis of whether the substantive provision has its own intention of application. However, provisions which impose a substantive legal consequence may nevertheless at the same time take influence on the applicable law. Yet, a scope of application does not automatically also determine the applicability of a provision in relation to other legal systems.

Even if a unilateral conflict-of-laws rule may not be inferred from such provisions by way of interpretation, rules with a scope of application might have to be considered in addition to the law applicable under the general conflict-of-laws rules. It is therefore worth examining under which conditions provisions imposing a substantive legal consequence are taken into account in this way.

(1) Overriding Mandatory Provisions

The specific definition and concept of overriding mandatory provisions has long been subject of extensive debate.[263] The issue was also extremely controversial when the Rome Convention

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260 See above A.II.3.a).

261 Stéphanie Francq, 'Unilateralism', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 1787.

262 See also Michael Hellner, 'Private International Enforcement of Competition Law' (2002) 4 Yearbook of Private International Law 257, 294 et seq. who emphasises the difference between unilateral conflicts-of-laws rules and the unilateral approach.

263 Hannah L. Buxbaum, 'Mandatory Rules in Civil Litigation: Status of The Doctrine Post-Globalization' (2007) 18 American Review of International Arbitration 21; see on the historical dimension of this debate and for an overview on the situation in different jurisdictions Andrea Bonomi, 'Mandatory Rules in Private International Law – The Quest for Uniformity of Decisions in a Global Environment' (1999) 1 Yearbook of Private International Law 215, 218 et seq.; see on the different wording, which sometimes

and the Rome I Regulation were drafted.[264] Common to the various concepts is the understanding of a substantive rule which is not part of the legal system referred to under the general conflict-of-laws rules but nevertheless has an impact on the legal consequences.[265] A comprehensive theoretical explanation for the existence of this legal phenomenon in the European conflict-of-laws systems is still lacking, and it is unlikely that such an explanation is possible at all.[266] Also Friedrich Carl von Savigny, who was already aware of the existence of this type of rule[267], did not provide an abstract justification for its existence.

The conflict-of-laws significance of the overriding mandatory provision is justified by the specific purpose pursued by the legislator with the provision and to which it attaches particular importance.[268] Therefore, the legislator must have expressed somehow an intention to apply the provision internationally. The categorisation of this provision as an overriding mandatory provision requires this intention to be derived from the provision by way of interpretation.[269] To this extent, the exceptionally nature and the therefore necessary narrow interpretation has to be taken into account.[270] In European conflict of laws, the overriding mandatory provision is defined autonomously[271] as a rule "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

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also indicates a slightly different concept, Thomas G. Guedj, 'The Theory of the Lois de Police, A Functional Trend In Continental Private International Law – A Comparative Analysis With Modern American Theories' (1991) 39 American Journal of Comparative Law 661, 664 and Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 6.

264 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 11; Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 15.10; Jonathan Harris, 'Mandatory Rules and Public Policy under the Rome I Regulation' in Franco Ferrari and Stefan Leible (eds), *Rome I Regulation* (sellier 2009) 269.

265 Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 744; Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2 Journal of Private International Law 27, 31; Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-003.

266 Jürgen Basedow, *The Law of Open Societies* (Brill 2015) para 713 et seq.

267 Friedrich Karl von Savigny, *System des heutigen römischen Rechts*, Band 8 (Veit & Comp. 1848) 34 et seq.

268 Trevor C. Hartley, 'Mandatory Rules in international contracts: the common law approach' (1997) 266 Recueil des Cours 337, 346; Andrea Bonomi, 'Mandatory Rules in Private International Law – The Quest for Uniformity of Decisions in a Global Environment' (1999) 1 Yearbook of Private International Law 215, 231; Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (2011) 348 Recueil des Cours 9, 182.

269 ECJ, C-184/12 *Unamar* [2012] ECLI:EU:C:2013:663, para 50; Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 10 et seq.

270 ECJ, C-135/15 *Nikiforidis* [2016] ECLI:EU:C:2016:774, para 44.

271 Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 15.12.

an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable […]."[272]

The possibility for the courts of the *forum* to review the characterisation as an overriding mandatory provision within the meaning of Article 9(1) Rome I Regulation is severely restricted. Whether a provision is an internally mandatory rule is not subject to a review and must hence be accepted by the *forum*. This also applies to the issue of which provisions a legislator recognises as rules whose observance is of crucial importance and the intention to apply these provisions internationally.[273] By contrast, whether a rule serves the safeguarding of public interests is a requirement underlying autonomous interpretation in accordance with the European conflict-of-laws rule. This criterion may therefore be reviewed substantively by the courts of the *forum*.[274] All in all, the legislature's scope for discretion is nevertheless very broad. Overriding mandatory provisions regularly do not require any necessary structural element which would allow the classification of a provision to be overriding mandatory. Rather, the presence of the requirements necessary under European conflict of laws must be established by interpretation.[275] Structurally, overriding mandatory provisions always provide for substantive legal consequences. Thus, whether a provision is an overriding mandatory provision is determined not by a formal but by a substantive criterion.

(2) The Self-Limiting Rule

The term "self-limiting rule" is used to refer in principle to all those rules whose unifying feature is that they provide rules on their own scope of application.[276] For these provisions, it is unclear whether and under which conditions it can be inferred from their scope of application if the legislator has also assigned these provisions an international scope of application

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272 Article 9(1) Rome I Regulation; according to Recital 7 Rome II Regulation, this definition is also decisive for Article 16 Rome II Regulation (Angelika Fuchs, 'Art. 16 Rome II Regulation', in Peter Huber (ed), *Rome II Regulation Pocket Commentary* (sellier 2011) para 8).

273 Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-019.

274 See on this Felix Maultzsch, 'Art. 9 Rom I-VO', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Rom I-VO* (C.H. Beck 2023) para 66 et seq.; Michael Hellner, 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles' (2009) 5 Journal of Private International Law 447, 458; Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-017; Moritz Renner, 'Art. 9 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 14 et seq.

275 Hill and Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2015) para 4.97; Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-022 et seq.

276 Peter Hay, 'Comments on Self-Limited Rules of Law in Conflicts Methodology' (1982) 30 American Journal of Comparative Law Supplement 129; Thomas G. Guedj, 'The Theory of the Lois de Police, A Functional Trend In Continental Private International Law – A Comparative Analysis With Modern American Theories' (1991) 39 American Journal of Comparative Law 661, 668; David Cavers, *The Choice-of-Law Process* (University of Michigan Press 1966) 225 et seq.

corresponding to their territorial scope of application. This fact is not surprising since, as previously seen, the scope of application *per se* is generally not a relevant factor in identifying the applicable law.

The determination of the international scope of application by substantive rules themselves is probably among the longest discussed issues of modern conflict of laws, even if it has only recently come to the fore. With regard to the provisions subsequently labelled as overriding mandatory provisions, already Friedrich Carl von Savigny acknowledged the existence of provisions which do not fit into the system of identifying the applicable law by the facts to which the case belong.[277] In his view, these rules had to be applied irrespective of the otherwise applicable law, as long as they were part of the *lex fori*.[278] Subsequently and also today, the existence of this category of rules is recognised in principle.[279]

However, the problem – already identified by Savigny[280] – of which rules exactly fall under this category could not be given a conclusive solution.[281] This is also true for the issue of whether all these rules must be treated equally by conflict of laws and whether some of them may be integrated into the European conflict of laws. Particularly in the last third of the 20th century, an attempt was made to classify these kind of rules in relation to the approaches emerging in the course of the American conflict-of-laws revolution.[282] The discussion reached its latest peak for the time being with the codification of overriding mandatory provisions, particularly in European and Swiss conflict of laws.[283] In the process of these codifications, the

277 Friedrich Karl von Savigny, *System des heutigen römischen Rechts*, Band 8 (Veit & Comp. 1848) 34 et seq.

278 *Ibid*.

279 Arthur Nussbaum, *Principles of Private International Law* (Oxford University Press 1943) 71; D. St. L. Kelly, 'Localising Rules and Differing Approaches to the Choice of Law Process' (1969) 18 International and Comparative Law Quarterly 249; Robert Allen Sedler, 'Functionally Restrictive Substantive Rules in American Conflicts Law' (1977) 50 Southern California Law Review 27, 31; Peter Hay, 'Comments on Self-Limited Rules of Law in Conflicts Methodology' (1982) 30 American Journal of Comparative Law Supplement 129; Jeffrey A Talpis, 'Legal Rules Which Determine Their Own Sphere of Application: A Proposal for Their Recognition in Quebec Private International Law' (1982) 17 Revue Juridique Themis 201, 204; Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4 Journal of Private International Law 1; Maria Hook, 'The "statutist trap" and subject-matter jurisdiction' (2017) 13 Journal of Private International Law 435.

280 Friedrich Karl von Savigny, *System des heutigen römischen Rechts*, Band 8 (Veit & Comp. 1848) 34 et seq.

281 Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 1 (16th ed Sweet & Maxwell 2022) 1-051.

282 Robert Allen Sedler, 'Functionally Restrictive Substantive Rules in American Conflicts Law' (1977) 50 Southern California Law Review 27; D. St. L. Kelly, 'Localising Rules and Differing Approaches to the Choice of Law Process' (1969) 18 International and Comparative Law Quarterly 249, 270 et seq.

283 Frank Vischer, 'General Course on Private International Law' (1992) 232 Recueil des Cours 15, 153; Thomas G. Guedj, 'The Theory of the Lois de Police, A Functional Trend In Continental Private International Law – A Comparative Analysis With Modern American Theories' (1991) 39 American Journal of Comparative Law 661; George A. Bermann, 'Public Law in the Conflict of Laws' (1986) 34 American Journal of Comparative Law Supplement 157, 160 et seq.

relationship between the various substantive rules with a potential effect on the conflict of laws has also been examined[284] but is still a widely unresolved issue.

(a) Structure of Self-Limiting Rules

The previous discussion of the legal phenomenon of self-limiting rules and the implications of self-limiting rules for the relations to other legal systems has proven difficult for several reasons. Firstly, especially in the past the terminology was very inconsistent[285] and the discussion lacked a sufficient differentiation of the various substantive rules claiming international applicability. In more recent literature, however, the term "self-limiting rule" seems to have gained acceptance.[286] In the following, this term will therefore be used.

The inconsistent terminology has also been accompanied by divergent definitions.[287] Further, especially previous to the codification of the first overriding mandatory provisions in Europe,[288] the relationship between self-limiting rules and overriding mandatory provisions has been unclear.[289] A further obstacle arises from the different approaches Common law and Civil law attach to the role of statutes in assessing the applicable law.[290]

There is considerable disagreement on how to define self-limiting rules. However, considering the different definitions, it is possible to identify common elements. Firstly, a self-limiting rule

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284 Andreas Köhler, *Eingriffsnormen – Der „unfertige Teil" des europäischen IPR* (Mohr Siebeck 2013) 8 et seq.

285 See for a collection of different terms D. St. L. Kelly, 'Localising Rules and Differing Approaches to the Choice of Law Process' (1969) 18 International and Comparative Law Quarterly 249; G. van Hecke, 'International Contracts and Domestic Legislative Policies', in Werner Flume, Hugo J. Hahn, Gerhard Kegel and Kenneth R. Simmonds (eds), *International Law and Economic Order* (C.H. Beck 1977) 183, 185; Kurt Lipstein, 'The General Principles of Private International Law' (1972) 135 Recueil des Cours 97, 195 fn. 435; Otto Kahn-Freund, 'General Problems of Private International Law' (1974) 143 Recueil des Cours 144, 241; A Thomson, 'A Different Approach to Choice of Law in Contract' (1980) 43 Modern Law Review 650, 663.

286 See e.g. Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4 Journal of Private International Law 1, 4; Michael Hellner, 'Private International Enforcement of Competition Law' (2002) 4 Yearbook of Private International Law 257, 284; Maria Hook, 'The "statutist trap" and subject-matter jurisdiction' (2017) 13 Journal of Private International Law 435.

287 Robert Allen Sedler, 'Functionally Restrictive Substantive Rules in American Conflicts Law' (1977) 50 Southern California Law Review 27, 31; Peter Hay, 'Comments on Self-Limited Rules of Law in Conflicts Methodology' (1982) 30 American Journal of Comparative Law Supplement 129; D. St. L. Kelly, 'Localising Rules and Differing Approaches to the Choice of Law Process' (1969) 18 International and Comparative Law Quarterly 249.

288 Article 18 et seq. Swiss IPRG, Article 7 Convention on the Law Applicable to Contractual Obligations 1980 (Rome Convention).

289 See on different concepts Kurt Lipstein, 'Inherent Limitations in Statutes and the Conflict of Laws' (1977) 26 International and Comparative Law Quarterly 884, 885; F. A. Mann, 'Statutes and the Conflict of Laws' (1972-1973) 46 British Year Book of International Law 117; Jeffrey A Talpis, 'Legal Rules Which Determine Their Own Sphere of Application: A Proposal for Their Recognition in Quebec Private International Law' (1982) 17 Revue Juridique Themis 201, 208 et seq.; Frank Vischer, 'General Course on Private International Law' (1992) 232 Recueil des Cours 15, 154; Uglješa Grušić, 'The Territorial Scope of Employment Legislation and Choice of Law' (2012) 75 The Modern Law Review 722, 743.

290 See e.g. for the common law tradition Uglješa Grušić, 'The Territorial Scope of Employment Legislation and Choice of Law' (2012) 75 The Modern Law Review 722; F. A. Mann, 'Statutes and the Conflict of Laws' (1972-1973) 46 British Year Book of International Law 117.

is a provision with a substantive legal consequence and elements on the facts limiting or extending their scope of application in relation to the territory of the enacting legislator.[291] Hence structurally, self-limiting rules are characterised by two elements. The facts comprise a restrictive element, the existence of which is necessary to trigger the legal consequences of the provision. To this extend, it is irrelevant whether the delimitation of the scope of application is made with recourse to a positive or negative reference to the factual elements. In the latter case, the element might also just be formulated positively as a – albeit almost always given – prerequisite for the establishment of the legal consequence. As a second element characterising a self-limiting rule, the legal consequences of a self-limiting rule must always affect directly the substantive legal situation.

In contrast, not essential for the existence of a self-limiting rule and without influence on its legal effects is an element in a provision on the legal consequences according to which this provision applies irrespective of the applicable law. Such an element is not required under the definition reflecting the elements common to most of the definitions of a self-limiting rule. The existence of such an element is not necessary to trigger the substantive legal consequence, but rather one which – on the legal consequences – regulates the applicability in relation to other legal systems.

Thus, according to the common elements relied upon in most definitions of self-limiting rules, self-limiting rules do not presuppose elements regulating their relation to provisions of other legal systems. The smallest common denominator of these definitions requires instead on the facts side an element defining its scope of application and on the legal consequences a substantive regulation.

(b) Common Features of Self-Limiting Rules

This broad approach followed by the existing definitions of self-limiting rules leads to a situation where many different provisions are to be categorised as a self-limiting rule. It is thus to be examined whether the legal category of self-limiting rules can be further narrowed down by recourse to other specific features. These features are characterised by the fact of being shared by only some of these provisions structurally classified as self-limiting rules. Such a limitation would also allow to distinguish self-limiting rules categorised in this way more clearly from other provisions of a legal system and to classify them in relation to other provisions of a legal system.

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[291] See also F. A. Mann, 'Statutes and the Conflict of Laws' (1972-1973) 46 British Year Book of International Law 117, 121; similar but limited to spatial elements Robert Allen Sedler, 'Functionally Restrictive Substantive Rules in American Conflicts Law' (1977) 50 Southern California Law Review 27, 32.

(i) Common Features on the Facts Side

On the facts side, these characteristics may follow from the structure of the provisions or from the specific design of the scope of application or the criteria used for its determination. They may also be derived from the role of the self-limiting rule within the legal system. Whether one of these elements may specify more closely the concept of self-limiting rules will be examined in the following.

(a) Structure of the Provision

No special characteristics inherent to self-limiting rules may be derived from the structure of the provisions itself. It is irrelevant for the classification as a self-limiting rule whether the elements defining the scope of application are to be found in the individual rule itself or whether they precede or succeed several provisions in the form of a provision defining the scope of application.[292] The respective structure is merely a design decision by the legislator, which has no impact on the regulatory content of the individual provision.

(b) Consequences of the Scope of Application

Further, it has no influence on the classification as a self-limiting rule whether a scope of application results in a reduction or expansion of the scope of the provision in comparison with a corresponding but more generally formulated provision of the same jurisdiction.[293] The mere fact of a provision stipulating a broader scope of application than the general provisions must be distinguished from the permissibility of such a broad scope of application. Only the latter question is relevant for public international law.[294] However, permissibility in itself has no influence on the legal categorisation of those provisions in the context of conflict of laws.

(c) Type of Criterion for Determining the Territorial Scope

Finally, the type of criterion employed by a self-limiting rule to identify its scope of application is irrelevant to its categorisation as a self-limiting rule.[295] In addition to territorial criteria, personal or other factual elements may also be taken into account. Although at first glance it

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292 See also D. St. L. Kelly, 'Localising Rules and Differing Approaches to the Choice of Law Process' (1969) 18 International and Comparative Law Quarterly 249, 257; Robert Allen Sedler, 'Functionally Restrictive Substantive Rules in American Conflicts Law' (1977) 50 Southern California Law Review 27, 32; Kurt Lipstein, 'Inherent Limitations in Statutes and the Conflict of Laws' (1977) 26 International and Comparative Law Quarterly 884.

293 This point has already been mentioned by Rodolfo De Nova, 'Self-Limiting Rules and Party Autonomy' (1973) 5 The Adelaide Law Review 1, 7.

294 See on this question already above A.II.1.b)(1).

295 Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 1 (16th ed Sweet & Maxwell 2022) 1-050; D. St. L. Kelly, 'Localising Rules and Differing Approaches to the Choice of Law Process' (1969) 18 International and Comparative Law Quarterly 249, 251.

seems reasonable to restrict self-limiting rules to those rules containing a personal or territorial definition of the scope of application,[296] this is neither necessary nor feasible.

Such a restriction could be supported by the fact that territorial and personal criteria are typical connecting factors in conflict of laws.[297] However, there is no objective reason for such a limitation. In principle, each element incorporated in a provision may allow for a distinction from other provisions at the level of substantive law or conflict of laws. A different conflict-of-laws treatment may be more far-fetched for certain types of differentiation criteria. However, it is a matter of interpretation not relevant for the categorisation of those provisions as such. Nevertheless, a conflict-of-laws rule designed to coordinate the applicability of laws of different legislators may possibly be designed in such a way for it to resort to other connecting factors. These connecting factors may, for example, include the point in time, gender or another criterion to characterise the facts of the case. Whether these criteria are suitable or legally permissible from a public international law point of view is to be answered separately. However, the admissibility under public international law does not *a priori* restrict the ability of the legislator to establish corresponding conflict-of-laws rules based on these connecting factors.

(d) Legislative Function of a Self-Limiting Rule

Another specific feature of self-limiting rules which might allow this type of provision to be distinguished from other provisions within a legal system could be seen in the legislative function assigned to the provision when implementing a provision in a legal system. In this respect, only those provisions which address a situation already governed by general provisions of the legal system and providing a different legal consequence might be considered to constitute a self-limiting rule. Other provisions stipulating a scope of application, where the legislator does not provide for a more general provision, may not be characterised as self-limiting rules. However, the legislator's intention in adopting criteria to limit the scope of application is to subject certain situations to specific legal consequences. Otherwise, the legislator could have abstained from limiting the scope of application. In this regard, it is immaterial whether the legislator addressed the more general situations by another law or by just leaving these situations unregulated. In both cases, the legislator identified the need to establish different legal consequences in certain situations compared to any other situation. The

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296 And in fact this is often done, at least implicitly; see e.g. Thomas G. Guedj, 'The Theory of the Lois de Police, A Functional Trend In Continental Private International Law – A Comparative Analysis With Modern American Theories' (1991) 39 American Journal of Comparative Law 661, 668.

297 European conflict of laws is beside the possibility of a choice of law mainly based on territorial criteria to identify the applicable law, see e.g. Article 4-8 Rome I Regulation, Article 4-9 Rome II Regulation. However, sometimes it is also referred to the nationality to assess the applicable law, see e.g. Article 8 lit. c) Rome III Regulation, Article 26(1)(b) Matrimonial Property Regulation.

different ways in which the more general situations are regulated do not justify a diverging legal categorisation of the rules with a limited scope of application.

(e) Interim Conclusion

Since no convincing additional element could be identified so far which would allow to limit the number of provisions constituting a self-limiting rule, it is increasingly relevant to analyse how self-limiting rules can be distinguished from other rules. This is because the vast majority of regulations contain factual elements which must be met for the legal consequences to apply.[298] As far as can be seen, this issue has not yet been discussed in depth. This might be due to the fact of a more detailed examination not seeming necessary, as in principle any restriction of the scope of application results in a categorisation as a self-limiting rule. A distinction to the general rules would thus be superfluous. In contrast, however, this might also be connected to the fact of not being easily possible to differentiate between criteria limiting the scope of application without the regulation being categorised as a self-limiting rule and those resulting in its categorisation as a self-limiting rule. In particular, it could also depend on which definition of the term self-limiting rule is used as a basis.

Irrespective of which of the two causes is correct in the end, the lack of an answer to this question reveals a fundamental issue of the concept of self-limiting rule. This is especially true with regard to the legal consequences resulting from a classification as a self-limiting rule. The variance and generality of the concept of self-limiting rules is so wide that it is not possible to identify common elements which reliably distinguish self-limiting rules from other rules, *i.e.* general rules, of a legal system. This is further emphasised by the almost complete absence of specific elements of self-limiting rules on the factual side.

Conversely, however, in a large and partly unrelated number of areas of law[299] the legislator defines specific areas of application for individual provisions or entire complexes of provisions for regulations. These provisions typically address potentially cross-border situations by referring to territorial criteria. The concept of self-limiting rule thus derives its *raison d'être* from summarising and formulating this factual phenomenon in a term of its own. Yet, for the reasons stated above, no legal conclusions may be drawn from this alone. Each individual provision is hence subject to its very own legal assessment. Insofar as the term self-limiting rule is used in the following, it serves as a collective term for substantive provisions with an

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298 Similar Christopher Bisping, 'Avoid the Statutist Trap: The International Scope of the Consumer Credit Act 1974' (2012) 8 Journal of Private International Law 35, 53.

299 See also the comprehensive collection in Gerhard Kegel, 'Die selbstgerechte Sachnorm', in Erik Jayme and Gerhard Kegel (eds), *Gedächtnisschrift für Albert A. Ehrenzweig (1906-1974)* (C.F. Müller 1976) 51, 71 et seq., insofar as Kegel refers to the protection of certain groups or the affiliation to public law, these categories are so general that nothing may be derived from them for a common legal treatment of self-limiting rules.

explicitly specified scope of application. However, the use of this term is not intended to give the impression of these types of provisions forming a special set of provisions with common characteristics going beyond the element of self-limitation.

(ii) Common Features on the Legal Consequences

Yet, another approach for defining the concept of self-limitation more precisely might be to identify the provisions falling under this concept not by their facts but by their legal consequences. Accordingly, a provision might potentially be categorised as self-limiting if it contains not only a substantive provision as a legal consequence, but also a further legal consequence which distinguishes it from other provisions comprising a substantive provision as a legal consequence. Such a delimiting legal consequence might be seen in the fact of a self-limiting rule not only consisting of a substantive provision, but also claiming international applicability. Based on this duality of legal consequences, the provision would then constitute both a substantive and a conflict-of-laws provision.

However, the common denominator of self-limiting rules is their explicitly defined scope of application on the factual side. On the legal consequences they regularly provide *prima facie* only a substantive rule. Therefore, self-limiting rules do not necessarily contain an explicit order for international application. It is hence doubtful whether it can be inferred from the provisions which are generally referred to as self-limiting rules by way of interpretation that these claim in any case international applicability.

Assuming that self-limiting rules would be subject to uniform legal treatment or that the category of self-limiting rules would be more narrowly defined and thus a delimitation from other regulations would be possible, this would not affect their legal assessment. Even if one were to take this different view, nothing can be derived from the legal concept of the self-limiting rule, at least from the perspective of conflict of laws. Irrespective of the categorisation as a self-limiting rule, rules with a defined scope of application may nevertheless be of significance in relation to conflict of laws under specific circumstances. This would be true even if the definition of the scope of application on a case-by-case analysis might also provide an indication of the willingness to apply the provision internationally.

(iii) The Potential Relevance of the Self-Limiting Rule in the Conflict of Laws

An intention for an international application would be indicated if a self-limiting rule were also to be classified as a conflict-of-laws rule. Further, it might be given international effect as

overriding mandatory rule independently of the law referred to by the general conflict-of-laws rules.[300]

One of the most controversial aspects when dealing with rules specifying their scope of application has been the extent to which the definition of the scope of application has a conflict-of-laws dimension. This addresses the legal nature of self-limiting rules, especially whether their scope of application merely affects the level of substantive law or whether they also establish rules of conflict-of-laws content.

A formal differentiation between provisions of substantive law and conflict of laws according to whether the provision entails a substantive rule or merely refers to the applicable law[301] does not provide any guidance on this question. The issue of classification of self-limiting rules is not of whether self-limiting rules establish a regulation on the legal consequences or only refer to a substantive provision in this respect. The self-limiting rule is characterised by its rule on the scope of application on the facts side and a substantive rule on the legal consequences.[302] According to their formal appearance, the self-limiting rule could thus be clearly assigned to substantive law as these provisions establish at any rate a substantive legal consequence. This, however, would miss the actual point. The crucial issue when it comes to the relationship between self-limiting rules and conflict of laws is whether and under which conditions the applicability of a rule in cross-border situations may be justified in deviation from the general conflict-of-laws rules. Such a deviation could be justified by the rule declaring itself applicable by means of its scope of application. However, a formal differentiation is not possible for provisions whose legal consequences contain both a substantive and a conflict-of-laws provision. This differentiation cannot therefore be consulted to determine the relationship between self-limiting rules and conflict of laws, as it does not provide for such a substantiation of international applicability.

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300 It should be noted that the understanding of the relationship between self-limiting rules, unilateral conflict-of-laws rules and overriding mandatory rules might be based on two fundamentally different concepts. On the one hand, the classification as unilateral conflict-of-laws rule or overriding mandatory rule could be understood as an additional characteristic of a self-limiting rule. On the other hand, one could also assume an exclusive relationship between these instruments. This would result in a provision being classified either as a self-limiting rule or as a unilateral conflict-of-laws rule or as an overriding mandatory provision (so e.g. Maria Hook, 'The "statutist trap" and subject-matter jurisdiction' (2017) 13 Journal of Private International Law 435, 439). Since – according to the definition of the self-limiting rule relied on here – the self-limiting rule has no independent legal significance as such anyway, these different approaches have no effect.

301 See above A.II.1.b)(2).

302 See above A.II.3.c)(2)(b)(i)-(ii).

(iv) The Self-Limiting Rule as a Unilateral Conflict-of-Laws Rule

However, also under the multilateral approach there are provisions declaring just a single specific law on a limited range of legal issues to be applicable once the requirements on the facts side are met. The explicitly defined scope of application of a self-limiting rule might indicate an interpretation of a self-limiting rule as such a unilateral conflict-of-laws rule. The classification as a conflict-of-laws rule might in this case be derived from the definition of the scope of application. The unilateral nature of this conflict-of-laws rule follows from a particular rule already being expressly specified in the legal consequence of the self-limiting rule. In contrast to multilateral conflict-of-laws rules, the legal consequence of a self-limiting rule is achieved by imposing a substantive legal consequence that is not openly phrased and is thus specified by the scope of application.

The discussion on the classification of a self-limiting rule as unilateral conflict-of-laws rule – which used to be very controversial[303] – seems to have been largely settled. To this end, recourse has been taken to the distinction that evaluates the legal consequences of the self-limiting rule. The view has prevailed that the legal concept of the self-limiting rule as such does not define the applicable law by way of a unilateral conflict-of-laws rule. The legal consequences of a self-limiting rule therefore do not already apply in a cross-border situation if the scope of application and the other requirements of the provision are met. Rather, they also presuppose the self-limiting rule to be considered applicable under conflict of laws.

At least for the law of the United Kingdom this characterisation is expressly stated in the literature. For this jurisdiction, the legal nature of a self-limiting rule is to be considered undisputed.[304] But also in other jurisdictions the absence of a conflict-of-laws element in a self-limiting rule seems to be increasingly accepted in recent literature.[305] This understanding

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303 See on the one hand J. H. C. Morris, *The Conflict of Laws* (Stevens & Sons 1971) 235, Kurt Lipstein, 'Inherent Limitations in Statutes and the Conflict of Laws' (1977) 26 International and Comparative Law Quarterly 884, 887, 896; D. St. L. Kelly, 'Localising Rules and Differing Approaches to the Choice of Law Process' (1969) 18 International and Comparative Law Quarterly 249, 250 and on the other hand Otto Kahn-Freund, 'General Problems of Private International Law' (1974) 143 Recueil des Cours 144, 240 et seq.; F. A. Mann, 'Statutes and the Conflict of Laws' (1972-1973) 46 British Year Book of International Law 117, 123; Peter Hay, 'Comments on Self-Limited Rules of Law in Conflicts Methodology' (1982) 30 American Journal of Comparative Law Supplement 129, 130; Robert Allen Sedler, 'Functionally Restrictive Substantive Rules in American Conflicts Law' (1977) 50 Southern California Law Review 27, 32; see for a summary also Michael Hellner, 'The Country of Origin Principle in the E-commerce Directive – A Conflict with Conflict of Laws?' (2004) 12 European Review of Private Law 193, 207 et seq.

304 Uglješa Grušić, 'The Territorial Scope of Employment Legislation and Choice of Law' (2012) 75 The Modern Law Review 722, 747.

305 Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4 Journal of Private International Law 1, 8; Maria Hook, 'The "statutist trap" and subject-matter jurisdiction' (2017) 13 Journal of Private International Law 435, 439; Jan Kropholler, *Internationales Privatrecht* (6th edn, Mohr Siebeck 2006) § 13 IV 2, V; but still different Martin Davies, Andrew Bell, Paul Le Gay Brereton, Michael Douglas, *Nygh's Conflict of Laws in Australia* (10th edn, LexisNexis 2019) 40 and also Symeon

follows from the consideration that a legislator has not intended to regulate the international applicability of every self-limiting rule it establishes. It is supported by the observation that jurisdictions – at least insofar as they regulate the applicable law by statute – generally issue a dedicated statute to regulate the international applicability of their legal system. The assumption of an element of conflict of laws in a self-limiting rule would result in a widespread regulation of conflict of laws outside of provisions specifically addressing the applicable law and outside of dedicated conflict-of-laws acts. This would contradict the systematic separation between substantive law on the one hand and conflict of laws on the other. In addition, at least the continental legislators in principle regulate conflict of laws through multilateral conflict-of-laws rules which comprehensively determine the applicable law based on the respective facts of the case. Systematically, this approach would be contradicted if the law applicable to the facts of the case were regularly fragmented by a multitude of scattered unilateral conflict-of-laws provisions. Contradictions would hence threaten to arise both from the fragmentation of the relevant rules assessing the applicable law and from the extensive use of unilateral conflict-of-laws rules.[306] This applies even more as, given the potentially broad understanding of the self-limiting rule, a variety of substantive law provisions would be relevant for identifying the applicable law.

(c) Interim Conclusion

The existing approaches to describing the concept of the self-limiting rule are therefore very broad and vague. From a legal perspective, nothing can be derived from them. Furthermore, the smallest common denominator of these different definitions does not provide an indication on the applicability of self-limiting rules in relation to other legal systems.

Nor were attempts to narrow down these approaches by looking for common features characterising some self-limiting rules successful. This is particularly true for the applicability of self-limiting rules in relation to other legal system since not every self-limiting rule contains a unilateral conflict-of-laws rule by way of interpretation. Hence, the mere fact of a provision containing a scope of application does not allow any conclusion on its scope of application in relation to other legal systems. Furthermore, this illustrates the unsuitability of the scope of application as a criterion for identifying a category of law allowing an assessment of the common characteristics of provisions with a scope of application.

C. Symeonides, *Codifying Choice of Law Around the World* (Oxford University Press 2014) 295 who seem to assume that self-limiting rules are directly applicable, at least to the extent they explicitly refer to cross-border situations.

306 This threat has also been identified by Frank Vischer, 'General Course on Private International Law' (1992) 232 Recueil des Cours 15, 158.

(3) The Relationship of Self-Limiting Rules to Other Types of Rules

Therefore, a provision's definition of its own scope of application does not necessarily indicate its international applicability. However, this raises the issue of when the international applicability of this provision is established by the definition of the scope of application and how this provision relates to other provisions which are intended to designate the applicable law.

(a) The Relation of Self-Limiting Rules and Unilateral Conflict-of-Laws Rules

Although self-limiting rules do not always regulate their relationship to rules of other legal systems, this does not necessarily prevent some rules defining their scope of application on the facts side from constituting unilateral conflict-of-laws rules.[307] This merely implies not every self-limiting rule as such constitutes a conflict-of-laws rule at the same time. However, it is not precluded to interpret a specific self-limiting rule in such a way as to incorporate a unilateral conflict-of-laws rule alongside its substantive regulatory content.[308]

In this context, the special characteristic already mentioned above must be taken into account that self-limiting rules regularly comprise only a substantive rule on the legal consequences in terms of their formal appearance and structure. They therefore do not refer to an applicable law, as is typical under the conventional distinction between substantive and conflict-of-laws rules.[309] In order to determine whether a self-limiting rule not only provides a substantive rule but also contains a unilateral conflict-of-laws rule, it is therefore necessary to examine whether the rule indicates an intention for international application by interpretation.

Such an intention may be assumed, firstly, if the provision expressly states in determining its scope of application that the scope of application also defines the relationship to the laws of other legal systems. However, not any regulation on the relationship to another legal system may be understood as a conflict-of-laws rule. In this respect, the different roles of the unilateral conflict-of-laws rules and the overriding mandatory provision in cross-border situations are to

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307 Maria Hook, 'The "statutist trap" and subject-matter jurisdiction' (2017) 13 Journal of Private International Law 435, 439; F. A. Mann, 'Statutes and the Conflict of Laws' (1972-1973) 46 British Year Book of International Law 117, 132 et seq.

308 Kurt Siehr, 'Normen mit eigener Bestimmung ihres räumlich-persönlichen Anwendungsbereichs im Kollisionsrecht der Bundesrepublik Deutschland' (1982) 46 Rabels Zeitschrift für ausländisches und internationales Privatrecht 357, 374; G. van Hecke, 'International Contracts and Domestic Legislative Policies', in Werner Flume, Hugo J. Hahn, Gerhard Kegel and Kenneth R. Simmonds (eds), *International Law and Economic Order* (C.H. Beck 1977) 183, 186.

309 Nor can it be said in this context for this distinction to be irrelevant. Regardless of how one differentiates in detail between conflict of laws and substantive law provisions, each provision may be assigned to either one of the two categories. To this extent, there is no "tertium" (this term has been coined in this context by Jan Kropholler, *Internationales Privatrecht* (6th edn, Mohr Siebeck 2006) 109).

be taken into account.[310] To this end, it must be indicated by the wording of the provision itself whether the provision, by virtue of its scope of application, is an inherent part of the assessment of the law applicable to the situation and does not merely supersede or supplement the law designated as applicable by the general conflict-of-laws rules.

For example, the wording "the conditions of this rule determine its applicability also in relation to other legal systems" or "in relation to other legal systems, this law applies" expressly demonstrates the legislator's intention to regulate the international applicability without, however, underlining the intention to apply the provision irrespective of the otherwise applicable law. If, conversely, a rule contains a wording which indicates it applies irrespective of the governing law, the wording as such must not be read as indicating its legal nature as a unilateral conflict-of-laws rule. An example for a provision of this latter type might be the wording according to which a rule shall apply "irrespective of the law applicable to the contract".[311] Another example are provisions stating that – for the purposes of a legal act – it is irrelevant whether the law governing the issue beside the legal act is the law of that state.[312] It follows from the wording of such a provision that the law applicable *per se* – which may be identified by multilateral, but also by unilateral conflict-of-laws rules – is to be superseded in any case. This type of provision does not identify the applicable law but instead declares itself applicable beside the applicable law and irrespective of which law applies in fact. However, this does not imply that overriding mandatory provisions are not considered conflict-of-laws rules. Yet, overriding mandatory provisions establish their applicability differently from conflict-of-laws rules by deriving their conflict-of-laws relevance from the substantive level of regulation itself.

Problems arise, though, in cases where it is not clear from the wording whether the rule is to apply as part of the governing law or independently of it.[313] Sometimes it is not clear from the wording whether a provision is intended to distinguish the law governing the subject matter from an individual statute established by this provision. The applicability of such an individual statute would hinge on a separate conflict-of-laws rule enshrined in this provision. In contrast, the provision could also apply independently of the governing law and therefore as an overriding mandatory provision. The differentiation is sometimes very nuanced. It is therefore

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310 See on this difference below at A.II.3.c)(3)(b)(i) and Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 67 et seq.

311 This wording is part of the definition given in Article 9(1) Rome I Regulation.

312 Section 204(1) UK Employment Rights Act 1996 and similar Article 6 German EGHGB.

313 See e.g. Article 3(2) Spanish Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación stating that the law will also apply to contracts subject to foreign law. With this wording, it remains unclear whether the provision is intended to restrict the scope of application of the *lex contractus* or override the law referred to.

doubtful to what extent the legislature actually had such a differentiation in mind when adopting a rule with such an inconclusive wording. Against this backdrop, when classifying a self-limiting rule, significance may only be attached to an unambiguous wording. In cases of doubt, the wording only has an indicative significance and other factors also need to be taken into account.

In the absence of an expressly declared intention of international application, it must be assessed by way of interpretation whether the legislator intended to assign the provision such an intention of application.[314] In the following, therefore, the specific criteria will be analysed which require an interpretation of a self-limiting rule as a rule which also incorporates a unilateral conflict-of-laws rule. Before doing so, however, it must be explored how the interpretation of a self-limiting rule is influenced by the integration of the self-limiting rule into a legal system governed by different legislators.

(i) The Constrained Relevance of a Unilateral Conflict-of-Laws Rule Found in a Self-Limiting Rule

Before analysing whether and when self-limiting rules may be classified as unilateral conflict-of-laws rules, a preliminary clarification is required. If the national legislator imposes self-limiting rules, the precedence of European law over national law must be observed. This priority rests on the principle of primacy of the law of the European Union.[315] The conflict-of-laws rules of national law are therefore superseded by corresponding provisions of the European legislator. This at least holds true for those legal systems subject to the regulatory regime of European conflict of laws. Although self-limiting rules may therefore in principle also contain independent conflict-of-laws rules, any European conflict-of-laws rule must be applied with priority.

The relevance of this observation, as blatant as it might be, must not be underestimated for the interpretation of a self-limiting rule. When interpreting self-limiting rules, it is necessary to consider a national legislator's general intention not to establish a law which has no relevant scope of application due to the primacy of European law. For areas of application in which the European legislator has enacted conflict-of-laws rules, the national legislator may not therefore be assumed to have intended to define the international scope of application of these national provisions at the same time as defining a scope of application. In these cases, a national self-

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314 G. van Hecke, 'International Contracts and Domestic Legislative Policies', in Werner Flume, Hugo J. Hahn, Gerhard Kegel and Kenneth R. Simmonds (eds), *International Law and Economic Order* (C.H. Beck 1977) 183, 186 et seq.

315 This has been stated by ECJ, C-6/64 *Flaminio Costa v E.N.E.L.* [1964] ECLI:EU:C:1964:66 and has since then been part of the established case law of the ECJ.

limiting rule cannot – in principle – be interpreted as providing a unilateral conflict-of-laws rule since it would have no relevant scope of application.

(ii) Existing Approaches

Whether a self-limiting rule may be interpreted to contain a unilateral conflict-of-laws rule is considered to be an extremely difficult issue not yet having been fully solved.[316] This is further complicated by the absence of a uniform categorisation of self-limiting rules. Further, a distinction between self-limiting rules and overriding mandatory rules has not been made, particularly in early treatises.[317] As will be shown, however, these are fundamentally different legal phenomena.

Yet, at the same time it must be taken into account that the reasons prompting the legislator to establish a self-limiting rule may also be similar to those triggering the creation of an overriding mandatory rule. However, this does not resolve the issue of whether the self-limiting rule may be classified as a unilateral conflict-of-laws rule. In the following, some of the already existing attempts at delimitation will be presented in order to subsequently develop a customised approach to delimitation.

(a) The Criteria Applied to Identify the Territorial Scope of Application

Some take the view that whether a self-limiting rule may constitute a unilateral conflict-of-laws rule depends on whether the scope of application is based on criteria which may likewise form part of a connecting factor in typical conflict-of-laws rules.[318] If the criteria might form part of a connecting factor as well, the provision at issue is considered a conflict-of-laws rule. Otherwise, it would be a mere self-limiting rule. An argument against such an approach is the lack of any evidence or reason why the legislator should be restricted in its choice of connecting factors. Admittedly, this view is supported by the fact that the use of atypical connecting factors indicates that the legislator did not have the international application in mind when drafting the provision. However, concluding from this argument that the legislator did not intend such a provision to constitute a unilateral conflict-of-laws rule at the same time would require restricting the legislator's choice of connecting factors too far.

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316 Christopher Bisping, 'Avoid the Statutist Trap: The International Scope of the Consumer Credit Act 1974' (2012) 8 Journal of Private International Law 35, 45; Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 1 (16th ed Sweet & Maxwell 2022) para 1-051.

317 See e.g. Otto Kahn-Freund, 'General Problems of Private International Law' (1974) 143 Recueil des Cours 144, 241.

318 J. Unger, 'Use and Abuse of Statutes in the Conflict of Laws' (1967) 88 The Law Quarterly Review 1967, 427, 429 fn. 6.

(b) The Remaining Scope of Application for a Provision of Substantive Law

Another approach focuses on the scope of application of the self-limiting rule if the applicability of the rule were determined under the general conflict-of-laws rules.[319] Similarly, it is analysed to what extent the regulatory content of the self-limiting rule might be circumvented if it did not provide for a unilateral conflict-of-laws rule.[320] In principle, this approach provides a sound starting point, as it does not target at a specific substantive result, but rather enquires into the scope of application of a substantive provision in the context of conflict of laws. It distinguishes the issue of the applicable law from the issue of the substantive result and thus allows for a distinct separation from the concept of an overriding mandatory rule where the issue of the applicable law is of no significance. The issue with this approach, however, consist in its assumption of the legislator's intention to apply the respective substantive law, even though the same legislator has established or at least observes dedicated conflict-of-laws provisions. The national legislator has regularly enacted explicit and separately codified conflict-of-laws rules in order to regulate the applicability of its own law in relation to other legal systems and to separate the issue of the applicable law from substantive regulation. It thereby separated the issue of the applicable law and the substantive regulation and assigned these matters in principle to different provisions within the legal system.

Another argument against the exclusive reliance on this approach might arise from the fact of a foreign conflict of laws not necessarily referring to the respective legal system as a whole, including its conflict of laws, but instead may solely refer to the substantive provisions of the legal system. This issue may arise if a foreign court has international jurisdiction.[321] In these situations, the restriction of the scope of application by the conflict of laws of the legal system to which reference is made is of no significance, as these provisions are not applied.

Against this backdrop, the considerations on the interplay of conflict of laws and substantive law within a single legal system might be relevant to some extent. Thus, the mere fact of a substantive provision having a limited scope of application may not serve as the sole appropriate demarcation criterion. The legislator would have been able to regulate the international applicability expressly and separately in relation to the existing conflict-of-laws rules.

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319 Kurt Siehr, 'Normen mit eigener Bestimmung ihres räumlich-persönlichen Anwendungsbereichs im Kollisionsrecht der Bundesrepublik Deutschland' (1982) 46 Rabels Zeitschrift für ausländisches und internationales Privatrecht 357, 375.

320 Trevor C. Hartley, 'Mandatory Rules in international contracts: the common law approach' (1997) 266 Recueil des Cours 337, 401.

321 Extensive from an international perspective Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (2011) 348 Recueil des Cours 9, 156-166.

(c) Alternative Test

Finally, there is also a partial plea for an alternative test.[322] According to this test, the scope of application of a self-limiting rule is restricted to the substantive level and hence no conflict-of-laws element may be assumed if and to the extent that the scope of the provision serves to delimit the provision from other provisions of the same legal system. This kind of delimitation is given if the respective legal system, in the absence of the law stipulating the delimitation criterion, provides another regulation which addresses this situation. If, in contrast, it is a matter of delimitation from the scope of application of provisions of other legal systems, the provision on the scope of application also consists of a conflict-of-laws element. Such a delimitation of other legal systems is provided, if the legal system at issue would leave this situation unregulated in the absence of the law containing the delimiting factor.

Admittedly, this approach is in principle based on a sound premise in that it takes up the starting point of conflict of laws as a coordinating instrument for the applicable law in situations with links to several legal systems. However, it appears problematic to assess the reasons on which the legislator restricts the scope of application of a provision exclusively on a monocausal basis for determining the purpose of the provision. Under this approach, the sole decisive factor is whether the respective legal system provides for another, more general provision. Nor does this test consider the possibility of the non-regulation of a factual situation by defining a scope of application may have been a deliberate decision of the legislator.[323]

Further, even if a general rule exists, this does not necessarily mean that the legislator's intention in defining the scope of application was solely to distinguish the law containing a provision on the territorial scope of application from that rule. This provision may also have been intended by the legislature to take account of the limited scope of application, which requires a different conflict-of-laws analysis.

Likewise, the conflict-of-laws legislator may equally have had an interest in a separate regulation for certain situations, irrespective of the restriction of the scope of application at a substantive level. An example of this are the special conflict-of-laws rules with different connecting factors in the Rome Regulations of the European legislator.[324] These rules are in part a manifestation of the conflict-of-laws legislator's perception to have found a law deviating from the conflict-of-laws rules for certain situations which would better serve the objectives of conflict of laws. These objectives consist in applying the most appropriate territorial law.

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322 See Klaus Schurig, *Kollisionsnorm und Sachrecht* (Duncker & Humblot 1981) 61; Gerhard Kegel and Klaus Schurig, *Internationales Privatrecht* (9th edn, C.H. Beck 2004) 57.

323 This is also admitted by Gerhard Kegel, 'Die selbstgerechte Sachnorm', in Erik Jayme and Gerhard Kegel (eds), *Gedächtnisschrift für Albert A. Ehrenzweig (1906-1974)* (C.F. Müller 1976) 51, 77 et seq.

324 See e.g. Article 4(1)(c),(d),(g),(h), 5-8 Rome I Regulation and Article 5-12 Rome II Regulation.

Additionally, those rules may also be an expression of substantive considerations of justice. Those may also be pursued by means of conflict of laws. Conflict-of-laws rules, just like substantive law provisions, may therefore be based on regulatory techniques which provide for legal consequences deviating from the general rules in specific situations. These serve to take account of the purpose of conflict of laws or substantive considerations of justice. The regulatory method of defining provisions which apply only to specific situations by establishing a scope of application distinguishing those provisions from other provisions is therefore common to both substantive and conflict-of-laws rules. If this technique is shared by both types of provisions, it may not be employed in determining the regulatory content of a provision. At least for conflict-of-laws rules, this technique is also followed to identify the applicable law, irrespective of whether there is a more general conflict-of-laws rule.

The existence or non-existence of a general rule may therefore not be the sole criterion for distinguishing between a substantive rule and a conflict-of-laws rule. Thus, the crucial point is not whether a general rule exists, but why such a general rule may or may not have been established. How the existence or non-existence of a general rule might influence the interpretation of a self-limiting rule will be further examined below.[325] In spite of this weaknesses, the alternative test is in principle at least convincing in so far as it provides a first and easily accessible indication of whether a conflict-of-laws rule may be inferred from a provision. As seen, it is in contrast not suited to reach a conclusive decision on the issue of how to categorise a self-limiting rule.

(iii) Suggestion for a New Approach

The variety and multitude of self-limiting rules and the weaknesses of the existing approaches highlight the absence of a harmonised approach to establish the conflict-of-laws content of a self-limiting rule. As has been seen, the proposals to date for assessing the regulatory content of a self-limiting rule provide appropriate elements, but these are not capable of fully capturing the phenomenon. In the following, an attempt will therefore be made to transform the previous criteria into a uniform approach and to systematise the procedure.

(a) Method

In general, a tiered approach taking into account the weaknesses of the previous approaches appears to be adequate to sufficiently reflect the numerous and different conflict-of-laws provisions.

The first step under this approach is to establish the – supposed – conflict-of-laws content of a rule. This is achieved by substituting on the legal consequences of the self-limiting rule the

325 See below A.II.3.c)(3)(a)(iii)(b)(ii).

substantive legal consequence with the applicable law, corresponding to a typical unilateral conflict-of-laws rule. The substitution allows firstly to verify whether the provision at issue would not have been referred to anyway under the general conflict-of-laws rules. Second, the limitation of the conflict-of-laws analysis to the phenomenon of the self-limiting rule makes it possible to eliminate any overriding mandatory provision that is specifically characterised by its legal consequence.

If a potential unilateral conflict-of-laws rule has been identified in this way, the second step is to examine whether there are already conflict-of-laws rules which explicitly deal with these facts. Looking for an already existing conflict-of-laws rule, it must be taken into account that the respective conflict-of-laws acts often consist of provisions which identify the individual issues addressed by the reference.[326] Where the facts of the unilateral conflict-of-laws rule thus established concern these individual issues, these issues are also expressly governed by this conflict-of-laws rule. A separate regulation is not required in these cases and the self-limiting rule therefore does not provide a unilateral conflict-of-laws rule. If there is no express conflict-of-laws rule governing the facts or if the facts are broader than those of the presumed unilateral conflict-of-laws rule, there is currently no conflict-of-laws rule expressly regulating the facts subject to the self-limiting rule. In that case, it can be assumed that the legislature intended to regulate at the same time the applicability of the self-limiting rule under the conflict of laws.

If such a general conflict-of-laws rule exists, the third step is to examine whether the content of a conflict-of-laws element in a self-limiting rule is identical in its legal consequences to the existing conflict-of-laws rules under which the facts might be subsumed. Generally, this will presuppose the connecting factors to be identical. If the facts are already subject to another conflict-of-laws rule and the legal consequences are identical, a conflict-of-laws element in a self-limiting rule would be superfluous. In this case, the legislator cannot be assumed to have intended to give the self-limiting rule a conflict-of-laws element at the same time.

If the presumed conflict-of-laws rule has an independent legal relevance since it results in divergences regarding the applicable law, the potential hierarchy of both rules must be analysed. It is then necessary to examine whether a hierarchy exists between the presumed conflict-of-laws rule and the general conflict-of-laws rule. If the general conflict-of-laws rule takes precedence over the presumed conflict-of-laws rule, it cannot be assumed that the legislator intended to establish a conflict-of-laws rule, as the rule would have no scope of application regarding its conflict-of-laws element.

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326 See e.g. Article 12 Rome I Regulation, Article 15 Rome II Regulation.

Only if such a hierarchical relationship is also missing, it is finally to be examined in a fifth step whether the self-limiting rule may be interpreted to comprise a rule which also governs the applicability of this rule in relation to the rules of other legal systems. Unless this issue is resolved in the affirmative, it may not be assumed in favour of the self-limiting rule to contain also a unilateral conflict-of-laws rule.

(b) Criteria for the Interpretation of the Self-Limiting Rule

The starting point for the fifth step and the issue of whether the provision can be interpreted in this sense is the wording of the provision and the intention of the legislator in drafting the provision. In principle, it is reasonable to assume no unilateral conflict-of-laws rules may be derived from a self-limiting rule.[327] Otherwise, there would be a risk that the range of substantive law provisions subject to specific conflict-of-laws rules would be extended to almost any self-limiting rule and that the multilateral system would be superseded.[328]

As has already been seen,[329] so far there is a lack of convincing criteria for determining whether the self-limiting rule contains a unilateral conflict-of-laws rule.[330] Given the diversity of situations which are regulated by self-limiting rules, this is hardly surprising. However, the starting point for an approach to identify the regulatory content of a self-limiting rule will have to be the special characteristic of the rules summarised under the collective term "self-limiting rule". This special characteristic consists in the existence of an explicitly regulated scope of application. It is a matter of interpretation to assess whether the legislator intended to provide this scope of application with a meaning going beyond a definition of substantive law. The interpretation of this provision must be based on the conventional principles of interpretation. Therefore, it needs to be analysed whether it is possible to derive from the wording, the structure, the history of origin or the intention and objective of the provision the intention of the legislator of the self-limiting rule to also provide a unilateral conflict-of-laws rule. In this context, existing approaches may be drawn on, provided they are based on compelling considerations.

(i) Criteria Used for the Determination of the Territorial Scope

In terms of the wording, the approach according to which the characterisation of a self-limiting rule depends on whether a typical connecting factor is employed is based on a valid consideration. A legislator who adopts such connecting factors regularly has in mind situations

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327 Maria Hook, 'The "statutist trap" and subject-matter jurisdiction' (2017) 13 Journal of Private International Law 435, 439 et seq.

328 Frank Vischer, 'General Course on Private International Law' (1992) 232 Recueil des Cours 15, 158 on "lois d'application immédiate".

329 See above A.II.3.c)(3)(a)(ii).

330 Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 1 (16th ed Sweet & Maxwell 2022) para 1-051.

such as those which require recourse to conflict-of-laws rules and intended to address this type of situation.

The use of such connecting factors thus argues in principle in favour of the self-limiting rule providing a unilateral conflict-of-laws rule. According to this approach, temporal differentiation criteria, for example, generally militate against the assumption of a unilateral conflict-of-laws rule. In contrast, spatial and – to a lesser extent – personal differentiation criteria indicate the existence of a unilateral conflict-of-laws rule.

If a territorial delimitation criterion is used, a further indication for the categorisation of a self-limiting rule lies in whether the wording of the criterion extends to matters which are subject to a different jurisdiction. In any event, such wording suggests an awareness by the legislator of the cross-border situation when drafting the provision, even if the wording does not necessarily imply an intention to regulate this situation by means of the criterion. A legislator who expressly stipulates the application of a provision also in situations outside of its jurisdiction must be aware of the possibility of the provision also applying in situations with a relation to other legal systems. He must likewise have been aware of the significance of conflict of laws for these provisions.

This is also underlined by the argument according to which a provision – if it must first be referred to by a separate provision of conflict of laws – with a very limited scope of application is rather a provision also regulating its own scope of application in relation to provisions of other legislators. It is rather far-fetched for the legislator to adopt a rule which, by virtue of its wording, is expressly applicable in situations in which it is often not referred to by the conflict-of-laws rules of the same legislator. In contrast, nothing can be derived from a restriction of the scope of application to an area within the enacting jurisdiction. It could be interpreted both as a substantive limitation and as a safeguard for the application of the provision at the level of conflict of laws.[331]

In interpreting self-limiting rules, it is also necessary to consider the quantitative effect if the scope of application of the provision establishes a rule deviating from the general conflict of laws. The classification of a self-limiting rule as a unilateral conflict-of-laws rule might result in the substitution of a more general multilateral conflict-of-laws rule. However, in particular the European legislator – following the tradition of Friedrich Carl von Savigny's search for the law applicable to the facts – regularly assumes the law deemed applicable to govern the facts of the case exhaustively.[332] The more comprehensively and thus the more serious a self-limiting

331 See also with regard to its international mandatory application below A.II.3.c)(3)(b)(i)(a).

332 See e.g. Article 12, 1(2) Rome I Regulation, Article 15, 1(2) Rome II Regulation.

rule would interfere in this system as a unilateral conflict-of-laws rule, the more important the reasons for such an interpretation have to be. Accordingly, the interpretation of a self-limiting rule as a unilateral conflict-of-laws rule needs to be restrained.

(ii) Alternative Test

As part of a systematic interpretation, the alternative test already mentioned may also be taken into account in spite of its drawbacks.[333] Therefore, if there is a more general provision in the respective legal system, this tends to indicate an intention on the part of the legislator to merely delimit the scope of application in relation to this general provision. If, in contrast, there is no general provision, this may imply an intention of the legislator in creating the respective provision to differentiate it from provisions of other legal systems.

(iii) Underlying Interests of the Legislator

If, in the context of interpretation, the purpose of the provision is to be analysed, the position of the unilateral conflict-of-laws rule within the multilateral approach provides a further indication for determining the regulatory content of a specific self-limiting rule. Under a multilateral approach a unilateral conflict-of-laws rule is a special, albeit well-known, type of conflict-of-laws provision in that it does not refer to any legal system, but rather stipulates the applicability of a specific legal system. Despite its superficial similarity, this method of determining the applicable law may not be compared with that underlying overriding mandatory provisions and the various concepts stemming from the American conflict revolution.[334] However, these types of conflict-of-laws rules also allow for the consideration of specific conflict-of-laws interests as well as interests typically pursued by substantive law provisions.

Unilateral conflict-of-laws provisions are not alien to the European conflict-of-laws approach. According to the conventional approach of conflict of laws of European origin, the applicability in a cross-border situation is not subject to substantive law, *i.e.* it is not assessed whether the law itself claims its international applicability. Rather, it is necessary to consider which legal system the matter is most closely connected to.[335] As seen, this approach is in principle also followed by unilateral conflict-of-laws rules.[336] Furthermore, the legislator also recognises other legislative interests in addition to the search for the closest connection between the facts

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333 See above A.II.3.c)(3)(a)(ii)(c).

334 See on this distinction Christian v. Bar and Peter Mankowski, *IPR, Band I* (2nd edn, C.H. Beck 2003) § 4 para 99 et seq.; for the approaches under American law see Thomas G. Guedj, 'The Theory of the Lois de Police, A Functional Trend In Continental Private International Law – A Comparative Analysis With Modern American Theories' (1991) 39 American Journal of Comparative Law 661, 678, 683 et seq.

335 Giesela Rühl, 'Unilateralism PIL', in Jürgen Basedow, Klaus J. Hopt and Reinhard Zimmerman (eds), *Max Planck Encyclopedia of European Private Law*, vol 2 (Oxford University Press 2012).

336 See above A.II.3.b)(3).

of the case and the substantive law when drafting conflict-of-laws rules. Conflict of laws at least nowadays is neither apolitical nor neutral.[337] Therefore, also unilateral conflict-of-laws rules which might take account of substantive law interests fit into the European approach of conflict of laws.

For their assessment from a conflict-of-laws perspective, it does not matter whether the self-limiting rule provides a substantive regulation on the legal consequences directly in the respective provision. The stipulation of a substantive legal consequence directly in the self-limiting rule may also be interpreted as a mere shortcut in identifying the applicable law. Instead of a unilateral abstract assessment of the governing law, the unilateral conflict-of-laws rule may also be integrated into the respective act or provision being part of the legal system which is deemed to be applicable by the unilateral conflict-of-laws rule. The decision to employ a self-limiting rule instead of a unilateral conflict-of-laws provision is therefore merely a question of the legislative technique.

The multilateral conflict-of-laws approach, of which unilateral conflict-of-laws rules are part of[338], strives to establish the closest connection between the facts of the case and the applicable law.[339] Therefore, it needs to be considered whether the definition of the scope of application requires the application of a provision which takes better account of the facts than the provision which would have been referred to by the otherwise applicable conflict-of-laws rule. It is therefore crucial to determine whether the differentiation which the legislator has imposed for its substantive law is based on considerations requiring a differentiation also for the issue of the applicable law. To this extent, the different objectives and functioning of the conflict-of-laws rules in relation to substantive rules have to be taken into account.[340] When assessing the necessity for a diverging treatment also in relation to other jurisdictions, the typical objectives of conflict of laws – *i.e.* certainty, predictability and uniformity of result – need to be considered.[341] However, the substantive interests of the legislator must also be borne in mind in this context.

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337 Symeon C. Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism General Course on Private International Law' (2017) 384 Recueil des Cours 9, 129.

338 see above A.II.3.b)(3); Christian v. Bar and Peter Mankowski, *IPR, Band I* (2nd edn, C.H. Beck 2003) § 4 para 99.

339 see on this above A.II.3.a).

340 This difference is also mentioned by Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (2011) 348 Recueil des Cours 9, 78.

341 American Law Institute, *Restatement of the Law, Second: Conflict of Laws* (American Law Institute 1971) § 6; Peter Stone, *Stone on Private International Law in the European Union* (4th edn, Edward Elgar 2018) 369; Friedrich K. Juenger, 'General Course on Private International Law' (1985) 193 Recueil des Cours 119, 180; Martin Davies, Andrew Bell, Paul Le Gay Brereton, Michael Douglas, *Nygh's Conflict of Laws in Australia* (10th edn, LexisNexis 2019) para 3.18 et seq.

In assessing the extent to which substantive interests pursued by the legislator must also be reflected in relation to other legal systems, it should first be considered whether the legislator may pursue different substantive interests in matters with an international dimension than in matters relating only to a single legal system. The substantive interests sought by the legislator with its conflict-of-laws rules might be clarified in this respect by recourse to the existing, expressly regulated conflict-of-laws rules. The interest identified to this end are not conclusive and may merely serve as an indication of the legislator attributing weight to such substantive interests also in relation to other legal systems. In contrast, nothing may be inferred from the absence of dedicated conflict-of-laws rules taking into account the substantive interests addressed by the self-limiting rule. In particular, it does not follow from said absence for these substantive interests to be fundamentally insignificant for the legislator at the level of conflict of laws. An equally plausible explanation is that the legislature may simply not have considered the relevance of this substantive interest for conflict of laws. For example – on a substantive level – the legislator may distinguish between rental contracts for the lease of chattel, commercial space and accommodation rental.[342] In contrast, on the conflict-of-laws level it might differentiate only between rental contracts on chattel and immovable property.[343] The legal treatment of employment contracts serves as a counter-example. The separation of individual employment contracts and other types of service contracts at national level is also pursued in European conflict of laws. For individual employment contracts, the deviating regulation is justified with regard to both the substantive provisions and the conflict-of-laws rule with the weaker position of the employee in need of protection.[344] Irrespective of the potentially different substantive interests pursued at the level of substantive law and conflict of laws, the assessment and weighting of interests may also shift in the international context, even if they remain essentially identical.[345] This may be particularly true if different states are responsible for the regulation of substantive law and conflict of laws.

Consequently, the interpretation must be based on the interests which led the legislator to adopt a separate rule. If the interests underlying the facts of the self-limiting rule deviate from those of the general conflict-of-laws rules to such an extent that the substantive purpose of the self-

342 See e.g. §§ 535 et seq., § 578(1),(2) German BGB.

343 Article 4(1) lit. b) Rome I Regulation, Article 4(1) lit. c), d) Rome I Regulation.

344 On Article 6 Rome Convention, see Mario Giuliano and Paul Lagarde, 'Report on the Convention on the law applicable to contractual obligations' [1980] OJ C 282/1, 25; for the German substantive regulation on individual employment contracts, see Martin Maties, '§611a BGB', in Martina Benecke (ed), *beck-online.GROSSKOMMENTAR BGB* (C.H. Beck 2023) para 201.

345 See on this issue in relation to commercial agency and mandatory overriding rules Wulf-Henning Roth, 'Case C-381/98, *Ingmar GB Ltd v. Eaton Leonard Technologies Inc.* judgment of the Court (Fifth Chamber) of 9 November 2000. [2000] ECR I-9305' (2002) 39 Common Market Law Review 369, 379.

limiting rule cannot be reached anymore, the self-limiting rule must be considered to also provide a unilateral conflict-of-laws rule. If, in contrast, the self-limiting rule is only intended to take account of special circumstances arising from the particularities of the respective legal system, its regulatory content is also limited to substantive law.[346] When assessing these interests, it is not the factual substantive result that matters. Conflict of laws has assigned the objective of promoting a specific substantive result internationally mainly to the specific conflict-of-laws rules which unilateral conflict-of-laws rules are not automatically part of.[347] Therefore, only the respective scope of application of a self-limiting rule is relevant for assessing the interests of the legislator, but not the substantive result of the legal consequences.

(iv) Limitation of the Territorial Scope in Cross-Border Situations

When determining whether a self-limiting rule also provides for a unilateral conflict-of-laws element, the function of a provision on the territorial scope of application must be taken into account. At the outset, the purpose of such a provision is merely to limit the territorial applicability of the corresponding regulation.[348] Thus, the self-limiting rule presupposes, at least according to the conflict-of-laws rules of the respective legal system, the application of the respective legal act and thus also the provisions on the territorial scope of application in the first place.[349] The provision on the territorial scope of application thus hinges decisively on a reference by the competent conflict-of-laws rules. Therefore, the scope of application of a substantive legal act is not only determined by the provision on the territorial scope of application, but also by the conflict of laws. To this extent, it is for the connecting factors of the conflict-of-laws rules and the territorial criteria on which the provision on the territorial scope of application is based to assess the scope of application of a substantive rule.

However, a situation may occur in which the connecting factors of the relevant conflict-of-laws rule and the rules on the territorial scope of application differ qualitatively. As a consequence of these differences, the respective legal system may – according to the conflict of laws – only deemed to be applicable if the territorial scope of application of the legal act is not opened up or only opened up to a very limited extent. In such a situation no or hardly any scope of application remains for the respective self-limiting rule in cross-border situations. The

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346 See also Bernd von Hoffmann, 'Inländische Sachnormen mit zwingendem internationalem Anwendungsbereich' (1989) Praxis des Internationalen Privat- und Verfahrensrechts 261, 268; Anton K Schnyder, *Wirtschaftskollisionsrecht* (Schulthess 1990) para 13.

347 Christian v. Bar and Peter Mankowski, *IPR, Band I* (2nd edn, C.H. Beck 2003) § 4 para 92, 99; an exception thereof seems to be conflict-of-laws rules providing cumulative or alternative connecting factors. However, these types of conflict-of-laws rules do not promote a specific substantive result but only serve as a means of ensuring the existence or assumption of a substantive factual situation through the conflict of laws.

348 See already above A.II.1.a).

349 See on this already above A.II.1.b).

corresponding substantive rules contained in this legal act thus lose their functionality in any case to a large extent in cross-border situations.

Yet, it cannot be assumed of a legislator having intended to create a substantive rule without or with only a very limited scope of application. This is particularly true since the relationship between rules on the territorial scope of application and conflict of laws becomes relevant especially for those rules on the territorial scope of application who comprise a cross-border reference. In these cases, the legislator must have been aware of the conflict-of-laws implications of these rules. Therefore, in these situations there is a strong argument in favour of the respective self-limiting rule containing an element of conflict of laws simultaneously. This ensures for the respective legal act to retain a sufficient scope of application even in cross-border situations by displacing the general conflict-of-laws rules. Conversely, this argument also has implications if the assumption of a unilateral conflict-of-laws rule comprised in a self-limiting rule would result in a scope of application contradicting the objectives pursued by the legislator with the self-limiting rule. If the assumption of a conflict-of-laws element would result in an application of the act to cross-border situations going far beyond the situations intended by the legislator, this indicates the absence of a unilateral conflict-of-laws rule in the respective provision. Also, an element of conflict of laws is rather to be denied if the conflict-of-laws acts of the *lex fori* regularly refer to the law of the *forum* for those situations described by the self-limiting rule of the respective legal acts. In this case, the provision on the territorial scope of application takes full effect and there is no need for a separate conflict-of-laws provision rendering the respective legal act applicable.

However, not any limitation of a scope of application of a self-limiting rule by conflict-of-laws acts automatically implies the existence of a unilateral conflict-of-laws rule. A legal act – even if its scope of application is expressly defined – does not necessarily apply in every case, precisely because of the very nature of cross-border situations and their handling under conflict of laws. It is exactly in cross-border situations where there is a need for harmonisation with other legal systems and their claim to applicability. The existence of a unilateral conflict-of-laws rule may only be assumed if the scope of application of the self-limiting rule would be significantly limited. This will regularly only be considered if the conflict-of-laws legal acts of the *forum* – due to their primary objective connecting factors – result in a situation where the respective legal act – due to its provision on the territorial scope of application – no longer has any scope of application. The same is also true if the conflict-of-laws acts exclude from the scope of the self-limiting rule such matters which, according to a corresponding provision, are expressly intended to be covered. In contrast, the conflict of laws provides for an unconditional

application of provisions of substantive law only under the prerequisites of an overriding mandatory provision of the *lex fori*.[350] Insofar as these prerequisites are not met, a coordination of the scope of application with provisions of foreign substantive law by means of conflict of laws is necessary in principle.

An argument in favour of such a tiered model is its ability to comprehensively accommodate the manifold manifestations of self-limiting rules, which are neither limited to certain areas of law nor to specific connecting factors. Such an approach also allows sufficient consideration to be given to the specific characteristics of multi-level legal systems. These considerations are becoming particularly relevant in the relationship between the member states of the European Union and European Union law, but also within European Union law.[351] However, particularly in relation to the last step of the approach proposed here, more precise specifications are required and need to be developed on a case-by-case basis. Further, this final step depends on interests which are sometimes difficult to ascertain. The approach proposed here is therefore a toolbox, which as such does not provide definitive answers. The problem of classification of self-limiting rules is thus not finally solved, but merely put to a systematic approach.

(b) Self-Limiting Rules and Overriding Mandatory Rules

Thus, self-limiting rules may also comprise unilateral conflict-of-laws rules and therefore may have some relevance for assessing the applicable law. This raises the question as to how these rules relate to overriding mandatory provisions. Overriding mandatory provisions – as we have seen – are provisions providing substantive legal consequences and which are also to be considered when determining the applicable law. In this respect, the following will analyse the differences of self-limiting rules and overriding mandatory provisions and whether and how these legal concepts are related to each other.

(i) Distinction of Self-Limiting Rules and Overriding Mandatory Provisions

First of all, it must be examined whether self-limiting rules and overriding mandatory provisions differ only conceptually but describe the same legal phenomenon in substance. To this end, the first step is to analyse whether the characteristics of the two types of rules differ.

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350 See above A.II.3.c)(1).

351 E.g. Article 101, 102 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01 (TFEU) and Article 6 Rome II Regulation.

(a) The Structural Differences of Self-Limiting Rules and Overriding Mandatory Provisions

The relationship between self-limiting rules and overriding mandatory provisions is particularly affected by the blurred use of both terms.[352] Especially in early treatises on self-limiting rules, no clear distinction was made between the phenomenon of self-limiting rule and overriding mandatory provision.[353] Self-limiting rules and overriding mandatory provisions, however, may differ in terms of both the facts and the legal consequences. Those differences make it possible to distinguish between these two legal institutes.[354]

The overriding mandatory provision is characterised structurally only by the fact of providing a substantive regulation on the legal consequences.[355] In contrast, self-limiting rules are characterised by a scope of application on the facts and a substantive regulation on the legal consequences.[356] Self-limiting rules and overriding mandatory provisions hence provide both for a substantive regulation on the legal consequences and as such form part of the substantive law. However, beside this structurally commonality there are some differences on the functioning. Thus, the legal significance of the structural elements of the self-limiting rule on the one hand and the overriding mandatory provision on the other requires closer examination.

(i) Structural Elements of Overriding Mandatory Provisions

The structural elements of overriding mandatory provisions are intended to enforce certain legal objectives and purposes so important as to require the substantive provision to be applied also in relation to provisions of other legal systems.[357] The structural elements through which this is achieved by the legislator are irrelevant for the characterisation as an overriding mandatory provision. To this end, overriding mandatory provisions do not necessarily presuppose an

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352 See on the one hand Mary Keyes, 'Statutes, Choice of Law, and the Role of Forum Choice' (2008) 4 Journal of Private International Law 1, 5 fn. 27 and on the other hand Friedrich K. Juenger, 'General Course on Private International Law' (1985) 193 Recueil des Cours 119, 201.

353 See e.g. D. St. L. Kelly, 'Localising Rules and Differing Approaches to the Choice of Law Process' (1969) 18 International and Comparative Law Quarterly 249; Kurt Lipstein, 'Conflict of Laws 1921-1971 - The Way Ahead' (1972) 31 Cambridge Law Journal 67, 72; Bernard Audit, 'A Continental Lawyer Looks at Contemporary American Choice-of-Law Principles' (1979) 27 The American Journal of Comparative Law 589, 601 et seq.; Gerhard Kegel, 'Die selbstgerechte Sachnorm', in Erik Jayme and Gerhard Kegel (eds), *Gedächtnisschrift für Albert A. Ehrenzweig (1906-1974)* (C.F. Müller 1976) 51.

354 Symeon C. Symeonides, *Codifying Choice of Law Around the World* (Oxford University Press 2014) 299 et seq.; Tamás Szabados, *Economic Sanctions in EU Private International Law* (Hart 2020) 36; Maria Hook, 'The "statutist trap" and subject-matter jurisdiction' (2017) 13 Journal of Private International Law 435, 439; Andrea Bonomi, 'Mandatory Rules in Private International Law – The Quest for Uniformity of Decisions in a Global Environment' (1999) 1 Yearbook of Private International Law 215, 231 fn. 52; the need to differentiate between these two legal instruments was identified early on by Kurt Lipstein, 'Inherent Limitations in Statutes and the Conflict of Laws' (1977) 26 International and Comparative Law Quarterly 884, 885 and F. A. Mann, 'Unfair Contract Terms Act 1977 and the Conflict of Laws' (1978) 27 International and Comparative Law Quarterly 661, 664 fn. 7.

355 See above A.II.3.c)(1).

356 See above A.II.3.c)(2)(b)(i)-(ii).

357 See above A.II.3.c)(1).

explicit scope of application on the facts.[358] Thus, whether a provision is an overriding mandatory provision is assessed not by a formal but by a substantive criterion, the protected interests, and the intention for an international application of the provision.

(ii) Structural Elements of Self-Limiting Rules

By contrast, the self-limitation inherent in any self-limiting rule is supposed to define the scope of application of the respective regulation. No further-reaching legislative intent may be derived from this limitation. In particular, it is not possible to infer from a regulation of the scope of application by itself whether the legislator intended these provisions to be applied internationally, as is required for a provision to be categorised as an overriding mandatory provision.[359] The self-limitation may well be intended to take account of special state interests, such as the protection of certain groups of people or the efficiency of the economy. However, this is not mandatory. For example, a regulation may also be restricted because a more far-reaching regulatory content would have no effect. The restriction might also result from the limitation being based solely on the specific factual circumstances at a particular location. An example of the former reasoning is the restriction of laws for the protection of pregnant persons to women.[360] An example of the latter reasons are road traffic regulations, rules restricting open fires in forests[361] or specific public holidays which are restricted to only one city.[362] Another reason for the limitation of a scope of application could be seen in the principle of proportionality, which is a widely recognised legislative principle[363]. The principle of proportionality militates against taking measures which are not necessary to achieve a specific objective.[364] Also, even if the explicit definition of a scope of application specifically addresses cross-border situations, this does not necessarily reflect the intention of the legislator to consider this provision as an overriding mandatory provision. The explicit definition of the scope of application may also result from the mere consideration of the legislator that cross-border situations, if its law is applicable, require a different regulation than those which only have a connection to its jurisdiction. No conclusion can therefore be drawn on a substantive assessment of interests by the legislature when it uses the legal means of scope of application. The self-limiting rule is thus not defined by a substantive criterion, but exclusively by the

358 Jürgen Basedow, *The Law of Open Societies* (Brill 2015) para 720.

359 This seems to be the crucial difference for Symeon C. Symeonides, *Codifying Choice of Law Around the World* (Oxford University Press 2014) 300.

360 See, for example, § 1 German MuSchG.

361 See e.g. § 47(1) LFoG NRW.

362 See, for example, Article 1(2) FTG Bavaria.

363 Matthias Lehmann, 'New challenges of extraterritoriality: superposing laws', in Franco Ferrari and Diego P. Fernández Arroyo (eds), *Private International Law* (Edward Elgar 2019) 258, 289.

364 Matthias Lehmann, 'New challenges of extraterritoriality: superposing laws', in Franco Ferrari and Diego P. Fernández Arroyo (eds), *Private International Law* (Edward Elgar 2019) 258, 289.

formal requirement of containing in its facts a rule requiring its application to certain situations. The reasons for the legislator to regulate the scope of application may have various causes. Not all of these reasons necessarily imply the intention to apply the respective regulation internationally or to promote interests which are particularly important to the legislator. It is therefore impossible to derive a precise meaning and purpose of the legislator from the definition of the scope of application *per se*.

Therefore, the legal institutes of self-limiting rule and overriding mandatory provision are not congruent. Structurally, not every overriding mandatory provision provides a scope of application, while self-limiting rules are defined solely by this formal criterion. Also, the objectives in defining the scope of overriding mandatory provisions and self-limiting rules may differ. Some authors argue for a specific definition of the territorial or personal scope being a strong indication for an overriding mandatory rule.[365] However, the limitation as such by means of a scope of application comprised in the facts of a self-limiting rule does not necessarily prove a special interest of the legislator in the application of the respective provision.

(b) The Differences on the Legal Consequences

The differences between self-limiting rules and overriding mandatory provisions are also reflected in the varying way of application of the two legal concepts under conflict of laws. The self-limiting rule has in principle no significance for assessing the applicable law. If, exceptionally, the self-limiting rule also contains a unilateral conflict-of-laws rule, this conflict-of-laws rule must only be taken into account in identifying the applicable law under certain conditions. Such a consideration will only be required if the self-limiting rule is part of the *lex fori* or the *lex causae*, and only until the applicable law has been determined. Classification as an overriding mandatory provision, in contrast, only becomes relevant if it has previously been established for the overriding mandatory provision not to be part of the *lex causae*. Only in this situation is it necessary to establish the characteristics as an overriding mandatory provision, as

365 Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 77; Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 747; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 69; see for the effects of the ECJ's *Unamar* judgment on this question Giesela Rühl, 'Commercial agents, minimum harmonization and overriding mandatory provisions in the European Union: *Unamar*' (2016) 53 Common Market Law Review 209, 219 et seq. and Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-010, 12-024.

the provisions would otherwise apply as part of the *lex causae*.[366] In this respect, the overriding mandatory provision is subordinate to the search for the applicable law.[367]

(c) Interim conclusion

Hence, at the level of facts and at the level of legal consequences, self-limiting rules and overriding mandatory provisions differ in that self-limiting rules are defined solely by the formal characteristic of providing a scope of application. In contrast, overriding mandatory provisions are defined by the substantive characteristic of the relevance of the protected interest to the legislator, the intention to apply internationally and in their way they influence the substantive outcome in situations with a cross-border element. Thus, self-limiting rules and overriding mandatory provisions are separate legal concepts which must be clearly distinguished.

(ii) Relationship Between Self-Limiting Rules and Overriding Mandatory Provisions

The mere assessment of self-limiting rules and overriding mandatory provisions being separate legal concepts is nevertheless no conclusive evaluation of their relationship. It just proves that they both are in substance not identical.

With regard to the relation of self-limiting rules and overriding mandatory provisions, some authors refer to self-limiting rules, which contain unilateral conflict-of-laws rules, also as mandatory overriding provisions in the formal sense.[368] This categorisation has to be conceded in view of the fact that both self-limiting and overriding mandatory provisions are confronted with the question of the extent to which a provision containing a substantive rule is to be taken into account in the assessment of the applicable law. From a formal point of view, it could thus be argued for both types of rules being subject to the same legal phenomenon.

However, the differences outlined above clearly demonstrate how self-limiting rules and overriding mandatory provisions are two different legal concepts which are only partially congruent. The criteria required on the facts for a self-limiting rule and for an overriding mandatory provision are neither exclusive nor coinciding. While a self-limiting rule requires merely an explicitly defined scope of application, an overriding mandatory provision

366 Different to this extent solely parts of the German legal scholarship Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-033.

367 See on the methodological difference also Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 8 et seq.; Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-004.

368 Andreas Köhler, *Eingriffsnormen – Der „unfertige Teil" des europäischen IPR* (Mohr Siebeck 2013) 204.

necessitates an intention of international application and a specific protected interest. Therefore, not every self-limiting rule meets the requirements of an overriding mandatory provision and not every overriding mandatory provision satisfies the prerequisites of a self-limiting rule.
The two legal concepts are hence independent of each other. The abovementioned classification of the self-limiting rule as an overriding mandatory provision in the formal sense masks these differences, which is why it should not be adopted.

(iii) The Confluence of a Self-Limiting Rule and an Overriding Mandatory Provision Within a Provision

From the above, it is also apparent at first sight of the legal concepts self-limiting rule and overriding mandatory provision not being mutually exclusive. The substantive characteristics of a crucial provision and the international intention of application may easily be combined with the formal criterion of determining a scope of application in a single provision. This becomes particularly clear in those cases where the legislator defines a scope of application and at the same time stipulates this provision to apply independently of the otherwise applicable law.[369] Therefore, it also follows from these different characteristics that a self-limiting rule might in principle be classified as an overriding mandatory provision. This presupposes that a corresponding interest and a respective intention of the legislator for an international application can be ascertained by way of interpretation.[370]
Even if the conditions of both legal institutes are present concurrently in a single provision, it could still be reasoned for a provision being in any event either a self-limiting rule or an overriding mandatory provision in any case, but not both at the same time. Such an approach is supported, as outlined above, by the exceptional nature of an overriding mandatory provision[371] which serves to pursue the interests of a state by a specific substantive regulation. The applicability of these provisions could thus not be determined by the regular conflict-of-laws rules but only by those provisions itself.[372] According to this approach, a self-limiting rule which also meets the requirements of an overriding mandatory provision could not simultaneously contain a unilateral conflict-of-laws provision. Therefore, the substantive legal

369 See e.g. Article 6:247 Dutch Civil Code.
370 See also Thomas G. Guedj, 'The Theory of the Lois de Police, A Functional Trend In Continental Private International Law – A Comparative Analysis With Modern American Theories' (1991) 39 American Journal of Comparative Law 661, 668.
371 See above A.II.3.c)(1).
372 This theory is called "Sonderanknüpfungslehre" and still seems to be the prevailing view under German legal scholars, see Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-033; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 101 and Felix Maultzsch, 'Art. 9 Rom I-VO', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Rom I-VO* (C.H. Beck 2023) para 158 et seq.

consequences of this provision are applicable in a cross-border situation only under the rules established for overriding mandatory provisions. Thus, a self-limiting element within such a provision could then not be interpretated as a unilateral conflict-of-laws rule if the provision were to be regarded as an overriding mandatory provision. For such an approach argues the promotion of the harmonisation of judgments on an international level. This approach allows for the application of foreign overriding mandatory provisions to the greatest extent possible and it also protects the parties from contradictory provisions by different legislators.[373]

These arguments are of some weight with regard to the applicability of overriding mandatory provisions of the *lex causae* in general. However, they are not convincing in the present context. The characteristic as a unilateral conflict-of-laws rule does not limit the applicability as an overriding mandatory provision. Therefore, the extent to which the legal consequences would apply if the self-limiting rule were considered to be merely an overriding mandatory provision is not restricted. To the extent to which the unilateral conflict-of-laws rule extends the scope of application of the self-limiting rule, this extension – as seen – only becomes relevant if the applicable law is not the law of the *lex fori*. In these cases, the international harmonisation of judgments is nevertheless not endangered.

With regard to the argument of avoiding situations with contradictory provisions, it should be noted that the substantive legal consequences are limited by the respective scope of application of self-limiting rules. This limitation applies regardless of whether it results from a unilateral conflict-of-laws rule or from the characteristic as an overriding mandatory provision. The risk of contradictory provisions is thus not increased by the coincidence of a unilateral conflict-of-laws rule and an overriding mandatory provision within a single provision. Further, the regulation on the scope of application within a self-limiting rule is tailored exactly to this specific provision. Against this backdrop, it cannot be disputed for this unilateral conflict-of-laws rule to be appropriate to determine the situations in which this provision apply. Nothing can therefore be derived from the special characteristics of overriding mandatory provisions for the relationship between a self-limiting rule containing a unilateral conflict-of-laws rule and an overriding mandatory provision. In particular, these special characteristics do not imply a single provision may not be considered both an overriding mandatory provision and a self-limiting rule providing a unilateral conflict-of-laws rule.

Consequently, it must be assessed separately for each self-limiting rule whether the provision has any relevance at all to the conflict of laws. It therefore needs to be examined whether it is

373 Ulrich Drobnig, 'Comments on Art. 7 of the Draft Convention', in Ole Lando, Bernd von Hoffmann and Kurt Siehr (eds), *European Private International Law of Obligations* (Mohr Siebeck 1975) 82, 83.

involved in the conflict-of-laws procedure as a unilateral conflict-of-laws rule, as an overriding mandatory provision or even as both. Thus, a self-limiting rule might provide for a unilateral conflict-of-laws rule and the legislator simultaneously has a crucial interest in respecting this provision and an intention to apply this provision internationally. In this situation, the provision constitutes a self-limiting rule with a unilateral conflict-of-laws element and a mandatory overriding provision at the same time.[374]

(iv) The Self-Limiting Rule as an Overriding Mandatory Provision

To establish whether a self-limiting rule may also be categorised as an overriding mandatory provision, the definition of European conflict of laws of the overriding mandatory provision is to be used as a starting point. Under this definition, a self-limiting rule is at the same time an overriding mandatory provision if it meets the two conditions required by Article 9(1) Rome I Regulation. Therefore, the respect for this rule must be "regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation" and the intention of the legislator to apply the rule "irrespective of the law otherwise applicable" must become clear.[375]

However, it is uncertain in detail how precisely compliance with such a rule is specified as being crucial and when there is an intention to apply it internationally. According to some authors the definition of the scope of application, as in the case of a self-limiting rule, is intended to indicate the existence of such a crucial rule.[376] However, the definition of a scope of application might have a wide variety of causes.[377] Not all of those causes necessarily indicate such an increased interest. Therefore, nothing may be deduced from the mere definition

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374 See also Peter Hay, 'Comments on Self-Limited Rules of Law in Conflicts Methodology' (1982) 30 American Journal of Comparative Law Supplement 129, 131; Uglješa Grušić, 'The Territorial Scope of Employment Legislation and Choice of Law' (2012) 75 The Modern Law Review 722, 743; on the problems of integrating a foreign mandatory rule into the applicable law see Jonathan Harris, 'Mandatory Rules and Public Policy under the Rome I Regulation' in Franco Ferrari and Stefan Leible (eds), *Rome I Regulation* (sellier 2009) 311 et seq.

375 Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 15.39 et seq., 15.43; as can be seen from Recital 7 Rome II Regulation, the term under Article 9(1) Rome I Regulation must be interpreted accordingly for the Rome II Regulation in the absence of indications to the contrary.

376 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds) *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 87; Louise Merrett, *Employment Contracts in Private International Law* (2nd edn, Oxford University Press 2022) para 7.15; Richard Fentiman, *International Commercial Litigation* (2nd edn, Oxford University Press 2015) para 3.48; some authors who argue in this way often do not distinguish between the existence of an explicit scope of application and the stipulation that this provision applies irrespective of the applicable law determined by the conflict of laws, see e.g. Hill and Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2015) para 4.103-4.105; also critical on the relevance of the scope of application for characterising an overriding mandatory provision Jürgen Basedow, *The Law of Open Societies* (Brill 2015) para 723 et seq.

377 See above A.II.3.c)(3)(b)(i)(a)(ii).

of the scope of application for the existence of an overriding mandatory provision.[378] A scope of application regulating cross-border situations only underlines the legislator's awareness of the effects of the legal consequences on cross-border situations and its intention for its rules to be applicable in at least some of these situations. On the contrary, from the wording by itself does not follow the intention of the rule being applicable in any case, provided the requirements as to the scope of application are met. This may also be seen from the different types of criteria characterising the respective legal institute. Whereas, as seen above, overriding mandatory provisions are defined by substantive criteria, self-limiting rules are based on formal criteria. Thus, the categorisation as a self-limiting rule is independent of the classification as an overriding mandatory provision.

Because of the different types of criteria for the requirements necessary to characterise a rule as an overriding mandatory provision, nothing may be deduced from the rule being a self-limiting rule regarding their characterisation as an overriding mandatory provision. Rather, whether a self-limiting rule is to be classified as an overriding mandatory provision is to be assessed by the general criteria, as with any other provision.[379]

III. Interim Conclusion

The previous chapter has shown that Articles 3, 44 GDPR provide for regulations on the territorial scope of application of the GDPR. Further, rules on the territorial scope of application, like those stipulated in Articles 3, 44 GDPR, initially only take effect at the substantive level. Moreover, such a scope of application is common to many rules, which can be termed self-limiting rules. Apart from this common structural element, these provisions have no further commonalities and are not subject to a special legal treatment.

By way of interpretation, the provision on the territorial scope of application may also contain a unilateral conflict-of-laws rule. The regulation on the territorial scope of application set forth in the GDPR could therefore be considered a conflict-of-laws rule in and of itself. If such a unilateral conflict-of-laws rule is given, the territorial scope of application also acquires significance in relation to other legal systems. Such a unilateral conflict-of-laws provision is not unknown to European conflict of laws and fits in with its approach of seeking the law with the closest connection.

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378 Different Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 747; Jürgen Basedow, *The Law of Open Societies* (Brill 2015) para 724.

379 See on these criteria under European conflict of laws below B.II.2.a)(2).

The unilateral conflict-of-laws rules found in self-limiting rules are to be distinguished from overriding mandatory provisions. This does not preclude the possibility of a rule of substantive law may provide both a unilateral conflict-of-laws rule and an overriding mandatory provision. Therefore, regardless of whether Article 3 GDPR is considered to have an element of conflict of laws, the provisions of the GDPR could also be deemed to possess the quality of overriding mandatory provisions.

Whether a provision on the scope of application is relevant to the conflict of laws and whether it is to be considered a unilateral conflict-of-laws rule or as an overriding mandatory provision must be established by interpretation. Regarding the classification as a unilateral conflict-of-laws rule, a multi-stage test should be followed methodologically, which takes into account the special situation of the provision being a rule of substantive law. The characterisation of a self-limiting rule as an overriding mandatory provision follows the general criteria. Therefore, rules on the territorial scope of application – such as those in Articles 3, 44 GDPR – may theoretically provide for unilateral conflict-of-laws rules and overriding mandatory provisions. However, the question now arises as to the extent to which Articles 3, 44 GDPR contains such conflict-of-laws rules and overriding mandatory provisions.

To interpret Articles 3, 44 GDPR with regard to their relevance to conflict of laws, the relationship of the GDPR to other secondary law of the European Union and in particular to the general conflict-of-laws acts of the European Union must first be examined. A conflict-of-laws dimension by way of interpretation may only be assumed, if the substantive law enacted by the European Union does not apply regardless of the conflict of laws as long as the scope of application of the respective legal act of the European Union is given.

B. The Applicability of Substantive Union Law in Situations Involving Third States

We have thus established that the GDPR provides rules on the territorial scope of application. Moreover, provisions concerning data protection may be referred to via the general conflict-of-laws rules of private international law, if the matter at issue is a dispute under private law. For the identification of the applicable law by the conflict-of-laws rules, the classification of individual provisions as provisions of public law is immaterial. These provisions are also subject to the general conflict-of-laws rules if they are of relevance within the context of a private-law relationship. Furthermore, the different types of conflict-of-laws rules and the presence of conflict-of-laws rules in provisions on the territorial scope of application of substantive law have been analysed. In addition, it also emerged that legal acts comprising such provisions are not necessarily to be classified as overriding mandatory provisions. Rather, legal acts providing for a regulation of their territorial scope of application and overriding mandatory provisions are different phenomena which must be considered separately.

The GDPR constitutes a central building block of European data protection law.[380] It features the distinctive characteristic of directly providing substantive data protection law itself in the form of a regulation. The GDPR thus forms part of the substantive uniform law[381] of the European Union.[382] However, substantive Union law manifests peculiarities. In particular, the European legislator acts precisely for the purpose of the international standardisation of substantive rules[383] and thus challenges the significance of conflict of laws in this respect. This specific purpose typically inherent in legislation of the European Union prompts the question of whether the results found in the first chapter may also be transferred to legal acts of substantive Union law. Yet, the prerequisites for the applicability of such substantive Union law in cross-border situations have rarely been the subject of a more detailed and systematic examination.[384] The same holds true for the impact of this uniform law on the conflict of laws.[385]

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380 Other legal acts of the European Union in this area are in particular Regulation (EU) 2018/1725 and Directive (EU) 2016/680.

381 Uniform law refers to law which is binding and uniformly interpreted in more than one legal system. Substantive uniform law is characterised by containing substantive legal provisions and typically being created specifically for cross-border situations, cf. Franco Ferrari, 'Uniform substantive law and private international law', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law, Volume 2* (Edward Elgar 2017) 1772. A very well-known example of this type of regulation is the United Nations Convention on Contracts for the International Sale of Goods (CISG), 1489 UNTS 25567.

382 In the following, this type of law is also referred to as substantive Union law.

383 This already results, for example, for the internal market from Article 114 TFEU.

384 For attempts, see Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) and Stéphanie Francq, *L'Applicabilité du Droit Communautaire Dérivé au Regard des Méthodes du Droit International Privé* (Bruylant 2005).

385 From a conceptual perspective on the relation of EU private international law and EU private law, see Xandra E. Kramer, 'The interaction between Rome I and mandatory EU private rules – EPIL and EPL:

This is all the more surprising given the growing importance of this issue. This is particularly true in view of the recent activity of the European legislator in the field of regulation of digital markets in the broadest sense. Examples of these include the Digital Services Act[386], the GDPR[387], but also the MiCA Regulation[388], which typically include cross-border aspects especially with third countries. Therefore, the significance of substantive Union law for private international law and its relationship to the conflict of laws is becoming more and more relevant. In this respect, the main issue is to assess the significance of the general conflict-of-laws acts of the European legislator in view of the increasing harmonisation of law through substantive Union law. It will therefore be addressed in greater detail in the following.

To this end, in a first step, the question arises under which conditions substantive Union law is applied in cross-border situations – in particular, how the substantive Union law relates to (I.) and in which ways it can be integrated into (II.) the conflict of laws. Subsequently, the implications of some acts of substantive Union law for conflict of laws will be examined (III.), to draw general conclusions for the conflict-of-laws relevance of acts of substantive Union law (IV.). Finally, where substantive Union law provides its own conflict-of-laws rules, the remaining scope of application of the general conflict-of-laws rules is analysed (V.).

This chapter focuses on European Union law. Therefore, neither the issue of which areas of application remain for national law beside substantive Union law nor according to which criteria the applicable national law is to be determined will be considered in the following.

I. Requirements for the Applicability of Substantive Union Law

Substantive Union law in the form of regulations and directives harmonises substantive law on a European level. It operates alongside the conflict-of-laws rules unified by the European legislator, namely the Rome I and Rome II Regulation. Conflict of laws takes on significance in any case when it comes to determining the law applicable in situations where different legal systems are involved. Against the background of substantive law established by the European legislator, however, it is doubtful what scope remains for the conflict of laws in areas

communicating vessels?', in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2017) 248.

386 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

387 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.

388 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L 150/40 (MiCA Regulation).

harmonised by the European legislator if interferences of legal systems were to be reduced by standardisation. Therefore, in what follows it is first to be examined which requirements the territorial applicability of the substantive Union law is subject to in cross-border situations (1.). At the same time, this also raises the question of how the conflict of laws relates to the substantive Union law (2.).

In addition to the opening of the territorial scope as a requirement for the application of a provision, it has already been established for national law that its application also depends on its reference by the conflict of laws.[389] As to the relationship between substantive Union law and the conflict of laws, two approaches may be taken at the outset. On the one hand, it may be postulated for substantive Union law to claim its primacy and unconditional applicability prior to the conflict of laws. According to this position, conflict of laws would be of no significance for the scope of application of substantive Union law in situations with a link to third countries. The applicability of substantive Union law would then depend exclusively on the opening of the territorial scope of application of the respective act of substantive Union law. On the other hand, the contrary could also be argued. Under this approach, substantive Union law – like any other substantive rule of national origin – depends on a reference by conflict of laws. If the subject matter of the proceedings concerns a private-law relationship, conflict of laws would be called upon to determine the applicability of substantive Union law. Following this line of reasoning, the relevant conflict-of-laws rules could be taken either from the substantive Union law itself, but also from the general rules of conflict of laws.

Regardless of which of these two approaches is followed, the issue also arises as to whether a distinction should be made between the various forms of legal acts available to the European legislator in terms of the significance of conflict of laws for substantive Union law. To this extent, it could be argued – for example – for legal acts adopted in the form of directives to first require a transposition into national law. These legal acts would then become indistinguishable from other purely national legislation. Accordingly, they might subsequently also be handled in the same way as provisions of national law in terms of conflict of laws. In contrast, this argument might not hold for regulations where a different analysis is required.

In the following, it will therefore be examined whether the application of substantive Union law hinges on a reference by the conflict of laws and which of these two approaches should thus be followed (1.). Furthermore, it is to be analysed whether the specific form in which the respective legal act of the European Union has been adopted is a relevant factor for its relation to the conflict of laws (2.).

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389 See above A.II.1.b).

1. The Dependence of Substantive Union Law on a Reference by Conflict of Laws

For substantive uniform law of international law origin, it is controversial how this type of law relates to the conflict of laws. In this respect, some argue in favour of a separate and primary application of the substantive uniform law over the conflict of laws.[390] The arguments typically put forward by those in favour of this view, however, do not carry any weight at least for substantive Union law.

Typically, three arguments are made for the primacy and independence of substantive uniform law of international origin over any conflict of laws. Firstly, it is regularly argued that conflict of laws merely serves to resolve a conflict in which several legal systems claim to apply simultaneously. However, there would be no such conflict if the law were unified at the substantive level, thus making a conflict-of-laws analysis superfluous.[391] Secondly, it is emphasised that it is the substantive uniform law of international origin which establishes

390 Emphasising the independence of substantive uniform law from conflict of laws, e.g. Katharina Boele-Woelki, 'Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws' (2010) 340 Recueil des Cours 271, 396, 398 et seq.; Stéphanie Francq, *L'Applicabilité du Droit Communautaire Dérivé au Regard des Méthodes du Droit International Privé* (Bruylant 2005) 634; Antonio Malintoppi, 'Les Rapports entre Droit Uniforme et Droit International Privé' (1965) 116 Recueil des Cours 1, 59, 62; Friedrich K. Juenger, 'The Problem with Private International Law', in Jürgen Basedow, Isaak Meier, Anton K. Schnyder, Talia Einhorn and Daniel Girsberger (eds), *Private Law in the International Arena* (T.M.C. Asser Press 2000) 289, 305; Max Planck Institute for Foreign Private and Private International Law, 'Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization' (2004) 68 Rabels Zeitschrift für ausländisches und internationales Privatrecht 1, 20; Franco Ferrari, 'Uniform substantive law and private international law', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law, Volume 2* (Edward Elgar 2017) 1774; with further references on the status of the legal discussion also Valentine Espinassous, *L'Uniformisation du Droit Substantiel et le Conflit de Lois* (L.G.D.J. 2010) para 528, 590; Charalambos P. Pamboukis, 'Droit International Privé Holistique: Droit Uniforme et Droit International Privé' (2008) 330 Recueil des Cours 9, 177, 188, 196; F. A. Mann, 'Uniform Statutes in English Law', The Law Quarterly Review 376, 393; James Fawcett, Jonathan Harris and Michael Bridge, *International Sale of Goods in the Conflict of Laws* (Oxford University Press 2005) para 16.01; with regard to the CISG also Clayton P. Gillette and Steven D. Walt, *The UN Convention on Contracts for the International Sale of Goods* (2nd edn, Cambridge University Press 2017) 24 et seq.; Achim Kampf, 'UN-Kaufrecht und Kollisionsrecht' (2009) Recht der Internationalen Wirtschaft 297, 298.

391 See for example Jürgen Basedow, 'Rome II at Sea – General Aspects of Maritime Torts' (2010) 74 Rabels Zeitschrift für ausländisches und internationales Privatrecht 118, 128; Thomas Kadner Graziano, 'The CISG Before the Courts of Non-contracting States? Take Foreign Sales Law as You Find It' (2011) 13 Yearbook of Private International Law 165, 166; Jürgen Basedow, 'Regulations and Conventions: A Comment on the Sources of European Union Private International Law', in Jan von Hein, Eva-Maria Kieninger and Giesela Rühl (eds), *How European is European Private International Law?* (Intersentia 2019) 53, 58 et seq.; Oliver Remien, 'European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice' (2001) 38 Common Market Law Review 53, 63; Martin Wolff, *Private International Law* (2nd edn, Clarendon Press 1950) 7; Haroldo Valladão, 'Private International Law, Uniform Law, and Comparative Law' in Hessel E. Yntema, Kurt H. Nadelmann, Arthur Taylor von Mehren and John N. Hazard (eds), *XXth Century Comparative and Conflicts Law* (A.W. Sythoff 1961) 98, 100; Stürner, 'Internationales Privatrecht', in Katja Langenbucher (ed), *Europäisches Privat- und Wirtschaftsrecht* (5th edn, Nomos 2022) § 8 para 49; this argument is also addressed by Michael Stürner, 'Kollisionsrecht und Optionales Instrument: Aspekte einer noch ungeklärten Beziehung' (2011) 8 Zeitschrift für das Privatrecht der Europäischen Union 2011, 236.

substantive rules specifically for the resolution of cross-border cases. As such, or because of its more limited territorial scope, it would provide a more specific set of rules compared to conflict of laws.[392] Finally, substantive uniform law is – according to the proponents of this view – supposed to express international substantive justice better and more directly than the substantive law referred to by conflict of laws.[393]

Irrespective of how viable one considers these arguments to be for substantive uniform law of international origin, they cannot in any case be fruitfully employed for the relationship between substantive Union law and conflict of laws. Unlike substantive uniform law of international origin, substantive Union law is limited from the outset to the unification of law in the European Union. Thus, according to its very conception, it is not intended to lead to a worldwide unification of substantive law, but only to unify substantive law within the European Union. Hence, despite a unification of substantive law within and by the European Union, situations may arise in which several legal systems – namely the substantive Union law and the substantive law of a third state – demand their application. Therefore, in contrast to substantive uniform law of international origin, substantive Union law cannot – by virtue of its conception – prevent the clash of several legal systems from the outset.

In addition, substantive Union law is not limited to cross-border situations, as it does not necessarily require a cross-border situation for its applicability. It is thus not a special legal regime exclusively addressing cross-border situations which, due to its more limited territorial or substantive scope of application, could take precedence over the conflict-of-laws rules because of the *lex specialis* principle.[394] Rather, substantive Union law often replaces national law entirely and regulates both, purely domestic as well as cross-border situations. This indifference regarding the internationality of facts does not exclude the possibility of provisions of substantive Union law themselves comprising conflict-of-laws rules. However, it highlights

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392 Franco Ferrari, 'Forum Shopping Despite Unification of Law' (2021) 413 Recueil des Cours 9, 122 et seq.; Franco Ferrari, 'La Convention de Vienne sur la vente internationale et le droit international privé' (2006) 133 Journal du Droit International 27, 29; Marco Torsello, *Common Features of Uniform Commercial Law Conventions* (Sellier 2004) 46; Valentine Espinassous, *L'Uniformisation du Droit Substantiel et le Conflit de Lois* (L.G.D.J. 2010) para 543; Franco Ferrari, 'Uniform substantive law and private international law', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law, Volume 2* (Edward Elgar 2017) 1774.

393 Charalambos P. Pamboukis, 'Droit International Privé Holistique: Droit Uniforme et Droit International Privé' (2008) 330 Recueil des Cours 9, 180.

394 This principle is also acknowledged in European Union law, see Karl Riesenhuber, 'Interpretation of EU Secondary Law', in Karl Riesenhuber (ed), *European Legal Methodology* (2nd edn, Intersentia 2021) § 10 para 31; the ECJ and also the European legislator regularly rely on the *lex specialis* principle in their argumentation on the relationship between EU secondary acts, see e.g. ECJ, C-104/22 *Lännen MCE* [2023] ECLI:EU:C:2023:343 para 25, 45; ECJ, C-677/21 *Fluvius Antwerpen* [2023] ECLI:EU:C:2023:348 para 38; ECJ, C-352/21 *A1 and A2 (Assurance d'un bateau de plaisance)* [2023] ECLI:EU:C:2023:344 para 39; Recital 12 Directive 2014/61; Recital 16 Regulation (EU) 2022/2554; Recital 4 Regulation (EU) 2019/1020; Recital 11 Regulation (EU) 2018/1725.

the necessity of a reference by the conflict of laws also for these provisions. Thus, those provisions are not subject to a different conflict-of-laws assessment. This follows in particular from the close connection between the scope of application and the regulatory content and objective of the law of the European Union.[395] The rules on the territorial scope of application are therefore already necessary because of the regulatory content of European Union law.

For this reason, regulations unifying and directives harmonising the substantive law of the European Union do not contribute to better cross-border justice. This is because they are regularly not limited to cross-border situations and are therefore not specifically tailored to these situations. As such, substantive Union law does not differ from substantive rules of national law[396], the application of which is preceded by their reference by conflict of laws. Accordingly, the application of substantive Union law is also subject to the requirement of its rules having been deemed applicable by conflict of laws.[397]

2. Conflict-of-Laws Relevance of the Various Types of Legal Acts of the European Union

The European legislator has various types of legal acts at its disposal by means of which it can establish rules.[398] As regulations are directly applicable law enacted by the European Union, it could be argued, at least for this type of legal act, that they are directly applicable regardless of conflict of laws.

However, the type of legal act chosen by the European legislator is immaterial for assessing the relationship between substantive Union law and conflict of laws. This follows firstly from the

395 Different Stéphanie Francq, 'The Scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the Other Way Around?' (2006) 8 Yearbook of Private International Law 333, 353.

396 See on this already above A.II.1.b).

397 So, in conclusion, also Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 182; Marc Fallon and Stéphanie Francq, 'Towards Internationally Mandatory Directives for Consumer Contracts?', in Jürgen Basedow, Isaak Meier, Anton K. Schnyder, Talia Einhorn and Daniel Girsberger (eds), Private Law in the International Arena (T.M.C. Asser Press 2000) 155, 171; Martina Melcher, 'Substantive EU Regulations as Overriding Mandatory Rules?' (2020) ELTE Law Journal 37, 38 et seq.; Xandra E. Kramer, 'The interaction between Rome I and mandatory EU private rules – EPIL and EPL: communicating vessels?', in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2017) 248, 261, 283 et seq.; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 51; Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 15.19; Andreas Köhler, *Eingriffsnormen – Der „unfertige Teil" des europäischen IPR* (Mohr Siebeck 2013) 150 goes even further, assuming the unification of substantive law within the EU solely serves the purpose of unifying or harmonizing law. The purpose of these provisions is therefore supposed to be limited to the harmonization of the substantive legal situation within the EU and lacks any conflict-of-laws component. Different apparently however Massimo Benedettelli, 'Connecting factors, principles of coordination between conflict systems, criteria of applicability: three different notions for an 'European Community private international law'' (2005) 10 Il Diritto dell'Unione Europea 421, 425.

398 Article 288(1) TFEU.

fact that the European legislator is free to choose the appropriate type of legal act for a variety of bases of competence.[399] According to Article 296(1) TFEU, the choice of the type "shall be made on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality". This, anyhow, does not limit the freedom of choice of the European legislator regarding the type of legal act depending on the scope of application under conflict of laws. The type of legal act chosen might be relevant for the proportionality of the legal act if there is no applicable European conflict-of-laws rule so far. However, if the international applicability of the respective legal act is already determined by European conflict of laws, the proportionality does not hinge on the conflict-of-laws content of a legal act. At least in these cases, the choice of the type of the legal act is unaffected by conflict-of-laws issues.

Moreover, conflict of laws always refers to the entire law of a state. Thus, the reference under conflict of laws comprises not only directives transposed into national law, but also regulations of the European Union. Those form in this respect also part of the national legal order.[400] Therefore, it is hardly plausible why a distinction should be made between regulations and directives for the relationship between conflict of laws and substantive Union law.

Furthermore, not every regulation provides for provisions on its territorial scope.[401] If the relationship between substantive Union law and conflict of laws depended solely on the type of the respective legal act, the applicability of these regulations to cross-border private law relationships would have to be determined by other means. For this reason alone, not every regulation containing substantive Union law is suitable for determining its own conflict-of-laws scope.

Thus, firstly, it becomes evident that the arguments in favour of an autonomy of substantive uniform law from conflict of laws do not apply to substantive Union law. There is accordingly no reason to treat substantive Union law differently from national substantive law. The latter, however, always presupposes a reference by the conflict of laws. Secondly, a differentiation in the conflict-of-laws treatment of regulations and directives is also not indicated.

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399 See e.g. Article 71(1)(d), 103(1), 113 TFEU.

400 Jürgen Basedow, *EU Private Law* (Intersentia 2021) Book IV Part IX para 21; This is also reflected by the European legislator in Article 23 Rome I Regulation and Article 27 Rome II Regulation. These provisions are intended to ensure the applicability of the directives, cf. Recital 40 Rome I Regulation, Recital 35 Rome II Regulation; see also ECJ, C-359/14 and C-475/14 *ERGO Insurance* [2016] ECLI:EU:C:2016:40 para 43 et seq., where it is also assumed that the law of the Directive is referred to by the conflict of laws of the European Union.

401 Stéphanie Francq, 'Unilateralism', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law, Volume 2* (Edward Elgar 2017) 1789; Jürgen Basedow, *EU Private Law* (Intersentia 2021) Book IV Part IX para 46.

II. The Substantive Union Law in the Conflict of Laws of the European Union

Therefore, any substantive Union law must be referred to by conflict of laws in private-law relationships. Thus, also substantive Union law is subject to conflict of laws. Hence, the question emerges as to which role substantive Union law takes in conflict of laws. In other words, it is to be examined whether substantive Union law is merely the object of conflict of laws or whether it may also be the subject of conflict of laws by providing for its own conflict-of-laws rules. If substantive Union law occupies such a place in conflict of laws, the issue also emerges of how these provisions fit into the system of conflict of laws. To this extent, further consideration will, however, be limited to the Rome I Regulation and the Rome II Regulation, since substantive Union law primarily addresses obligations within the scope of application of these regulations.

In the subsequent section, it will be examined in which way substantive Union law may be referred to by conflict-of-laws rules (1.) and the extent to which substantive Union law may also take effect if the law of a third country is referred to for application (2.).

1. Ways in which Substantive Union law May be Referred to by Conflict-of-Laws Provisions

In cross-border private-law relationships, substantive rules are in principle given effect by conflict of laws in two ways: Firstly, they may be referred to as part of the legal system designated by the conflict-of-laws rules. In this case, a conflict-of-laws rule is required to refer to the law of the respective legal system as a whole. Secondly, substantive rules may be given effect beside the law referred to by the conflict of laws. In these cases, a specific substantive provision may be given effect by the conflict of laws due to the subject matter of the provision or the importance the respective legislator attaches to this provision. These two mechanisms for giving effect to substantive law in cross-border private-law relationships are not mutually exclusive.[402] Rather, a provision given effect by the conflict of laws beside the applicable law may also apply as part of the legal system which is called upon to apply by the conflict-of-laws rules.

For substantive Union law, it follows from this two-track conflict of laws that its application to cross-border situations may be established, on the one hand, by conflict of laws referring to the law of a member state of the European Union for its application. In this case, regulations of the

402 See above A.II.3.c)(3)(b)(iii).

European Union apply as an immediate part of the legal system of that member state[403] without further ado.[404] Directives adopted by the European Union, in contrast, must first have been transposed[405] in order to be considered as part of member state law in a dispute between private parties.[406] Substantive Union law therefore applies as part of the legal system of the respective member state immediately – in the case of a regulation – or in the form it has found through the implementing national law – in the case of a directive. On the other hand, provisions of substantive Union law may also be given effect, either directly or in the form they have been given by national transposition law, due to their specific regulatory content or the importance attached to them by the European legislator.

Within this two-track conflict of laws, however, substantive Union law itself may have a role in determining the applicable law. In the law of the European Union, there are first and foremost specific legal acts to identify the applicable substantive law (conflict-of-laws acts). In this respect, the Rome I Regulation and the Rome II Regulation are particularly relevant. Substantive Union law itself may, however, be also important for establishing the applicability of substantive Union law in these cases. Firstly, this law may itself contain conflict-of-laws rules of various kinds, which call upon the rules of substantive Union law to apply and which supersede the general conflict-of-laws rules. Secondly, also the regulatory content or the importance attached to a provision depends exclusively on the respective substantive Union law. Thus, irrespective of the method by which substantive Union law is given effect to in a cross-border situation, substantive Union law and conflict of laws are potentially mutually interrelated.

Provisions of the substantive Union law may thus themselves contain conflict-of-laws rules establishing their applicability. In addition, conflict-of-laws acts may also give effect to rules of substantive Union law if those rules meet certain requirements. In the following, it will first be analysed how provisions of substantive Union law are given effect beside a legal system

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403 Marcus Klamert and Paul-John Loewenthal, 'Article 288 TFEU', in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) para 8; Paul Craig and Gráinne de Búrca, *EU Law* (7th edn, Oxford University Press 2020) 540.

404 For the reference to EU regulations under conflict of laws, see Jürgen Basedow, *EU Private Law* (Intersentia 2021) Book IV Part X para 21; Ulrich Magnus, 'Einführung Rom I-VO', in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 11.

405 Marcus Klamert and Paul-John Loewenthal, 'Article 288 TFEU', in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) para 17.

406 It is settled case law that directives cannot be applied directly in such cases, see ECJ, C-276/20 *Volvo and DAF Trucks* [2022] ECLI: EU:C:2022:494 para 76 et seq.; ECJ, C-428/19 *Rapidsped* [2021] ECLI:EU:C:2021:548 para 65; ECJ, C-193/17 *Cresco Investigation* [2019] ECLI:EU:C:2019:43 para 72 et seq.; ECJ, C-122/17 *Smith* [2018] ECLI:EU:C:2018:631 para 42 et seq.; see on the requirements for a direct application ECJ, C-46/15 *Ambisig* [2016] ECLI:EU:C:2016:530.

designated as applicable by the conflict of laws, prior to addressing the conflict-of-laws rules contained in substantive Union law itself (III. and IV.). For this purpose, it needs to be clarified initially to what extent provisions of substantive Union law may be given effect if a law is referred to for application by the conflict-of-laws acts of the European Union (2.). Furthermore, it is necessary to address how the law deemed applicable by those conflict-of-laws acts relates to the rules to which effect is given beside the applicable law (3.). If provisions of substantive Union law may be given effect beside the applicable law, the question is finally raised as to whether the manner in which they are given effect under conflict of laws is relevant for the application of the respective substantive Union law (4.).

2. Giving Effect to Substantive Union Law Beside the Applicable Law

The conflict-of-laws acts of the European Union provide in principle for two ways in which law not being part of the legal system referred to by the conflict-of-laws act may nevertheless be given effect. These provisions may also give effect under conflict of laws to provisions of substantive Union law. Firstly, in these cases provisions may be considered as overriding mandatory provisions (a). Secondly, provisions may qualify as provisions governing the performance of obligations or duties of safety and conduct. Those provisions may, under certain circumstances, be taken into account even if they are not part of the referred legal system (b). In addition, conflict-of-laws acts contain rules that limit the effects of a choice of law in certain situations. Such provisions may be found, for example, in Article 3(3),(4) Rome I Regulation, Article 6(2) Rome I Regulation, Article 8(1) Rome I Regulation, Article 14(3) Rome II Regulation. However, these provisions presuppose a reference to substantive Union law by relying on objective connecting factors and only oppose a deselection by way of a choice of law. Hence, they cannot positively establish the applicability of substantive Union law (c).

a) Overriding Mandatory Provisions in the Substantive Law of the EU

The conflict-of-laws acts of the European Union stipulate provisions for a "mandatory rule, compliance with which is considered by a State to be so essential for the protection of its public interest, in particular its political, social or economic organization, that it must be applied to all the facts falling within its scope, regardless of the law applicable to the contract by virtue of this Regulation".[407] If such a provision is part of the legal system of the state of the court seized, this provision applies irrespective of the law designated applicable by the conflict-of-laws act[408]

[407] Article 9(1) Rome I Regulation.
[408] Article 9(2) Rome I Regulation, Article 16 Rome II Regulation.

and supersedes the provisions of the law otherwise referred to[409]. In addition, under the Rome I Regulation, overriding mandatory provisions of the legal system of the state in which the obligations established by the contract are to be performed or have been performed may become relevant. These provisions are given effect to the extent that they render the performance of the contract unlawful.[410]

(1) Provisions of Substantive Union Law as Overriding Mandatory Provisions

In principle, any provision may be categorised as an overriding mandatory provision if it satisfies the requirements for an overriding mandatory provision laid down by the conflict of laws. Thus, also individual provisions of substantive Union law – if necessary by way of interpretation – may qualify as overriding mandatory provisions.[411] In this context, European Union law may be of relevance for the conflict-of-laws legal instrument of overriding mandatory provisions in a twofold manner. Firstly, it can itself comprise provisions which have the quality of an overriding mandatory provision.[412] Secondly, it may itself stipulate the overriding mandatory nature of specific provisions of national law – irrespective of their conflict-of-laws categorisation by the national legislator.[413] Regardless of how precisely substantive Union law influences the establishment of an overriding mandatory provision, overriding mandatory provisions are to be applied beside the applicable law as part of the *lex fori* pursuant to Article 9(2) Rome I Regulation and Article 16 Rome II Regulation. Where the place of performance is located in a member state, provisions of substantive Union law address this performance and those provisions qualify as overriding mandatory provisions, they take effect in accordance with Article 9(3) Rome I Regulation.

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409 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 25; Patrick Wautelet, 'Art. 16', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 25.

410 Article 9(3) Rome I Regulation.

411 On the basic admissibility of the classification of European Union provisions as overriding mandatory provisions, see Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 750; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 90; Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 7; Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-073; Patrick Wautelet, 'Art. 16', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 36.

412 See below for examples B.II.2.a)(1).

413 See e.g. Article 3(1) Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

Whether a provision of substantive Union law is to be characterised as an overriding mandatory provision within the meaning of Article 9(1) Rome I Regulation is decided conclusively by the ECJ.[414] In this respect, however, the significance the respective legislator attributed to the provision is crucial.[415] Therefore, the legislator also has a decisive influence on whether a provision is to be categorised as an overriding mandatory provision.

A classification as an overriding mandatory provision is not barred for provisions in legal acts transposing directives. In this regard, it is sometimes argued for Articles 3, 6, 8, 23 Rome I Regulation to conclusively regulate the international enforcement of provisions transposing directives by limiting the effects of a choice of law.[416] The concept of overriding mandatory provisions is a means of giving effect to provisions in cross-border situations beside the law applicable according to the conflict-of-laws rules.[417] There is no indication and no need for the European legislator to have intended to restrict the effect of such provisions for the implementation of directives in this area. Such a restriction would also be somewhat at odds with the case law of the ECJ in *Unamar*. According to this decision, provisions in legal acts implementing directives can in principle be given effect as overriding mandatory provisions.[418] Admittedly, the ECJ's decision concerned a directive which does not provide for a provision on the limitation of the choice of law as provided for in Articles 3, 6, 8, 23 Rome I Regulation. However, it is not apparent why this should require a different assessment in terms of classification as an overriding mandatory provision. This is particularly true as the ECJ did not emphasise the absence of such a provision in *Unamar*. Therefore, directive-implementing national law may also contain overriding mandatory provisions.

(2) Requirements for the Classification of substantive Union law as Overriding Mandatory Provision

The classification of provisions of substantive Union law as overriding mandatory provisions requires three elements – as follows from Art 9(1) Rome I Regulation. First, the provision must be mandatory.[419] Second, the provision must serve the public interests of the state enacting the

414 Moritz Renner, 'Art. 9 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 14; Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 7; Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 15.19; on the fundamental question of the role of national courts and the ECJ in determining the status of a mandatory provision, see Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 97.

415 See in detail below B.II.2.a)(2)(b).

416 This has been argued by Martin Zwickel, 'Eingriffsnormen (international zwigende Bestimmungen), Berücksichtigung ausländischer Devisenvorschriften, Formvorschriften', in Christoph Reithmann and Dieter Martiny (eds), *Internationales Vertragsrecht* (9th edn, otto schmidt 2022) para 5.31.

417 See above A.II.3.c)(1).

418 ECJ, C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663 para 40, 48.

419 "[…] they are applicable to any situation falling within their scope", Article 9(1) Rome I Regulation.

provision with a special quality.[420] Third, the provision must have an overriding reach.[421] These requirements can either be expressly laid down in the individual provision or in the legal act of which the provision forms part of. They may also be derived through interpretation.[422]

In this respect, the different requirements do not exist in complete isolation from one another. Rather, an international scope of application follows from the existence of a corresponding public interest, even if the former is not expressly provided for.[423] However, for a provision to be classified as an overriding mandatory provision, all three requirements must be met cumulatively.[424] Thus, even if a provision expressly stipulates its overriding reach or features an expressly defined scope of application, a classification as an overriding mandatory provision may not be considered if the corresponding provision does not also possess the necessary quality of public interest.[425] At the same time, from this it follows that it is not at the discretion of a legislature whether it confers the quality of an overriding mandatory provision by means of a formal criterion. Rather, it is decisive whether the provision is on a substantive level intended to protect a crucial public interest.[426]

(a) Mandatory Provision

Whether a provision is mandatory follows either from an express statement in the provision itself or may be inferred through an interpretation of the content and the policy underlying the provision.[427] However, this criterion is only of subordinate importance, as it is regularly absorbed by the second requirement. A mandatory provision generally also constitutes a provision which serves the public interests of a state with a certain quality.[428]

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420 "[…] the respect for which is regarded as crucial by a country for safeguarding its public interests […]", Article 9(1) Rome I Regulation.

421 "[…] irrespective of the law otherwise applicable to the contract under this Regulation.", Article 9(1) Rome I Regulation.

422 Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws, Volume 1* (16th ed Sweet & Maxwell 2022) para 32-241, 32-244; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 60; Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 10.

423 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 69.

424 Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws, Volume 2* (16th ed Sweet & Maxwell 2022) para 32-244.

425 Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-011, 12-013, 12-021-024.

426 Jonathan Harris, 'Mandatory Rules and Public Policy under the Rome I Regulation' in Franco Ferrari and Stefan Leible (eds), *Rome I Regulation* (sellier 2009) 296; Michael Hellner, 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles' (2009) 5 Journal of Private International Law 447, 460; however partly different, Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws, Volume 2* (16th ed Sweet & Maxwell 2022) para 32-245.

427 ECJ, C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663 para 50.

428 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 64; Paul Torremans, Uglješa Grušić, Christian

(b) Specific Quality of the Inherent Public Interest

A provision must also meet the necessary quality of the public interest pursued in order to qualify as an overriding mandatory provision. This requirement in turn consists of two elements. Firstly, the provision must serve a public interest. Secondly, this public interest must carry a certain weight.[429] The existence of such an interest and its weight is either apparent from the wording of the relevant provision or must be assessed by interpretation.[430]

Indisputably, a public interest within this meaning is given where a provision serves the protection of the collective interests of the community.[431] However, as follows from the wording of Article 9(1) Rome I Regulation and Recital 37 Rome I Regulation not any public interest is sufficient in this respect. Rather, it must constitute an important public interest.[432] In this respect, it is not so much the intention of the respective legislator which matters, but rather the factual consequences of the respective legislation.[433]

(i) Protection of Public Interest

It is disputed whether, in addition, provisions are also covered by Article 9(1) Rome I Regulation which primarily serve the protection of certain categories of individuals. The diverging views on this issue are rooted in the different understanding of the legal institution of overriding mandatory provisions in national conflict of laws in the various legal systems.[434] For example, in France, Italy and Belgium the legal concept of overriding mandatory provisions was understood broadly. In these legal systems, also provisions primarily protecting the

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Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 746 et seq.; for this reason it is sometimes argued that the mandatory nature of a provision is not an independent requirement for the classification as an overriding mandatory provision, cf. Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws, Volume 2* (16th ed Sweet & Maxwell 2022) para 32-240; also for the Rome II Regulation Patrick Wautelet, 'Art. 16', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 14, who negates the importance of a contractual derogation for the classification as an overriding mandatory provision.

429 Recital 37 Rome I Regulation; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 84.

430 ECJ, C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663 para 50; Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 747.

431 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 71.

432 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 84.

433 ECJ, C-49/98 *Finalarte and Others* [2001] ECLI:EU:C:2001:564 para 40-42.

434 Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) 15.28; this different understanding has already been reflected in the interpretation of the Rome Convention, see in the context of directives also Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-006, 12-028 et seq.

individual could be given the quality of an overriding mandatory provision under national conflict of laws.[435] In contrast, the legal institution of overriding mandatory provisions has been understood more restrictively in Germany and has been limited to provisions primarily serving public interests.[436] However, the wording of Article 9 Rome I Regulation, the legislative history of the predecessor provision in the Rome Convention and the legislative history of Article 9 Rome I Regulation itself argue for a broader understanding.[437] Also the case law of the ECJ on Art 7 Rome Convention and Art 9 Rome I Regulation supports this view.[438] Provisions which primarily intend the protection of individuals may therefore also be subject to Article 9(1) Rome I Regulation if they at least also serve the protection of public interests.[439]

(ii) Relevance of the Protected Interest

For assessing the relevance of the provision for the protection of the public interest, various factors are mentioned serving as indications. An overriding mandatory provision may only be assumed if it is clearly established that the respective provision satisfies the requirements for the necessary weight of the protected public interest.[440] Firstly, the existence of a relevance necessary to qualify as an overriding mandatory provision is – for example – supported by the express description of the scope of application of the provision by the legislator.[441] Secondly, an indication of such a relevance is also whether the respective legislator sanctions a violation of a specific provision by means of criminal law or by means of an administrative penalty.[442] If

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435 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 74.

436 Cf. Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) 15.29.

437 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 74, 77 et seq.

438 See ECJ, C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663, in which the ECJ confirmed the classification of Article 17, 18 Commercial Agents Directive as overriding mandatory provisions. According to the ECJ, this also applies insofar as the objective of these provisions – freedom of establishment and the functioning of undistorted competition in the internal market (see ECJ, C-381/98 *Ingmar GB* [2000] ECLI:EU:C:2000:605 para 24) – has already been achieved by the transposed Commercial Agents Directive as part of the applicable law.

439 Moritz Renner, 'Art. 9 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 20; Peter Stone, *Stone on Private International Law in the European Union* (4th edn, Edward Elgar 2018) 342; Michael Hellner, 'Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles' (2009) 5 Journal of Private International Law 447, 459; in result also for Article 16 Rome II Regulation Patrick Wautelet, 'Art. 16', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 16; Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 11.

440 Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-025.

441 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 69.

442 Moritz Renner, 'Art. 9 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 14; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 69; Patrick Wautelet, 'Art. 16', in Ulrich Magnus and Peter Mankowski (eds), *European*

compliance with a provision is ensured by sovereign means and not left exclusively to private parties, this serves as an indication of compliance with the provision being crucial for the safeguarding of public interests.[443] Thirdly, restrictions for reasons of public safety are generally considered to constitute an overriding mandatory provision.[444]

An indication of the weight given to the protection of public interests by the provision may also be obtained from a proportionality test. To this end, it must be examined whether the public interests protected by the provision are not also sufficiently safeguarded by the applicable law.[445] When classifying a provision as an overriding mandatory provision, the conflicting interests which underlie the various conflict-of-laws acts of the European Union as a whole are therefore always to be taken into account.[446] In this respect, the unity of the applicable law as well as the protection of the parties' interests in the application of the most appropriate law[447] and the protection of party autonomy[448] contrast with the state's interest in enforcing a particular policy.[449]

Conversely, if the provision or the legal system in which a provision is rooted itself provides for a multitude of exceptions to the provision in substantive or territorial terms, this militates against the presence of the required weight.[450] A further argument against the existence of such a weight is also said to be given if the respective mandatory provision is typically relevant in situations where the applicable law is determined according to Articles 6-8 Rome I Regulation.

Commentaries on Private International Law, vol. III (ottoschmidt 2019) para 167; critical on this, however, Jan von Hein, 'Art 16 Rome II Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 13.

443 Dieter Martiny, 'Art. 9 Rom I-VO', in Jan v. Hein (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 13* (8th edn, C.H. Beck 2021) para 20, 21.

444 Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 6.193.

445 Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws, Volume 2* (16th ed Sweet & Maxwell 2022) para 32-244; as in the result also for Article 16 Rome II Regulation Patrick Wautelet, 'Art. 16', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 16; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 85.

446 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 1.

447 Moritz Renner, 'Art. 9 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 11.

448 Emphasising the importance of preserving party autonomy in this context ECJ, C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663 para 40-44, 48.

449 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 1.

450 So for the prohibition of interest in some Islamic-influenced legal systems Moritz Renner, 'Art. 9 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 14; similarly also Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 14 et seq.

In this case, there is regularly no legitimate need to enforce the provision as an overriding mandatory provision.[451]

(c) Overriding Reach

Finally, the classification of a provision as an overriding mandatory provision requires this provision to have an overriding reach. In other words, the rule must apply in all situations falling within its scope of application, irrespective of the legal system otherwise referred to by the conflict-of-laws rules.[452] Such an intention of application may be directly stated in the respective provision itself. An explicit statement of this kind may also be found in provisions of substantive Union law.[453] An intention to be applied may also result indirectly from the provision itself – or the legal act in which such a provision is found – by providing for an express definition of its personal or territorial scope of application.[454] If the criterion used to define this scope of application does not correspond to the connecting factors of the applicable conflict-of-laws rules, this is supposed to indicate the legislators intention of applying the provision "irrespective of the otherwise applicable law".[455] For example, if a provision containing a prohibition on alienation is linked to the place where an object is located, this territorial scope of application deviates from the conflict-of-laws rules of the Rome I Regulation. This deviation is – according to this view – a clear indication that this provision

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451 Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 12; however, the relationship between Article 6-8 Rome I Regulation and overriding mandatory provisions as such is disputed, see in detail Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 26 et seq.

452 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 86.

453 Article 12(2) 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 [2009] OJ L 33/10. But see also, as a counter-example, Recital 58 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 [2011] OJ L 304/64. The first sentence of this Directive states that "[t]he consumer should not be deprived of the protection granted by this Directive". However, in the second sentence, the legislator subjects the applicability of the Directive in relation to third countries to the Rome I Regulation. If the European legislator had intended this Directive to be characterised as an overriding mandatory provision, it could not have made its applicability dependent on the Rome I Regulation.

454 Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 748; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 87; Patrick Wautelet, 'Art. 16', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 17; Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-002 fn. 11.

455 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 87.

should apply "irrespective of the otherwise applicable law". Whether such a definition of the scope of application may actually be interpreted as proofing a corresponding intention of the legislator is, however, doubtful. This would presuppose the legislator – when creating the respective provision – to have in mind precisely cross-border situations to which another law could apply. Otherwise, the provision might as well be merely a restriction of the scope of application. Such a limitation might, irrespective of a cross-border element, have been intended to limit the application of the provision to certain facts. In these cases, the provision would need to be considered as a mere self-limiting rule.[456] Yet, if a provision is to be qualified as a self-limiting rule, an intention of the legislator to regulate a conflict-of-laws dimension cannot be assumed solely on the basis of the regulation of a scope of application.[457]

An explicit definition of the personal or territorial scope of application may therefore only indicate the legislator's intent to apply the provision "irrespective of the otherwise applicable law" if the definition of the scope of application itself comprises a cross-border element.[458] Conversely, however, it can be assumed in the absence of an explicit or implicit definition of the scope of application for a provision not to qualify as an overriding mandatory provision.[459] In these cases, the respective legislator has generally not considered a different conflict-of-laws assessment to be necessary.

b) Regulations on the Fulfilment of Obligations and on Safety and Conduct Obligations

Within the scope of application of the Rome I Regulation – in addition to overriding mandatory provisions – regard shall be had to rules of the state of performance and which concern the manner of performance and the measures to be taken in the event of defective performance.[460] Similarly, Article 17 Rome II Regulation allows for the taking into account of rules of safety and conduct in force at the place and time of the event giving rise to the liability[461] when assessing the conduct of a liable person. Overriding mandatory provisions differ from those provisions mentioned in Article 12(2) Rome I Regulation and Article 17 Rome II Regulation. According to the definition in Article 9(1) Rome I Regulation overriding mandatory provisions

456 See above A.II.3.c)(2).

457 In conclusion also Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 87.

458 See, for example, Article 12(2) Timeshare Directive; different Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 10, who seems to consider such a definition to be an indication against the existence of an overriding mandatory provision.

459 Jonathan Hill and Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) para 4.102.

460 Article 12(2) Rome I Regulation.

461 See Recital 34 Rome II Regulation.

require a certain normative quality with regard to their regulatory purpose and their scope of application, irrespective of their regulatory content.[462] This definition is also authoritative for Article 16 Rome II Regulation.[463] In contrast, the classification as a provision concerning the fulfilment of obligations or containing safety and conduct obligations does not presuppose an inherent conflict-of-laws element beyond their actual substantive-law regulatory content. From a conflict-of-laws perspective, there is also no need for any intended special weight of the public interests pursued by the provision and no necessity for an overriding reach. These rules derive their conflict-of-laws effect solely from the regulation of certain substantive issues at the substantive level.

According to Article 12(2) Rome I Regulation, provisions of substantive Union law may therefore be considered in the legal assessment as part of the legal system of the state of the place of performance insofar as they concern the performance of a contract. For a classification under Article 12(2) Rome I Regulation, it is insignificant whether these provisions are to be qualified as overriding mandatory provisions. The same applies according to Article 17 Rome II Regulation within the framework of the Rome II Regulation for rules of safety and conduct in substantive Union law as part of the legal system at the place of the event giving rise to the liability.

c) Rules Protecting Against a Choice of Law

Some directives contain a provision requiring member states to ensure that the respective directive may not be deviated from to the detriment of the consumer by choosing the law of a third country where there is a close connection to a member state.[464] However, this type of provision may neither be considered a unilateral conflict-of-laws rule derived from a provision on the territorial scope of application, nor can it be equated with such a rule.

Rules protecting against a choice of law require a choice of law for the law applicable. This implicitly impose the requirement of a reference to the law of a member state implementing the respective directive in the conflict-of-laws rules governing the law applicable. The directive is thus in principle part of the law applicable. A separate assessment of the applicability of the directive in cross-border situations is therefore generally not necessary. Rather, rules protecting

462 See on this extensively already above B.II.2.a)(2)(b).

463 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 21; ECJ, C-149/18 *Da Silva Martins* [2019] ECLI:EU:C:2019:84 para 28.

464 Cf. Article 12(2) Distance Marketing of Financial Services Directive; Article 6(2) Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29 (Unfair Terms Directive); Article 9 Timesharing Directive; Article 22(4) Consumer Credit Directive; similar in content also Article 25 Consumer Rights Directive.

against a choice of law are merely intended to ensure that the respective directive cannot be waived by a choice of law in favour of a third country.

Such an understanding of rules protecting against a choice of law is also supported by the fact that, according to their wording, these directives may "not be deviated" from by a choice of law. However, a deviation only exists where the directive is applied as part of the legal system of a member state in the absence of a choice of law. The purpose of this type of provision is merely to ensure that the respective directive cannot be circumvented by a choice of law in favour of a third country.[465] Rules protecting against a choice of law are therefore not a prerequisite for the application of the directive in cross-border situations, but ensure its application in cases where there is a risk that its application will be overridden by a choice of law.

Rules protecting against a choice of law are also different from overriding mandatory provisions and regulations on the fulfilment of obligations and on safety and conduct obligations. They presuppose the existence of a choice of law in favour of a third-country law – and thus typically the applicability of a member state law according to the objective connecting factors – or directly the applicability of a member state law on the basis of objective connecting factors. By contrast, overriding mandatory provisions and conflict-of-laws rules on the rules on the fulfilment of obligations and on safety and conduct extend the scope of application. They refer to the law of a state in certain cases, even if the objective connecting factors of the relevant conflict-of-laws rule refer to the law of another state. The type of provision at issue here is not so much concerned with extending the territorial scope of application. They rather ensure the application of these provisions in cross-border situations, where they are typically referred to on the basis of the objective connecting factors.

Rules protecting against a choice of law will not be considered in the following. As a rule, they do not establish a territorial scope of application in a cross-border situation that goes beyond the objective connecting factors, but merely have a corrective function at the level of conflict of laws in the event of a choice of law.

3. Rules of Substantive Union Law in Conflict of Laws of the EU

Provisions within the substantive Union law may be categorised as conflict-of-laws rules declaring the respective substantive Union law to be applicable. If substantive Union law contains such a conflict-of-laws provision, these provisions could take precedence over the

465 Christian Förster, 'Art. 46b EGBGB', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Rom I-VO* (C.H. Beck 2023) para 28.

general conflict-of-laws rules under the *lex specialis* principle as special conflict-of-laws rules. However, it is unclear whether and to which extent such special conflict-of-laws rules are relevant in the conflict of laws of the European Union. Therefore, it is initially necessary to examine which criteria define the relationship between general and special conflict-of-laws rules within the legal system established by the European Union (a). Subsequently, the relationship between national conflict-of-laws rules and special conflict-of-laws rules in the substantive Union law (b) will be investigated. Finally, the relationship between conflict-of-laws acts of the European Union and special conflict-of-laws rules of substantive Union law (c) is to be evaluated.

a) The Relevance of Conflict of Laws in Resolving Conflicts of Conflict-of-Laws Provisions

The relationship between conflict-of-laws rules of substantive Union law and conflict-of-laws acts differs fundamentally from the subject matter of conflict of laws. Both share the objective of resolving a conflict between at least two provisions which require their application to the same situation. However, both types of underlying conflicts result from very different situations.

Conflict of laws deals with the overlapping of rules of different regulators. It thus addresses a conflict of sovereigns who are independent of each other and do not have a relationship of superiority or subordination (horizontal conflict). The respective conflict-of-laws rules are designed to decide whether the law of state A or the law of state B applies to a situation which relates to both state A and state B. In contrast, the relationship between conflict-of-laws rules in substantive Union law and the conflict-of-laws act addresses, firstly, the issue of the relationship between conflict-of-laws rules of the member states and conflict-of-laws rules in substantive Union law (vertical conflict). Secondly, it also concerns the issue of how to resolve a conflict of application of provisions of a single legislator – the conflict between the conflict-of-laws rules of substantive Union law and the conflict-of-laws acts of the European Union. The conflict in these cases is therefore not between the law of state A and state B, but within the legal system of state A, both in terms of its hierarchy of rules and in terms of the relationship between different provisions within the same layer of the legal system of state A.

The different subject matter is accompanied by different interests and mechanisms for resolving the respective conflicts. Conflict of laws, at least according to the European understanding of this area of law, focuses on the interests of the parties and only marginally takes into account

the interests of a state.[466] In contrast, assessing the relationship between substantive Union law and conflict of laws, the interests and expectations of the parties are not to be considered at all. This latter conflict is solely concerned with the vertical relationship between two legislators and the relationship between provisions of a sole legislator. Unlike conflict of laws, this conflict is not about the balancing of the interests of two legislators, but exclusively about the importance an individual legislator has assigned to the respective provision within its legal system. In this context, decisive are not the interests of the respective parties, but exclusively the intention of the specific legislator. Because of those different interests, the resolution mechanisms of conflict of laws are not suitable for resolving the conflict between substantive Union law and conflict of laws.

b) National Conflict of Laws and Conflict-of-Laws Rules in Substantive Union Law

To resolve this conflict, it is first necessary to differentiate between the relationship of national conflict-of-laws rules and substantive Union law and the relationship of conflict-of-laws acts of the European Union and substantive Union law.

Insofar as conflict-of-laws rules may be derived from substantive Union law, the latter rules take precedence over national conflict-of-laws rules. This follows, firstly, from the primacy of application of European Union law.[467] The primacy of application of European Union law establishes a priority application of European Union law and a displacement of national rules. Secondly, this follows from the principle of *effet utile*.[468] According to this principle, preference is to be given to any interpretation of national law which best and most effectively enforces European Union law. Therefore, also this principle requires a priority application of conflict-of-laws rules in substantive Union law. To the extent to which national conflict-of-laws rules regulate an area of law which is also subject to the conflict-of-laws rules of substantive Union law, only the conflict-of-laws rules of substantive Union law apply in general.

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466 Giesela Rühl, 'Private international law, foundations', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law, Volume 2* (Edward Elgar 2017) 1387 et seq.

467 Stéphanie Francq, 'The Scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the Other Way Around?' (2006) 8 Yearbook of Private International Law 333, 354 et seq.; see on this principle extensively – with further references – Marcus Klamert, 'Article 1 TEU', in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) para 34 et seq.; see also ECJ, C-430/21 [2022] ECLI:EU:C:2022:99 para 46-53.

468 Article 4(3) TFEU.

c) Conflict between Conflict-of-Laws Acts of the European Union and Conflict-of-Laws Rules in Substantive Union Law

The assessment is more difficult if the relevant legal acts were both adopted by the European legislator. In these cases, substantive Union law might provide for conflict-of-laws rules whose scope of application overlaps with the scope of the conflict-of-laws act of the European Union.

(1) The *Lex Specialis* Principle

In these cases, it could be argued for a blanket primacy of conflict-of-laws rules in substantive Union law on the basis of the *lex specialis* principle.[469] However, the present relationship must not be confused with the relationship between the substantive Union law and the conflict of laws. For the latter relationship, recourse to the *lex specialis* principle has already been rejected.[470] In contrast to this relationship, in the present case the *lex specialis* principle is supposed to contribute to the clarification of the relationship between the conflict-of-laws rules in substantive Union law and the conflict-of-laws rules in conflict-of-laws act of the European Union. The object of comparison of the *lex specialis* principle is thus not the relationship between substantive Union law and conflict of laws, but the relationship between the conflict-of-laws rules found in the respective legal acts.

The *lex specialis* principle may generally be used to determine the relationship of individual legal acts of the European Union to each other. It is also relied upon by the ECJ in its case law.[471] However, a general prior application of the conflict-of-laws rules of substantive Union law over those of the conflict-of-laws acts cannot be derived from the *lex specialis* principle. Rather, the speciality of substantive Union law *vis-à-vis* conflict-of-laws acts always depends on the design of both the specific conflict-of-laws rule of substantive Union law and the respective conflict-of-laws act.

Against such a blanket priority based on the *lex specialis* principle argues the absence of a general rule according to which the scope of application of conflict-of-laws acts is generally broader than the scope of application of substantive Union law. Admittedly, substantive Union law comprises only selective regulations and is thus tailored to specific situations according to the principle of conferral[472]. Pursuant to the *lex specialis* principle, the scope of application of

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469 Advocating for the applicability of the *lex specialis* principle in the relation of European private international law and substantive Union law Stéphanie Francq, 'The Scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the Other Way Around?' (2006) 8 Yearbook of Private International Law 333, 354 et seq.

470 See above B.I.1.

471 See the references above in fn. 15.

472 Article 4(1), 5(1),(2) TEU.

two provisions must differ in such a way that the scope of application of one provision comprises all elements of the scope of application of another provision and, in addition, provides for an additional element.[473] This holds regularly true for conflict-of-laws acts and substantive Union law, the latter typically dealing with specific issues. In order to address only these specific issues, corresponding elements on the facts side are needed to further limit the scope of application. The scope of application of substantive Union law is therefore regularly narrowly defined. In contrast, conflict-of-laws acts of the European Union are typically formulated rather broadly in their scope of application. They cover, for example, (non-)contractual obligations in civil and commercial matters which have a connection to the law of different states.[474]

However, it must also be taken into account that the conflict-of-laws rules themselves in these legal acts provide for various scopes of application. This is already shown by the Rome I Regulation, which contains a general conflict-of-laws rule for contractual claims in Article 4(2) Rome I Regulation. However, more specific conflict-of-laws rules for different types of contracts, subjects of contracts and contracting parties are found in Article 4(1) Rome I Regulation and in Articles 5-8 Rome I Regulation. The Rome II Regulation also provides for a general conflict-of-laws rule in Article 4(2) Rome II Regulation and conflict-of-laws rules for special types of non-contractual obligations in Articles 5-13 Rome II Regulation. Therefore, also conflict-of-laws acts of the European Union potentially establish rules with a comparatively narrowly defined scope of application.

Another argument against a blanket priority of conflict-of-laws rules of substantive Union law over the conflict-of-laws acts of the European Union follows from the concepts used to define the scope of application. The scope of application of substantive Union law and of conflict-of-laws acts of the European Union are not congruent, but only partially overlap due to the different criteria used within these legal acts. For example, the GDPR, the Air Passengers Rights Regulation, the Package Travel Directive[475] and the Product Liability Directive[476] do not differentiate with regard to the protection of certain groups of persons. In contrast, the different conflict-of-laws acts of the European Union provide for specific rules for consumers or for certain types of contracts. For example, Articles 4, 6 Rome I Regulation distinguish between contracts entered into by consumers and contracts concluded with other contracting

473 Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (3rd edn, Springer 1995) 88 et seq.

474 Article 1(1) Rome I Regulation, Article 1(1) Rome II Regulation.

475 Directive (EU) 2015/2302.

476 Council Directive 85/374/EEC.

parties when assessing the applicable law.[477] Also, the Rome II Regulation only allows to a limited extent for a choice of law by persons not pursuing a commercial activity according to Article 14 Rome II Regulation. In contrast, the GDPR, the Product Liability Directive, the Package Travel Directive or the Air Passengers Rights Regulation do not contain special rules for certain groups of persons. Other than the examples listed, the Rome I Regulation and the Rome II Regulation thus distinguishes between consumers and persons pursuing a business activity.

Therefore, the scopes of application of substantive Union law and conflict of laws of the European Union are not congruent, but merely overlap. Hence, both legal acts retain an independent scope of application. In such cases, however, the principle of *lex specialis* is not applicable, since it cannot be said of substantive Union law in general having a more specific scope of application than the conflict-of-laws rules.[478] Admittedly, there may be cases in which the scope of application of individual legal acts of substantive Union law and conflict-of-laws acts of the European Union are congruent. In these particular cases, the *lex specialis* principle may be relied upon to establish a relationship of priority. However, no general conclusions can be drawn from these cases regarding the general relationship between substantive Union law and conflict of laws.

The *lex specialis* principle is therefore not suitable to establish a principal priority of conflict-of-laws rules in substantive Union law over conflict-of-laws acts of the European Union. However, this does not preclude from relying upon this principle in individual cases to establish the primacy of the conflict-of-laws rules of individual substantive Union laws over individual conflict-of-laws acts.

(2) Rules in Conflict-of-Laws Acts of the EU on the Relationship with Conflict-of-Laws Rules in Substantive Union Law

This general and case-by-case application of the *lex specialis* principle is also reflected in the provisions of the conflict-of-laws acts of the European Union on the relationship with other Union law. Those provisions can be found in particular in Article 23 Rome I Regulation and Article 27 Rome II Regulation. According to these provisions, the respective conflict-of-laws acts should "[...] not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules [...]". Regardless of whether this

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477 The dissociation of the European Union Regulations especially in the field of transport law from the concept of consumer has already been noted by Margherita Colangelo and Vincenzo Zeno-Zencovich, *Introduction to European Union Transport Law* (3rd edn, RomaTrE-Press 2019) 142.

478 See already above B.I.1.

wording codifies the *lex specialis* principle[479], it expresses in any case a withdrawal of the conflict-of-laws acts. These provisions are also relevant for assessing the relation to substantive Union law in cross-border situations if the substantive Union law provides for conflict-of-laws rules. Admittedly, it is disputed which type of conflict-of-laws rules are addressed by Article 23 Rome I Regulation, Article 27 Rome II Regulation.[480] Further, it is unclear, whether conflict-of-laws rules of substantive Union law are to be classified as conflict-of-laws rules within the meaning of Article 23 Rome I Regulation, Article 27 Rome II Regulation.[481] Yet, there is in any case agreement on the primacy of conflict-of-laws rules of substantive Union law – at least via the *lex specialis* principle – over conflict-of-laws acts.[482]

(3) The Ambivalent Regulation of the Relationship by the European Legislator

However, for conflict-of-laws rules in substantive Union law, an ambivalent relationship to the conflict-of-laws acts of the European Union becomes apparent.[483] According to these conflict-of-laws acts, rules of European Union law are in principle to take precedence over the conflict-of-laws rules of conflict-of-laws acts.[484] Yet at the same time, the recitals of the conflict-of-laws acts illustrate the need for restraint when adopting or interpretating such a conflict-of-laws

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479 Affirmatively Max Planck Institute for Foreign Private and Private International Law, 'Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization' (2004) 68 Rabels Zeitschrift für ausländisches und internationales Privatrecht 1, 21; Matteo Gargantini, 'Competent Courts of Jurisdiction and Applicable Law', in Danny Busch, Guido Ferrarini and Jan Paul Franx (eds), *Prospectus Regulation and Prospectus Liability* (Oxford University Press 2020) para 19.38; Felix Maultzsch, 'Art. 9 Rom I-VO', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Rom I-VO* (C.H. Beck 2023) para 205; Peter Mankowski, 'Art. 27', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 1; Francisco J. Garcimartín Alférez, 'The Rome I Regulation: Much ado anout nothing?' (2008) 8 The European Legal Forum I-61, 66; Sebastian Omlor, 'Article 23', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 2; Stéphanie Francq, 'The Scope of Secondary Community Law in the Light of the Methods of Private International Law – Or the Other Way Around?' (2006) 8 Yearbook of Private International Law 333, 354 regarding the predecessor of Article 23 Rome I Regulation, Art 20 Rome Convention.

480 Ulrich Magnus, 'Art. 23 Rom I-VO', in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 13; Reiner Schulze and Matthias Fervers, 'Art. 23 Rom I-VO', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Rom I-VO* (C.H. Beck 2023) para 20.1; Eva-Maria Kieninger, 'Art. 23 Verordnung (EG) Nr. 593/2008', in Franco Ferrari et al., *Internationales Vertragsrecht* (3rd edn, 2018 C.H. Beck) para 3.

481 Ulrich Magnus, 'Art. 23 Rom I-VO', in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 13; Reiner Schulze and Matthias Fervers, 'Art. 23 Rom I-VO', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Rom I-VO* (C.H. Beck 2023) para 20.1; Eva-Maria Kieninger, 'Art. 23 Verordnung (EG) Nr. 593/2008', in Franco Ferrari et al., *Internationales Vertragsrecht* (3rd edn, 2018 C.H. Beck) para 3.

482 Cf. the references in fn 11-14.

483 Similar Matthias Weller, 'Art. 23 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 2, who describes the relation as "opaque".

484 See e.g. Article 23 Rome I Regulation, Article 27 Rome II Regulation.

rule in substantive Union law. According to the relevant recitals of the Rome I and Rome II Regulation, "[a] situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided".[485] Although this should "not exclude the possibility of inclusion of conflict-of-law rules [...] in provisions of Community law with regard to particular matters".[486] The expressed aim in creating the conflict-of-laws acts was, however, to concentrate the conflict of laws as far as possible in the conflict-of-laws acts.[487]

From this supposedly contradictory ordering of the primacy of special conflict-of-laws rules on the one hand and the expression of the intention to concentrate conflict-of-laws rules in the conflict-of-laws acts on the other, a consistent blueprint for an architecture of European conflict of laws can nevertheless be derived. This blueprint provides for the general rules of the conflict-of-laws acts of the European Union as the base plate. The building blocks are equally the conflict-of-laws rules of the conflict-of-laws acts and the special conflict-of-laws rules in other legal acts of the European Union. The roof is formed by the uniform European law on international jurisdiction and in particular the Brussels I*bis* Regulation[488], whereby this roof is reinforced in some places by provisions on international jurisdiction in individual substantive Union laws.

The roof protects the underlying structure by ensuring the applicability of the rules of the European Union as a whole by means of an allocation of jurisdiction to the European courts. By stating in the conflict-of-laws acts the primacy of special conflict-of-laws rules, the European legislator establishes a dual system of conflict of laws, which allows for an appropriate and tailor-made conflict of laws. The emphasis on a concentration of conflict-of-laws rules is a reminder to the legislator himself to make use of the competence to create further conflict-of-laws rules solely sparingly. Moreover, it is an interpretative guide for substantive Union law. According to this guide, the European legislator did not intend to incorporate into substantive Union law – in case of doubt – a conflict-of-laws rule governing its international territorial scope of application.[489] Therefore, if a conflict-of-laws rule is not expressly

485 Recital 40 Rome I Regulation, Recital 35 Rome II Regulation.

486 Recital 40 Rome I Regulation, Recital 35 Rome II Regulation.

487 Peter Mankowski, 'Art. 23', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 4, potentially also deriving a concentration on the Rome I Regulation from Recital 40 Rome I Regulation; in the result also Ulrich Magnus, 'Art. 23 Rom I-VO', in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 2.

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

489 So also in conclusion Ulrich Magnus, 'Art. 23 Rom I-VO', in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 29.

established in substantive Union law, it must be assumed in case of doubt of such a rule not being inferable from substantive Union law by interpretation.[490] As a result, this implies for the European legislator to have shifted the issue of the relationship between conflict-of-laws rules in substantive Union law and conflict-of-laws acts of the European Union to the issue of whether the respective substantive Union law provides for a conflict-of-laws rule. Which types of rules in substantive Union law may be relevant for conflict of laws and how it is possible to assess whether such a conflict-of-laws rule is actually given in the individual case is thus of decisive importance.

d) Relation of Different Means to Give Effect to Rules not Being Part of the Applicable Law

Where substantive Union law does not contain conflict-of-laws rules, its provisions may nevertheless be relevant under the conflict of laws. From a European perspective, substantive Union law may be given effect in various ways beside the law referred to by the general conflict-of-laws acts. Firstly, the provisions of substantive Union law are applicable[491] or effect may be given to them[492] as overriding mandatory provisions. They may also be given effect in accordance with Article 12(2) Rome I Regulation or Article 17 Rome II Regulation. Finally, substantive Union law may also provide for conflict-of-laws rules which identify the situations in which substantive Union law applies. In all of these cases, substantive Union law is given effect beside the law referred to by the general conflict-of-laws act, which only applies to the extent permitted by substantive Union law.

Substantive Union law may thus have effects beside the law referred to by the general conflict-of-laws acts. If several of these various mechanisms give effect to a particular provision of

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490 In this respect, the decisions ECJ, C-318/98 *Ingmar* [2000] ECLI:EU:C:2000:605 and ECJ, C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663 could be seen as contradictory to the above considerations. With regard to these decisions, however, it is already disputed how the statements of the ECJ are to be interpreted in terms of conflict of laws (see Peter Mankowski, 'Art. 23', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 15; Matthias Weller, 'Art. 23 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 15; Luis de Lima Pinheiro, 'Rome I Regulation: Some Controversial Issues', in Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden - Prinzipien bewahren* (Gieseking 2011) 245 et seq.). Assuming in this respect that the ECJ has attributed an overriding mandatory character to the provisions at issue (Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James J. Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 749; Moritz Renner, 'Art. 9 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 18 et seq.; Ulrich Magnus, 'Introduction', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 44). These statements by the ECJ do not refer to specific conflict-of-laws rules within the meaning of Article 23 Rome I Regulation or Article 27 Rome II Regulation, but to overriding mandatory provisions. These provisions are, however, not addressed by Recital 35 Rome I Regulation and Recital 40 Rome II Regulation.

491 Article 9(2) Rome I Regulation, Article 16 Rome II Regulation.

492 Article 9(3) Rome I Regulation.

substantive Union law, the relationship between the legal consequences of these mechanisms must be clarified. This issue may gain importance for substantive Union law in two ways if European courts are faced with a case to which the law of a third country applies under the general conflict-of-laws acts. In those situations, substantive Union law may nevertheless contain a provision which is to be categorised as a provision within the meaning of Article 12(2) Rome I Regulation or Article 17 Rome II Regulation and at the same time as an overriding mandatory provision. If a provision is subject to both legal instruments, the relationship between these legal instruments may be of significance. Secondly, the resolution of the relationship could also be of significance if, in this situation, there is a conflict between national provisions classifying as overriding mandatory provisions and substantive Union law solely be given effect via Article 12(2) Rome I Regulation, Article 17 Rome II Regulation.

The proper classification of the relationship with regard to the first mentioned scenario is relevant in particular since Articles 9(2),(3), 12(2) Rome I Regulation and Article 16, 17 Rome II Regulation differ not only in their requirements, but also in their legal consequences. Under Article 9(2) Rome I Regulation and Article 16 Rome II Regulation the conflict-of-laws act do not "affect" the application of overriding mandatory rules. However, according to Article 9(3), Article 12(2) Rome I Regulation and Article 17 Rome II Regulation the corresponding rules "may be given"[493] effect, "shall be had"[494] regard to or "shall be taken"[495] into account. The precise meaning of those divergent wordings is disputed.[496] However, there is in any case agreement that provisions to which effect is given by way of Articles 9(3), 12(2) Rome I Regulation, Article 17 Rome II Regulation have a deviating effect on the legal assessment of a situation compared to the effect of a conflict-of-laws rules as well as Article 9(2) Rome I Regulation, Article 16 Rome II Regulation.

As regards the latter scenario, the relationship between overriding mandatory provisions of national law and substantive Union law given effect via Article 12(2) Rome I Regulation or Article 17 Rome II Regulation indirectly influences the scope of application of substantive

493 Cf. Article 9(3) Rome I Regulation.

494 Article 12(2) Rome I Regulation.

495 Cf. Article 17 Rome II Regulation.

496 See on this Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 15.113 et seq., 17.53 et seq.; Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 65-68; Jan D. Lüttringhaus, 'Article 12', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 45-46; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 180-184; Franco Ferrari, 'Art. 12', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 41-43; Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 15.33.

Union law. This influence, which may result in a restriction of the scope of application of substantive Union law, has to be examined more closely.

(1) A Provision of Substantive Union Law is Subject to Several Conflict-of-Laws Rules

Articles 9(2), 9(3), 12(2) Rome I Regulation, Articles 16, 17 Rome II Regulation provide mechanisms to give effect to a provision of substantive law beside the applicable law. In the following, it will be examined which of these conflict-of-laws rules is authoritative if a single provision meets the requirements of several of these provisions.

(a) A Provision Meets the Requirements of Articles 9(2) and 9(3) Rome I Regulation

A situation may arise where the place of performance is located in the state of the court seized. In such cases, the *lex fori* – and thus also the provisions of substantive Union law if the courts of a member state of the European Union are seized – might be given effect under conflict of laws pursuant to both Article 9(2) Rome I Regulation and Article 9(3) Rome I Regulation.

If a provision of the *lex fori* meets the requirements of Article 9(2) Rome I Regulation as well as Article 9(3) Rome I Regulation according to its wording, it is always Article 9(2) Rome I Regulation which is solely relevant for its conflict-of-laws assessment. Article 9(3) Rome I Regulation is of no significance in this respect.[497] This does not follow from the principle of *lex specialis* (i). However, the legislative history of Article 9(3) Rome I Regulation clearly indicates that this provision was only intended to apply to overriding mandatory provisions foreign to the *forum* (ii).

(i) The Primacy of Article 9(3) Rome I Regulation due to the *Lex Specialis* Principle

Article 9(3) Rome I Regulation is not to be applied primarily on the basis of the *lex specialis* principle.[498] The principle of *lex specialis* requires the scope of application of the provisions to be identical in principle, but the more specific provision to have an additional element.[499] The scope of application of Article 9(2) Rome I Regulation covers provisions of the legal system of the state of the court seized. Article 9(3) Rome I Regulation – by contrast – applies to overriding mandatory provisions of the law of the country of performance and requires that those "provisions render the performance of the contract unlawful". However, provisions – contrary

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497 Also Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 7; Karsten Thorn, 'Art. 9 Rom I-VO', in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band III* (5th edn, ottoschmidt 2023) para 87.

498 This is, however, assumed by Ulrich Magnus, 'Art. 23 Rom I-VO', in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 142.

499 See above B.II.3.c)(1).

to Article 9(2) Rome I Regulation – do not have to be part of the *lex fori* in order to apply under Article 9(3) Rome I Regulation. In contrast, Article 9(3) Rome I Regulation is according to its wording indifferent on whether the overriding mandatory provision is part of the *lex fori*. Thus, the requirements of Article 9(2) Rome I Regulation and Article 9(3) Rome I Regulation are fundamentally different, even if they may overlap in individual cases. Hence, one prerequisite for the existence of a relationship of speciality is missing, namely the principal congruence of the scope of application of the two provisions.

(ii) The Legal Consequences and Legislative History of Article 9(3) Rome I Regulation

Instead, from the legislative intention underlying Article 9(3) Rome I Regulation follows the priority application of Article 9(2) Rome I Regulation. The European Commission intended – as expressed in the definition of Article 9(1) Rome I Regulation – with Article 9(2) Rome I Regulation to ensure the application of such provisions "to which a state attaches such importance that it requires them to be applied whenever there is a connection between the legal situation and its territory, whatever law is otherwise applicable to the contract".[500] Thus, the conflict-of-laws mechanism of overriding mandatory provisions is aimed at the protection of state interests and policies in a private-law relationship.[501] However, such protection can only be comprehensively ensured if the relevant overriding mandatory provisions are actually applied and not merely taken into account in the application of the law. If the provision were merely taken into account, the extent of the influence on the applicable law would depend on the respective court.

In addition, the historical development of Article 9(3) Rome I Regulation – in particular with regard to the enacted version of Article 9(3) Rome I Regulation – needs to be considered. This development demonstrates the European legislator's intention for Article 9(3) Rome I Regulation to be understood as referring to those overriding mandatory provisions only which are not part of the *lex fori.* Article 7(1) Rome Convention – the predecessor provision of Article 9(3) Rome I Regulation, which still provided for the possibility of a reservation[502] – referred explicitly to "mandatory rules of the law of another country". Also, in an early draft of the Rome I Regulation Article 8(3) addressed "mandatory rules of the law of another country",

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500 Commission of the European Communities, 'Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation', COM(2002) 654 final, para 3.2.8.1 <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0654> accessed 5 March 2024.

501 Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 15.01.

502 Article 22 Rome Convention.

while Article 8(2) dealt with "the rules of the law of the forum".[503] This previous draft thus provided for a clear separation in Article 8(2) and Article 8(3) between mandatory rules of the *lex fori* and those of other states.

During the legislation, Article 9(3) Rome I Regulation was finally limited in its scope to "the law of the country where the obligations arising out of the contract have to be or have been performed". However, this omission of the separation in the final version of Article 9 Rome I Regulation cannot be explained by such a separation having been no longer intended by the European legislator. Rather, it seems more likely for Article 9(3) Rome I Regulation to accommodate concerns about the uncertainty and scope of influence of third-country overriding mandatory provisions on the applicable law.[504] The adaption of Article 9(3) Rome I Regulation in the course of the legislative procedure may thus have had the purpose of preventing the inclusion of a reservation, in the interest of a uniform application of the regulation. Such a reservation was still provided for in the Rome Convention with regard to third-country overriding mandatory provisions. However, there is no indication suggesting this revision was intended to extend the scope of Article 9(3) Rome I Regulation to provisions of the *lex fori*. In contrast, from the former unambiguous separation of overriding mandatory provisions of the *lex fori* and of third countries an implicit conclusion is to be drawn for Article 9(2) Rome I Regulation. Accordingly, overriding mandatory provisions of the *lex fori* should be subject to the requirements and legal consequences of Article 9(2) Rome I Regulation but not of Article 9(3) Rome I Regulation.

Thus, both the diverging legal consequences of Article 9(2),(3) Rome I Regulation and the legislative history of Article 9 Rome I Regulation argue in favour of basing the application of an overriding mandatory provision solely on Article 9(2) Rome I Regulation.

(b) A Provision Meets the Requirements of Article 9(2) and 12(2) Rome I Regulation

In the relationship between Article 9(2) Rome I Regulation and Article 12(2) Rome I Regulation, Article 9(2) Rome I Regulation takes precedence. Also in this respect, the purpose of Article 9(2) Rome I Regulation – the protection of state interests and policies – can only be adequately met if the respective provision is applied as an overriding mandatory provision and not merely taken into account. This provision must necessarily prevail over the law which the contract is otherwise subject under the Rome I Regulation.

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503 Cf. Commission of the European Communities, 'Proposal of the Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)', COM(2005) 650 final <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005PC0650> accessed 5 March 2024.

504 In this regard, see the summary of the legislative process in Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 15.61-15.63.

Therefore, in proceedings before European courts, provisions of substantive Union law which are to be classified as overriding mandatory provisions apply in any case via Article 9(2) Rome I Regulation. Something else is true if the provision of substantive Union law does not possess the quality of an overriding mandatory provision and regulates the manner of performance and the measures to be taken by the creditor in the event of defective performance. In these cases, the provision of substantive Union law is to be taken into account via Article 12(2) Rome I Regulation.

(c) A Provision Meets the Requirements of Articles 16 and 17 Rome II Regulation

A provision might be classified both as an overriding mandatory provision within the meaning of Article 16 Rome II Regulation and as a rule of safety and conduct within the meaning of Article 17 Rome II Regulation. In these cases, the legal consequences are derived only from Article 16 Rome II Regulation.[505]

Article 17 Rome II Regulation could be considered as a *lex specialis* in relation to Article 16 Rome II Regulation. However, also in this respect the legislative purpose underlying the two provisions is very different. Article 16 Rome II Regulation – similar to Article 9(2) Rome I Regulation – is intended to ensure the protection of the state interests of the *forum*.[506] In contrast, Article 17 Rome II Regulation is primarily based on the consideration of the parties to a non-contractual obligation regularly adapting to the rules at the place and time of the event giving rise to the liability and expecting their application. These rules also ensure an appropriate balance of interests between the parties.[507] Sometimes it is suggested that Article 17 Rome II Regulation also protects the interests of the states affected. Article 17 Rome II Regulation ensures the rules of safety and conduct enacted by those states to be properly considered.[508] Such a protection of state interests, however, is at most a secondary purpose which may be drawn upon for any provision. It can be assumed that a legislator only establishes rules which are in its own interests. Thus, adherence to these rules is also always in the interests of the state. This purpose accordingly has no particular significance in the present case.

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505 In the result also Jan von Hein, 'Art. 17 Rome II Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 7.

506 Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 16.15; see also Recital 32 sentence 1 Rome II Regulation according to which "[c]onsiderations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions".

507 Jan von Hein, 'Art. 17 Rome II Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 1 et seq.; Patrick Wautelet, 'Art. 16', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 1; cf. Recital 34 sentence 1 Rome II Regulation.

508 Patrick Wautelet, 'Art. 17', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 1.

Rather, it follows from the divergent primary objective for overriding mandatory provisions of the *lex fori* – which at the same time provide rules of safety and conduct – to be given effect solely by Article 16 Rome II Regulation.[509] By means of Article 16 Rome II Regulation, the European legislator has made it sufficiently clear that provisions which serve to enforce state interests of the *forum* state supersede the applicable law. In particular, the legal consequence of "account shall be taken" established by Article 17 Rome II Regulation as opposed to an application according to Article 16 Rome II Regulation does not better serve the regulatory purpose of Article 17 Rome II Regulation. On the contrary, the application but not the mere taking into account of the rules of safety and conduct at the place of the event giving rise to the liability rather corresponds to the expectation of the parties of the respective obligation.

Thus, if a provision of substantive Union law simultaneously meets the requirements of Article 16 Rome II Regulation and Article 17 Rome II Regulation, the legal consequences are exclusively governed by Article 16 Rome II Regulation. The rule of substantive Union law then applies in addition to and supersedes the law referred to according to the provisions of the Rome II Regulation. It is not merely taken into account under the requirements set out in Article 17 Rome II Regulation.

(2) Relationship of Several Provisions Given Effect Beside the Applicable Law

A distinction must be made between two different situations. Firstly, there may be cases in which a single provision is subject to different conflict-of-laws rules which allow its application beside the law referred to by the conflicts of laws. Secondly, there may be situations in which provisions of substantive Union law and national law apply simultaneously beside the applicable law. Such a simultaneous application may result from the provisions of substantive Union law and provisions of national law being subject to Article 9(2),(3), Article 12(2) Rome I Regulation and Article 16, 17 Rome II Regulation.

For the former situations, a priority of application as overriding mandatory provision pursuant to Article 9(2) Rome I Regulation, Article 16 Rome II Regulation has already been established.[510] In the latter situations, however, it is unclear whether and in what situation national law may take precedence over substantive Union law.

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509 In conclusion also Patrick Wautelet, 'Art. 16', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 39; Jan von Hein, 'Art. 17 Rome II Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 7.

510 See above B.II.3.d)(1)(b)-(c).

(a) Situations Requiring a Ranking of the Various Provisions of Conflict-of-Laws Acts

However, this relationship between national law and substantive Union law only becomes relevant with regard to the national law of third countries or – in the case of a directive – in the event of non-implementation or divergent implementation of a directive.

According to Articles 9(2),(3), 12(2) Rome I Regulation, Articles 16, 17 Rome II Regulation, rules of the *lex fori* and those at the place of the event giving rise to the liability or performance may be given effect. Provisions of substantive Union law may thus be applied as part of the *lex fori* by European courts and as part of the legal system at the place of the event giving rise to the liability or place of performance– if they are located in the European Union – respectively. The situation in which substantive Union law and national law are subject to the same provision of a conflict-of-laws act may then be assessed unambiguously. In this case, substantive Union law always supersedes national law, because of the primacy of application of the law of the European Union.[511] Thus, national law of the *lex fori* and at the place of the event giving rise to the liability or the place of performance – if these are located in the European Union – are irrelevant within the scope of substantive Union law insofar as both are referred to by the same rule of conflict of laws.[512] This also applies to a directive which has been implemented into national law. In the latter case, there is already a lack of national law which could be contradictory to substantive Union law.[513]

However, the situation is somewhat different if provisions of substantive Union law and national law are subject to different conflict-of-laws rules which give effect to these provisions beside the applicable law. This is the case, for example, if national law of a third country is to be classified as an overriding mandatory provision pursuant to Article 9(1) Rome I Regulation and the substantive Union law constitutes a provision within the meaning of Article 12(2) Rome I Regulation. In this respect, the primacy of European Union law or the principle of *effet utile* cannot be relied upon to assess the relationship of those laws. Also, in its conflict-of-laws acts, the European legislator does not distinguish according to the source of law from which the individual provision originates. Rather, the law of the European Union is applied as part of the specific legal system of a member state of the European Union to which the respective conflict-of-laws act refers. Moreover, this situation cannot be resolved by the hierarchy of rules within

511 On the principle of primacy of the law of the European Union see already above B.II.3.b).

512 In the result also Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 31.

513 However, see below B.II.4.b)(3)(c) for cases where directives have been gold-plated.

a legal system, which results from the primacy of application.[514] In the present case, in contrast, the issue concerns the relationship between the provisions of two legal systems. In other words, the conflict of laws at issue here is not a vertical conflict, but a horizontal conflict of two rules.[515]

(b) Substantive Union law as Overriding Mandatory Provision of the *Lex Fori*

Whether the provision of national law or substantive Union law classifying as overriding mandatory provision of the *lex fori* is to take precedence depends on the regulatory purpose of Article 9, 12 Rome I Regulation and Article 16, 17 Rome II Regulation. In this respect, what has already been established for assessing the relevant conflict-of-laws provision for an overriding mandatory provision which is simultaneously given effect by Article 12(2) Rome I Regulation and Article 17 Rome II Regulation applies. The enforcement of state interests on the one hand and the expectations and interests of the parties on the other are opposed to each other.

To this extent, the fundamental assessment of the European legislator in Article 9(2) Rome I Regulation and Article 16 Rome II Regulation must be respected. According to this assessment overriding mandatory rules – and thus the interests of the state – are granted such a weight as to prevail over the applicable law specified by the conflict-of-laws act. However, the conflict-of-laws rules, Article 12(2) Rome I Regulation and Article 17 Rome II Regulation share the goal to give priority in each case to an appropriate legal system corresponding to the interests of the parties.[516] If those rules are based on comparable considerations, overriding mandatory provisions of the *lex fori* must also prevail over Article 12(2) Rome I Regulation and Article 17 Rome II Regulation. In contrast, the reference to the *lex specialis* principle in the relationship of these provisions – as seen – is again not convincing.

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514 The primacy of application concerns the relationship of EU law to the national law of the respective member state, but not the national law of other states, cf. ECJ, C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 and Others* [1998] ECLI:EU:C:1998:498 para 21 and ECJ, C-314/08 *Filipiak* [2009] ECLI:EU:C:2009:719 para 83. In the German language version of the judgments, these expressly refer to the relationship between national law and European Union law in the context of the primacy of application.

515 Describing the conflict addressed by the primacy of application also as a vertical conflict, Herwig CH Hofmann, 'Conflicts and Integration: Revisting Costa v Enel and Simmenthal II', in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU law* (Hart 2010) 60, 62, 64 et seq., 68; see also Monica Claes, 'The Primacy of EU Law in European and National Law', in Anthony Arnull and Damian Chalmers (eds), *The Oxford Handbook Of European Union Law* (Oxford University Press 2015) 178, 182 et seq. who compares the primacy of application in EU law with the regulation of conflicts in the legal systems of federal states.

516 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 2 et seq.

Thus, rules of substantive Union law – to the extent they are to be classified as overriding mandatory provisions of the *lex fori* – prevail over provisions which are subject to Article 12(2) Rome I Regulation and Article 17 Rome II Regulation.

(c) Other Cases of Considering Substantive Union Law beside the Applicable Law

Conversely, however, the weight given to Article 9(2) Rome I Regulation and Article 16 Rome II Regulation also serves as guidance for those cases in which the *lex fori* contains an overriding mandatory provision and substantive Union law does not qualify as overriding mandatory. This becomes firstly relevant if member states have implemented the directives differently within their margin of discretion and – in the law of the *lex fori* – this implementation qualifies as an overriding mandatory provision according to the intention of the national legislator. In this situation, overriding mandatory provisions of the *lex fori* also take precedence over substantive Union law if it does not constitute overriding mandatory provisions. The weight attributed to Article 9(2) Rome I Regulation and Article 16 Rome II Regulation is secondly of importance if jurisdiction lies with the courts of a third country.[517] In both situations, this applies irrespective of whether substantive Union law forms part of the applicable law as *lex causae* or is to be taken into account under Article 12(2) Rome I Regulation, Article 17 Rome II Regulation.

(i) The Primacy of Overriding Mandatory Provisions of the Lex Fori

The relationship between provisions of substantive Union law, which must be taken into account according to Article 9(3) Rome I Regulation, and national provisions, which are applicable under Article 9(2) Rome I Regulation, is ambiguous.

Such a situation may occur, for example, within the framework of the GDPR if a contract is concluded between a person located in the European Union and a data processor located outside the European Union (third-country data processor). Object of this contract is the use of a social network and for this purpose consent is given to the processing of personal data. In these cases, both the third-country data protection law and the GDPR may provide rules on the permissibility of data processing. Before the courts of the data processor's registered office outside of the European Union, the invalidity of this contract might be claimed based on a

517 Where third-country courts have jurisdiction, this is only the case if the conflict of laws of the third country provides for rules comparable to Articles 9, 12(2) Rome I Regulation, Articles 16, 17 Rome II Regulation or if the conflict of laws of the third country refer to the law of a member state, including its conflict of laws. In these cases, the provisions of substantive Union law are superseded by the third-country law of the *lex fori* as soon as the latter qualifies as an overriding mandatory provision.

violation of data protection rules. Like at least some provisions of the GDPR[518], third-country data protection law may potentially be categorised partly as overriding mandatory.

For the legal assessment of this case, the relationship between the various data protection laws potentially qualifying as overriding mandatory provisions may be decisive. This applies firstly if the third-country conflict of laws refers to the law of a member state of the European Union, including its conflict-of-laws rules. Secondly, the relationship between overriding mandatory provisions of the *lex fori* and other overriding mandatory provisions may also be decisive if the third-country conflict-of-laws rules themselves contain a provision similar to Article 9 Rome I Regulation.[519] While the third-country data protection law applies in these cases as overriding mandatory provision of the *lex fori*, provisions of the GDPR might be taken into account as overriding mandatory as well. Thus, in case courts of a third country have jurisdiction, there may be a conflict of overriding mandatory provisions if the conflict-of-laws rules of the *lex fori* refer to the law of a member state of the European Union, including its conflict of laws, or provide for rules comparable to Article 9 Rome I Regulation. Resolving this conflict is particularly relevant if data processing is permitted under the GDPR but is not allowed under the data protection law of the *forum*. In this situation, it is unclear whether the data protection law of the *forum* takes precedence or whether the provisions of the GDPR supersede the data protection law of the *forum*. Since the provisions each might take effect as overriding mandatory provisions, the law of which state is finally found to be applicable is immaterial in this respect.

In the relationship of overriding mandatory provisions of the *lex fori* to overriding mandatory provisions falling within the scope of Article 9(3) Rome I Regulation, the overriding mandatory

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518 See below C.II.1.d)(1).

519 See on the historical development of overriding mandatory provisions and legal systems familiar with the legal concept of overriding mandatory provisions Symeon C. Symeonides, *Codifying Choice of Law Around the World* (Oxford University Press 2014) 299-309; the application of overriding mandatory provisions of the *lex fori*, as set out in Article 9(2) Rome I Regulation, is a widely recognised principle of private international law; provisions which give effect to foreign overriding mandatory provisions and which are therefore comparable to Article 9(3) Rome I Regulation are to be found, for example, in Article 3079 Quebec Civil Code, Article 1192 Russian Civil Code, Article 19 Swiss IPRG, Article 16 Hague Convention of 14 March 1978 on the Law Applicable to Agency; see also for further examples Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2 Journal of Private International Law 27, 47-50; see critically on this issue Michael Bogdan, 'Private International Law as Component of the Law of the Forum' (2011) 348 Recueil des Cours 9, 186-190; according to Frank Vischer and Corinne Lüchinger Widmer, 'Art. 19 IPRG', in Markus Müller-Chen and Corinne Widmer Lüchinger (eds), *Zürcher Kommentar zum IPRG, Band I* (3rd edn, Schulthess 2018) para 3, the possibility of taking such overriding mandatory provisions into account is an internationally observable trend; see also the table at Symeon C. Symeonides, *Codifying Choice of Law Around the World* (Oxford University Press 2014) 305-306 for an overview of states authorising the application of mandatory rules of the forum and foreign overriding mandatory rules.

provisions of the *lex fori* take precedence.[520] This also follows from the case law of the ECJ. The ECJ has ruled in this manner in the case of gold-plating of a directive by the *lex fori*. This implementation by the *lex fori* supersedes even those overriding mandatory provisions of the law of another member state which may be taken into account under the conflict of laws and which contain an implementation in conformity with the directive.[521]

Another approach to resolve this conflict of overriding mandatory provisions is taken by those who propose to balance the conflicting overriding mandatory provisions by weighing up the respective regulatory interests.[522] Yet, such a weighing of interests is to be rejected. Firstly, a weighing is contradicted by the European legislator having attached significantly greater weight to the overriding mandatory provisions of the *lex fori* compared to the non-forum overriding mandatory provisions. This greater relevance already follows from the different legal consequences set out in Article 9(2) Rome I Regulation and Article 9(3) Rome I Regulation. Secondly, such a balancing would be associated with considerable legal uncertainties. Especially, the legal consequences ultimately decisive would not be foreseeable to the parties.

Therefore, overriding mandatory provisions of the *lex fori* must always be enforced over substantive Union law which is foreign to the *forum* even if it is to be classified as overriding mandatory. In this respect, it is immaterial whether the overriding mandatory provisions of the *lex fori* are rooted in national law or in substantive Union law. It is also irrelevant whether the court of a member state of the European Union or a third-country court has jurisdiction and whether the facts of the case are linked to a third country. In all these cases, substantive Union law is superseded by the overriding mandatory provisions of the *lex fori* – even if, in case of jurisdiction of the court of a member state, these overriding mandatory provisions may serve to implement substantive Union law.

(ii) The Significance of Primacy for Substantive Union Law

The primacy of overriding mandatory provisions of the *lex fori* generally has little effect on the conflict-of-laws significance of substantive Union law for matters falling within the jurisdiction of the courts of a member state. Because of the primacy of European Union law, regulations are applied with priority over national law. In addition, the national law of the member states is harmonised to the extent to which it is regulated by directives. Furthermore, a choice of law

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520 Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 74.

521 ECJ, C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663 para 47-52.

522 Arguing in favour of such a balancing Ulrich Magnus, 'Art. 9 Rom I-VO', in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 142; Dieter Martiny, 'Art. 9 Rom I-VO', in Jan v. Hein (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 13* (8th edn, C.H. Beck 2021) para 139.

in favour of the law of a third country would not prevent the applicability of substantive Union law pursuant to Article 3(3),(4) Rome I Regulation, Article 14(2),(3) Rome II Regulation. Therefore, substantive Union law typically supersedes national law in a purely internal EU matter, irrespective of its categorisation as an overriding mandatory provision.

The primacy of overriding mandatory provisions of the *lex fori* in an internal EU matter, for which a court of a member state is competent, only has an effect if a directive is not properly implemented. Examples of this are the gold-plating of directives, the insufficient implementation of a directive or the existence of overriding mandatory provisions in the *lex fori* which contradict substantive Union law. Given this limited significance in those cases, the primacy of overriding mandatory provisions of the *lex fori* is therefore particularly important if a third country has jurisdiction.[523]

(d) Interim Conclusion

In addition to the law found to be applicable by the conflict of laws, substantive Union law may be given effect on the basis of Article 9(2),(3), Article 12(2) Rome I Regulation, Articles 16, 17 Rome II Regulation. However, provisions of substantive Union law only supersede national law of a member state or a third country if the latter does not stipulate any conflicting overriding mandatory provisions. If national law of the *lex fori* contains overriding mandatory provisions, it will nevertheless prevail over substantive Union law even if the latter is to be classified as an overriding mandatory provision and is given effect via Article 9(3) Rome I Regulation.

4. Relevance of How Substantive Law is Given Effect by the Conflict of Laws

Substantive Union law might be applied firstly by a reference of the general conflict-of-laws rules and of the special conflict-of-laws rules in substantive Union law. Secondly, however, it may also be given effect by Article 12(2) Rome I Regulation and Article 17 Rome II Regulation and in form of overriding mandatory provisions according to Article 9(2),(3) Rome I Regulation and Article 16 Rome II Regulation beside the applicable law. The various possibilities of giving effect are not necessarily in a relationship of exclusivity to each other, but may also be employed cumulatively. For example, a provision of substantive Union law might be applied via the conflict-of-laws rules of a conflict-of-laws act or a special conflict-of-laws rule within the meaning of Article 23 Rome I Regulation or Article 27 Rome II Regulation. However, it

523 On the relationship between Article 9(2) Rome I Regulation and Article 9(3) Rome I Regulation, if the courts of a member state have jurisdiction and provisions of third-state law classify as overriding mandatory under Article 9(3) Rome I Regulation, see above B.II.3.d)(1)(a).

may at the same time qualify as an overriding mandatory provision and thus have effect via Article 9 Rome I Regulation or Article 16 Rome II Regulation.

How substantive Union law is given effect under conflict of laws in each individual case is of crucial importance. As will be seen, this issue cannot be left unresolved by assuming that substantive Union law is applicable in any event, since it qualifies as overriding mandatory within the meaning of Article 9(2) Rome I Regulation or Article 16 Rome II Regulation. Similarly, the mere statement that the provisions on the territorial scope of the respective act of substantive Union law contain a specific conflict-of-laws rule which takes precedence over the general conflict-of-laws rules of the European Union is misleading in this respect. The various ways in which provisions of substantive Union law may be given effect differ considerably in terms of their requirements (a) and legal consequences (b).

a) Significance of the Applicable Conflict-of-Laws Rule in Terms of their Requirements

A common requirement for all provisions of substantive law is that they are given effect by the conflict of laws. However, as already seen, the conflict of laws operates for this purpose in a variety of ways. A provision of substantive law may apply, firstly, if the relevant provision is part of the legal system which has been referred to for application by the conflict-of-laws rules. Secondly, the relevant provision of substantive law may also be given effect by the conflict of laws beside the applicable law. Depending on the respective way in which provisions of substantive law are given effect by the conflict of laws, the requirements which the conflict of laws imposes on the respective provision of substantive law to be given effect also vary. Apart from the territorial connection which specifies the applicable law, no requirements are placed on the substantive provision itself if it is applied as part of the applicable law. However, if the provision of substantive law is given effect beside the applicable law, the conflict of laws also requires – in addition to a certain territorial connection – the provision itself to have a certain regulatory content[524] or a certain regulatory quality[525]. The requirements for provisions of substantive law for being given effect under conflict of laws therefore differ significantly.

b) Significance of the Applicable Conflict-of-Laws Rule in terms of their Legal Consequences

In terms of the legal consequences, there are essentially four reasons in favour of a comprehensive examination of the conflict-of-laws classification of provisions of substantive Union law. Those are namely the different legal effects of conflict-of-laws rules (1), the

524 Article 12(2) Rome I Regulation, Article 17 Rome II Regulation.
525 Article 9 Rome I Regulation, Article 16 Rome II Regulation.

conflict-of-laws rules in substantive Union law and gold-plating of directives (2), the impact of overriding mandatory provisions on the applicable law (3) and the enforcement of decisions (4).

(1) Different Legal Effects of Conflict-of-Laws Rules

First, the various means of conferring effect under conflict of laws provide for mere consideration[526] or application.[527] It is unclear which legal consequences are attached to such a consideration in the individual case.[528] However, these are in principle not as far-reaching as it would be the case if a provision of substantive Union law was applied. Therefore, the rule of conflict of laws governing the individual case is decisive for the extent to which a provision of substantive Union law is given effect.

(2) Conflict-of-Laws Rules in Substantive Union Law and Gold-Plating of Directives

Secondly, the precise classification of a provision of substantive Union law is relevant if substantive Union law has been enacted as a directive, the respective directive provides for a special conflict-of-laws rule and this directive has been gold-plated by a member state.

The implemented special conflict-of-laws rules in those directives will in principle supersede the general conflict-of-laws rules pursuant to Article 23 Rome I Regulation and Article 27 Rome II Regulation. However, Article 23 Rome I Regulation and Article 27 Rome II Regulation only have effect to those parts of a directive which have properly transposed the directive.[529] To the extent the directive has been improperly implemented by the member states, the general conflict-of-laws rules apply.

Thus, for those parts of national law gold-plating the directive, the general European Union conflict of laws supersedes national conflict of laws and hence also those conflict-of-laws rules which have been adopted in implementation of the directive. The applicability of these gold-plated rules is therefore governed by the general conflict-of-laws rules of the European Union. Consequently, those provisions gold-plating the directive to be implemented may only be given effect via the general conflict-of-laws rules or via those conflict-of-laws rules which refer to provisions beside the applicable law.

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526 Article 9(3) Rome I Regulation, Article 12(2) Rome I Regulation, Article 17 Rome II Regulation.

527 Article 9(2) Rome I Regulation, Article 16 Rome II Regulation.

528 See already the references above fn. 115.

529 Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-073; Sebastian Omlor, 'Article 23', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 4.

(3) The Impact of Overriding Mandatory Provisions on the Applicable Law

The comprehensive characterisation of provisions of substantive Union law is also necessary because – in particular – the classification as an overriding mandatory provision may have a significant impact on the applicable law.

(a) Provisions of Third Countries Are Given Effect Beside the Applicable Law

Firstly, these effects manifest themselves when provisions of third countries are given effect beside the applicable law. This becomes particularly evident when a member state court has jurisdiction and a substantive Union law is referred to as part of the law of a member state, but a provision of the law of a third country may also be taken into account beside the applicable law.

Data protection law provides an example of this. If a data subject located in the European Union requests the erasure of its data from a data processor located in a third country who has stored the data in its home country before the courts of a member state, the GDPR is referred to for this claim. However, pursuant to Article 17 Rome II Regulation, a potential data protection law in the home country of the data processor needs to be taken into account and thus supersedes the GDPR with regard to the requirements for data processing.[530] Something different would only apply if the provisions of the GDPR concerning the requirements for data processing were attributed the quality of an overriding mandatory provision pursuant to Article 16 Rome II Regulation. In this case, the third country data protection law would be superseded by the overriding mandatory rules of the GDPR.

(b) Effects of Substantive Union Law Beyond its Classification as Overriding Mandatory

Conversely, it could be argued that – at least if a provision of substantive Union law applies as an overriding mandatory provision of the *lex fori* – a further examination of its conflict-of-laws categorisation is superfluous. This would result from its classification as an overriding mandatory provision, which ensures its application. Any other possibility of giving effect to other provisions under conflict of laws would then be superseded.

However, even in these cases there remains a scope of application for the other possibilities of giving conflict-of-laws effects to a provision. This is in particular true in proceedings before the courts of a third country, if the conflict of laws of the *lex fori* refers to the law of a member state of the European Union by way of a reference which also includes the conflict of laws. In

530 See above B.II.3.d).

this respect, reference can be made to the above example of a claim for erasure.[531] This claim might be brought before the courts of a third country and the reference to the law of a member state could include the conflict of laws of the European Union. In this case, according to the European conflict-of-laws rules, substantive Union law may not apply as an overriding mandatory provision of the *lex fori*, since the *forum* state is no member state of the European Union but a third country. Substantive Union law may then be given effect only under the general or special European Union conflict-of-laws rules or Article 12(2) Rome I Regulation, Article 9(3) Rome I Regulation and Article 17 Rome II Regulation.[532] It may thus also be given effect under conflict of laws in situations in which its application under conflict of laws cannot be based simply on its categorisation as overriding mandatory provision of the *lex fori*. In these cases, a conflict-of-laws analysis must therefore not be limited to the conclusion that the respective provision of substantive Union law constitutes an overriding mandatory provision.

(c) Gold-Plating Implementation of Directives

Further, the precise characterisation of substantive Union law is also of importance with regard to member state provisions which classify as overriding mandatory rules and which implement directives by way of gold-plating.[533] In these situations, national provisions which gold-plate directives supersede substantive Union law, if those national provisions are to be classified as overriding mandatory provisions.[534]

An example of such an implementation of a directive is the situation where the state of the court seized has properly implemented the Commercial Agents Directive and this implementation only provides for a right to compensation in the event of termination according to Article 17 Commercial Agents Directive. In contrast, the law applicable to the commercial agency agreement which has gold-plated the Commercial Agents Directive provides for more extensive claims. Only if the proper implementation of the Directive is to be qualified as an overriding mandatory provision of the *lex fori*, it supersedes the provisions of the applicable law which provide for such extensive claim.[535]

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531 See above B.II.3.a).

532 On the issue of the application of overriding mandatory provisions as part of the *lex causae* see Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 108 et seq.; Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-033. See also above A.II.3.c)(3)(b)(iii).

533 See already above B.II.4.b)(2).

534 See above B.II.3.d)(2)(c)(ii).

535 This example is based on the facts of ECJ, C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663.

(4) Enforcement of Decisions

Further, another situation in which the specific conflict-of-laws classification of provisions of substantive Union law may become relevant does not directly affect the application of the law as such but concerns the enforcement of decisions.

If a decision is to be enforced in another state, recognition and enforcement may be precluded by the fact that the court has not taken into account an overriding mandatory provision of the state of enforcement when deciding the case. Overriding mandatory provisions are an expression of fundamental policy and thus potentially also form part of public policy.[536] The law on recognition and enforcement of judgments of a variety of legal systems[537] – such as the Brussels I*bis* Regulation in its Article 45(1) lit a) – allows refusal of enforcement of a decision if it is contrary to the *ordre public* of the enforcing state. Thus, if the foreign decision is not based on the respective overriding mandatory provision, this may constitute an obstacle to enforcement.[538]

This aspect might become significant if a provision of substantive Union law is to be classified as an overriding mandatory provision and would have had effect in proceedings before European courts. In these cases, a foreign judgment in which this provision has not been taken into account may be precluded from being enforced because of a violation of the public policy of the executing state.

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536 According to Recital 37 Rome I Regulation and Recital 32 Rome II Regulation, overriding mandatory provisions and public policy serve reasons of public interest; see also Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 15.01; Patrick Wautelet, 'Art. 16', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 31; see also Trevor C. Hartley, 'Mandatory Rules in international contracts: the common law approach' (1997) 266 Recueil des Cours 337, 350 et seq.; Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-082 refers to these as two sides of the same coin. See on public policy in private international law Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201.

537 Lauterpracht refers to public policy as a principle of private international law that is universally recognized, see International Court of Justice, Guardianship Convention Case (Netherlands v Sweden) [1958] I.C.J. Rep. 53, 92; for the Common law, see Kenny Chng, 'A theoretical perspective of the public policy doctrine in the conflict of laws' (2018) 14 Journal of Private International Law 130; see also the enumeration of national legal systems and international conventions in Ioanna Thoma, 'Public policy (*ordre public*)', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law, Volume 2* (Edward Elgar 2017) 1454, 1455 et seq.

538 Pietro Franzina, 'Art. 21', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 10; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 51 describes public policy as the "main tool by which non-compliance with an overriding mandatory provision can be sanctioned at the stage of recognition and enforcement of a foreign decision". But see also Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 211 et seq.

(5) Interim Conclusion

The precise categorisation of provisions of substantive Union law is therefore of particular importance, since these provisions may be given effect in different ways under conflict of laws. In particular, substantive Union law may apply by reference through general or specific conflict-of-laws rules, but it may also be given effect as overriding mandatory provisions. So far, however, there are no abstract criteria or categories by means of which it can be assessed whether a provision of substantive Union law is to be classified as an overriding mandatory provision or whether substantive Union law provides for a conflict-of-laws rule. If provisions of substantive Union law do not contain any clear indication in this respect, their conflict-of-laws content must be assessed in each case by way of interpretation and is thus a matter of each individual case.[539]

III. The Conflict-of-Laws Integration of Selected Substantive Union Laws

Substantive Union law often addresses matters that have a cross-border element. They are therefore regularly confronted with the issue of the law applicable to a private-law relationship. Accordingly, the question is regularly raised for provisions of substantive Union law as to whether and how they can be referred to for application under conflict of laws.

In the following, therefore, it will be examined on the basis of selected areas and provisions of substantive Union law whether and how these provisions are given effect under conflict of laws. In the law of the European Union, however, various mechanisms can be identified by means of which influence is potentially to be exerted on the applicable law.[540] However, only those acts which contain an explicit provision on their territorial application will be examined in more detail below. Moreover, their conflict-of-laws relevance must be potentially affected by means of a conflict-of-laws dimension contained in those provisions on the territorial scope. In

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539 See also for the existence of a conflict-of-laws rule within the meaning of Article 23 Rome I Regulation, Article 27 Rome II Regulation, the principal concerns expressed by the different delegations during the legislation of the Rome I Regulation, cf. Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 2.68; Peter Mankowski, 'Art. 23', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 1 et seq., 8; Peter Mankowski, 'Art. 27', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 10; for the classification as an overriding mandatory provision of provisions of EU law not providing a specific choice-of-law rule Matthias Weller, 'Art. 23 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 1.

540 This may, for example, take place in the form of provisions describing a territorial scope of application – see the examples below in this section – but also by means of provisions stipulating the mandatory nature of a legal act – *e.g.* Article 12(2) 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 – or which limit the effects of a choice of law – e.g. Article 6(2) Unfair Terms Directive.

addition, only those provisions on the territorial scope of such legal acts which in any event affect at least private-law relationships are taken into account. Therefore, those legal acts which concern only a genuinely public-law relationship between an individual and a public authority are not taken into account. Similarly, the general conflict-of-laws acts of the European Union, which exclusively regulate such legal relations but do not contain substantive rules themselves, are not considered.

Subsequently, it will be examined whether criteria can be derived from this analysis to determine the applicability of provisions of substantive Union law in a cross-border situation by way of interpretation. Also, it will be examined whether it is possible to develop a systematic approach which would allow an unambiguous assessment of the conflict-of-laws content of provisions of substantive Union law (IV.).

1. Passenger Transport Regulations

The law of the European Union contains several regulations[541] which serve to protect passengers of various means of mass transport[542]. All those regulations have in common, that they explicitly define their territorial scope of application.

a) The Provisions on the Territorial Scope as Unilateral Conflict-of-Laws Rules

The Air Passengers Rights Regulation and the Maritime Passengers Rights Regulation apply in principle to passengers whose transport departs from the territory of a member state. They further apply to passengers whose transport departs from a third country and terminates in the territory of a member state if the transporting carrier is a Community carrier.[543] The Rail Passengers Rights Regulation applies "to international and domestic rail journeys and services throughout the Union provided by one or more railway undertakings licensed in accordance with Directive 2012/34/EU of the European Parliament and of the Council"[544]. The scope of

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541 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L 46/1 (Air Passengers Rights Regulation); Regulation (EU) 2021/782 of the European Parliament and of the Council of 29 April 2021 on rail passengers' rights and obligations (recast) [2021] OJ L 172/1 (Rail Passengers Rights Regulation); Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 [2011] OJ L 55/1 (Coach Passengers Rights Regulation); Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 [2010] OJ L 334/1 (Maritime Passenger Rights Regulation).

542 Recital 1 Air Passengers Rights Regulation, Recital 1-5 Rail Passengers Rights Regulation, Recital 1, 2 Coach Passengers Rights Regulation, Article 1, 2 Maritime Passengers Rights Regulation.

543 Article 3(1) Air Passengers Rights Regulation, Article 2(1) Maritime Passengers Rights Regulation.

544 Article 2(1) Rail Passengers Rights Regulation.

the Coach Passengers Rights Regulation is opened "to passengers travelling with regular services for non-specified categories of passengers where the boarding or the alighting point of the passengers is situated in the territory of a Member State and where the scheduled distance of the service is 250 km or more".[545]

The applicability of the Passenger Transport Regulation in a cross-border situation is usually based on two different arguments. On the one hand, it is argued that these regulations constitute uniform substantive law which does not require a conflict-of-laws reference.[546] However, this reasoning is not convincing, as substantive Union law is different from uniform substantive law and depends on being given effect by the conflict of laws.[547] On the other hand, the provisions on the territorial scope of the passenger transport regulations are classified in the literature as unilateral conflict-of-laws provisions. Those conflict-of-laws provisions would take precedence over conflict-of-laws rules enshrined in the conflict-of-laws acts of the European Union according to Article 23 Rome I Regulation.[548]

b) Classification of the Provisions as Overriding Mandatory Provisions

The classification of provisions of the passenger transport regulations as overriding mandatory provisions is little discussed and only rarely answered in the affirmative.[549] Typically, in this context, the classification of provisions of the Air Passengers Rights Regulation as overriding mandatory provisions is addressed. In support of such a classification, it is argued that these provisions are limited in the case of a departure of a flight from a third country if the passenger

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545 Article 2(1) Coach Passenger Rights Regulation.

546 Eva-Maria Kieninger, 'Art. 23 Verordnung (EG) Nr. 593/2008', in Franco Ferrari et al., *Internationales Vertragsrecht* (3rd edn, 2018 C.H. Beck) para 3; Stefan Leible, 'Artikel 23 ROM I', in Rainer Hüßtege, Heinz-Peter Mansel (eds), *NomosKommentar Rom-Verordnungen, Band 6* (3rd edn, Nomos 2019) para 8.

547 See above B.I.1.

548 Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 11.161; Andreas Maurer, 'Art. 5 Rome I Regulation', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 39 et seq.; Tim W. Dornis, 'Article 5', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 48; Peter Mankowski, 'Art. 23', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 11; with regard to the Air Passengers Rights Regulation Björn Steinrötter and Stefan Bohlsen, 'Art. 3', in Jan Dirk Harke (ed), *beck-online.GROSSKOMMENTAR Fluggastrechte-VO* (C.H. Beck 2023) para 134, the Maritime Passenger Rights Regulation Daniel Sliwiok-Born, 'Art. 2', in Jan Dirk Harke (ed), *beck-online.GROSSKOMMENTAR Schiffgastrechte-VO* (C.H. Beck 2023) para 17, and the predecessor of the Rail Passenger Rights Regulation – Regulation 1371/2007 – Jan-Jaap Kuipers, 'Bridging the Gap' (2012) 76 Rabels Zeitschrift für ausländisches und internationales Privatrecht 562, 583 fn. 87. Such an interpretation considering in any case possible for the Air Passengers Rights Regulation and Regulation 1371/2007 Richard Fentimann, 'Art. 5', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 10.

549 Assuming a quality as an overriding mandatory provision of the provisions of the Air Passengers Rights Regulation or its predecessor regulation Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 19.

has received benefits or compensation and was given assistance in that third country.[550] This would indicate the intention of the European legislator to primarily maintain a certain standard of protection in favour of air passengers with the provisions of the Air Passengers Rights Regulation. However, the legislator would not have intended to create a conflict-of-laws rule.[551] Further, according to Article 12 Air Passengers Rights Regulation, the regulation "shall apply without prejudice to a passenger's rights to further compensation". From this it could be inferred for the provisions of the Air Passengers Rights Regulation to apply as overriding mandatory provisions beside foreign law.[552] In addition, Article 15 Air Passengers Rights Regulation stipulates that a contractual restriction of the obligations arising from the Air Passengers Rights Regulation must not be to the detriment of the passenger. This could also indicate the Air Passengers Rights Regulation to comprise overriding mandatory provisions.[553] None of these arguments compellingly support the classification of provisions of the Air Passengers Rights Regulation as overriding mandatory provisions. The partial limitation of the scope of application of the Air Passengers Rights Regulation in cases where an equivalent right to compensation already exists may also be justified by the objective of avoiding an excessive compensation of the passengers. On the contrary, the limitation of the air passengers' rights in these cases rather suggests an intention of the European legislator not to consider the provisions contained in the Air Passengers Rights Regulation "as crucial [...] for safeguarding its public interests"[554]. Nor may any compelling evidence be derived from Article 12 Air Passengers Rights Regulation, which provides for further compensation for passengers. Article 12 Air Passengers Rights Regulation could also have been based merely on the consideration not to supersede more extensive national claims provided for by the legal systems of a member state. In this respect, also the reference to Article 15 Air Passengers Rights Regulation is without merit. This provision prohibits the restriction or exclusion of obligations towards the passengers established by the Air Passengers Rights Regulation. However, it is not clear from Article 15(1) Air Passengers Rights Regulation whether this provision was intended to exclude only a deviating agreement or also a choice of law. This applies all the more because of the explicit reference to deviating or restrictive provisions specifically in the contract of carriage in Article 15(1) Air Passengers Rights Regulation. Deviating or excluding clauses in a contract of carriage

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550 Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 240; this limitation follows from Article 3(1)(b) Air Passengers Rights Regulation.

551 Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 240.

552 Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 240.

553 This argument seems to be considered by Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 241.

554 Article 9(1) Rome I Regulation.

are – in a literal understanding – those which comprise a substantive legal regulation. Since Article 15(2) Air Passengers Rights Regulation refers directly to Article 15(1) Air Passengers Rights Regulation ("If, nevertheless,"), nothing can be inferred from Article 15(2) Air Passengers Rights Regulation either. For the provisions of the other passenger transport regulations – as far as can be seen – a classification as overriding mandatory provisions is not considered.[555]

As a result, there is widespread agreement that the provisions on the territorial scope of application of the passenger transport regulations contain unilateral conflict-of-laws rules.[556] They are therefore understood to determine the international applicability of the passenger transport regulations independently of the conflict-of-laws acts of the European Union. The international application of the passenger transport regulations is thus accordingly determined independently of the general conflict-of-laws acts of the European Union. In contrast, there is hardly any discussion on the classification of passenger transport regulations as overriding mandatory provisions. Merely the categorisation of the provisions of the Air Passengers Rights Regulation as overriding mandatory provisions is widely supported. Yet, it remains unclear whether the arguments put forward in this respect are convincing.

2. Cabotage Transport Regulations

The European legislator has created several regulations addressing cabotage and the transport of passengers by different means.[557] The regulations are in each case territorially limited to the transport of goods or passengers in a member state by a carrier established in another member state.[558] Further, these regulations each contain a rule according to which – at least for partial aspects of the contracts underlying the transport – the law of the state in which the transport

555 Critical on the classification of provisions of the passenger transport regulations as overriding mandatory provisions as a whole also Felix Maultzsch, 'Art. 9 Rom I-VO', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Rom I-VO* (C.H. Beck 2023) para 263.

556 See the references above fn 167.

557 Council Regulation (EEC) No 3921/91 of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State [1991] OJ L 373/1 (Cabotage by Waterways Regulation); Regulation (EC) No 1072/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international road haulage market (recast) [2009] OJ L 300/72 (Cabotage by Road Regulation); Regulation (EC) No 1073/2009 of the European Parliament and of the Council of 21 October 2009 on common rules for access to the international market for coach and bus services, and amending Regulation (EC) No 561/2006 (recast) [2009] OJ L 300/88 (Transportation by Bus Regulation).

558 Article 1 Cabotage by Waterways Regulation, Article 1(1) Transportation by Bus Regulation, Article 1(1),(2),(4), 2(2) Cabotage by Road Regulation.

service is provided is decisive, as long as nothing else follows from provisions of Community law.[559]

Two issues need to be distinguished for the conflict-of-laws relevance of the cabotage transport regulations. First, a conflict-of-laws dimension may be attributed to the regulations dealing with the law applicable to the transport contracts (a). If no such dimension exists, a conflict-of-laws element may, however, be inherent in the rules on the territorial scope of application of the respective regulation (b).

a) The Law Applicable to Transportation Contracts in the Context of Cabotage

The conflict-of-laws consequences of provisions of the cabotage transport regulations which address the law applicable to aspects of transport contracts are assessed differently. According to their wording, those provisions could be classified as multilateral conflict-of-laws provisions which determine the law applicable to transport contracts, at least for partial aspects. However, some authors argue that the Rome I Regulation takes precedence because the provisions of the cabotage transport regulations also contain a reservation clause.[560] According to this reservation, those provisions are subject to a limitation in favour of other European Union law.[561]

However, the fact that Article 23 Rome I Regulation limits its applicability in relation to more specific conflict-of-laws provisions argues against such a blanket primacy of the Rome I Regulation. Both the Rome I Regulation and the respective cabotage transport regulation thus consider themselves to be subordinate. Thus, the mere fact that the cabotage transport regulations provide for its own subordination[562] does not automatically imply that the Rome I Regulation takes precedence. Instead, this negative conflict of applicability must be resolved by way of interpretation.

In this respect, it argues in favour of the primacy of the cabotage regulations that their conflict-of-laws rules would otherwise have a relevant scope only in proceedings before Danish courts, since the Rome I Regulation is not binding or applicable only to Denmark[563]. This otherwise very limited scope of application of the provisions of the cabotage transport regulations concerning issues of applicable law indicates that they take precedence over the Rome I

559 Article 9(1)(a) Cabotage by Road Regulation, Article 3(1)(a) Cabotage by Waterways Regulation, Article 16(1)(a) Transportation by Bus Regulation.

560 Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 240.

561 "[S]ave as otherwise provided in Community legislation", cf. Article 9(1) Cabotage by Road Regulation, Article 3(1) Cabotage by Waterways Regulation, Article 16(1) Transportation by Bus Regulation.

562 Cf. Article 9(1) Cabotage by Road Regulation, Article 3(1) Cabotage by Waterways Regulation, Article 16(1) Transportation by Bus Regulation

563 Recital 46 Rome I Regulation.

Regulation.[564] Also, if only Danish courts had to apply the conflict-of-laws rules of the cabotage transport regulations, the standardising effect sought by these regulations[565] would be limited. One might thus assume a conflict-of-laws character for these provisions addressing the law applicable to transport contracts in the context of cabotage.

b) The Conflict-of-Laws Element in the Provisions on the Territorial Scope of Application

In contrast, the provision on the territorial scope of application of the cabotage transport regulations does not contain a conflict-of-laws element. The general conflict-of-laws acts of the European Union determine conclusively the law applicable in the context of cabotage. There is no indication that the European legislator intended to create additional conflict-of-laws rules for cabotage, in addition to the specific conflict-of-laws rules addressing the law applicable to aspects of transport contracts. Nor is it argued in the literature that the provision on the territorial scope of the cabotage provisions contains a conflict-of-laws element. The only purpose of the rules on the territorial scope of application is therefore to coordinate the applicability of the specific conflict-of-laws rules contained in the cabotage transport regulations with the general conflict-of-laws act of the European Union.

Provisions of the cabotage transport regulations are not given effect as overriding mandatory rules. A classification of the provisions incorporated in the respective cabotage regulations as overriding mandatory provisions is neither likely nor – as far as can be seen – supported.

3. Directives on the Performances of Services in the Internal Market[566]

In several directives, the European legislator has established rules for providing services in general and especially in the area of media law. These directives share the intention of promoting the internal market.[567] To this end they subject service providers to the supervision

564 So in their conclusion also Peter Mankowski, 'Art. 23', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 12; Tim W. Dornis, 'Article 5', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 19, 27, 30; Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 11.161; Stefan Leible, 'Artikel 23 ROM I', in Rainer Hüßtege, Heinz-Peter Mansel (eds), *NomosKommentar Rom-Verordnungen, Band 6* (3rd edn, Nomos 2019) para 8.

565 Cf. only Recital 3 Cabotage by Road Regulation, Recital 3 Transportation by Bus Regulation.

566 Insofar as directives are considered below to contain unilateral conflict-of-laws provisions or to have the quality of overriding mandatory provisions, this always refers - unless explicitly stated otherwise - to the respective member state law implementing the directive. A directive that has not been implemented into national law has no effect between private parties, cf. with a critical analysis of the case law of the ECJ in this area Paul Craig and Gráinne de Búrca, *EU Law* (7th edn, Oxford University Press 2020) 235 et seq., 238.

567 Recital 1, 5, 6, Article 1(1) 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 ('Directive on electronic commerce') [2000] OJ L 178/1, Recital 10, 11 Directive

of the member state in which they are established.[568] As such, they are typical of those internal market legal acts of the European Union that follow the country-of-origin principle.[569] For these directives, a cross-border element already arises from the subject matter of their regulation. Thus, the potential application of private-law rules of several legislators is already inherent in the respective directive already because of the subject matter of the directive. Accordingly, the European legislator must also have been aware of the need to regulate the relationship between these directives and the general conflict of laws when creating these directives. Therefore, these directives may be relevant for the assessment of the conflict-of-laws dimension of provisions on the territorial scope of application in legal acts of the European Union.

a) Directive on Electronic Commerce

The Directive on Electronic Commerce contains rules on electronic commerce and the provision of information society services.[570] It aims to secure the proper functioning of the internal market by ensuring the free movement of information society services between the member states.[571] This is achieved by harmonising the relevant provisions.[572]

With regard to the conflict-of-laws dimension of the Directive on Electronic Commerce, Articles 1(1), 3 Directive on Electronic Commerce are of particular importance. According to Article 1(1) Directive on Electronic Commerce, the directive applies to "information society services between the Member States". According to Article 3(1) Directive on Electronic Commerce, each member state shall ensure compliance of the information society services provided by a service provider established on its territory with the provisions applicable in the respective member state. Moreover, pursuant to Article 3(2) Directive on Electronic Commerce member states may not – for reasons falling within the coordinated field – restrict the freedom to provide information society services from another member state.

2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L 95/1 as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L 303/69, Recital 1-7 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36.

568 See Article 3(1),(2) Directive on Electronic Commerce; Article 2(1) Audiovisual Media Services Directive; Article 16(1) subpara 2 Services Directive.

569 See for a critique on this principle, Marc-Philippe Weller and Chris Thomale, 'Country of origin rule', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law, Volume 1* (Edward Elgar 2017) 480, 483.

570 Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 2.01.

571 Recital 8, Article 1(1) Directive on Electronic Commerce.

572 Article 1(2) Directive on Electronic Commerce.

As regards the conflict-of-laws relevance of Articles 1(1), 3 Directive on Electronic Commerce, two fundamentally different issues must be distinguished. Firstly, the issue arises of whether Article 3 Directive on Electronic Commerce comprises a multilateral conflict-of-laws rule for determining the law applicable to cross-border information society services within the internal market. Such a multilateral conflict-of-laws rule would refer to the law of the member state in which the service provider is established. Secondly, the question is raised whether Article 1(1) Directive on Electronic Commerce unilaterally stipulates the conflict-of-laws applicability of the Directive on Electronic Commerce itself. The underlying distinction, which is only touched upon by the above, is the distinction between the applicability of the Directive on Electronic Commerce to cross-border situations as such and the regulatory content of the Directive on Electronic Commerce.

(1) The Conflict-of-Laws Content of the Directive on Electronic Commerce

In terms of the regulatory content of the Directive on Electronic Commerce, the question arises as to whether the directive contains a multilateral conflict-of-laws rule in the form of the country-of-origin principle.

The question of whether a multilateral conflict-of-laws content can be derived from the Directive on Electronic Commerce and in particular from Article 3(1) Directive on Electronic Commerce – the so-called country-of-origin principle – has been the subject of extensive discussion.[573] The legislators in the different member states have implemented the provision in different ways with regard to its conflict-of-laws content.[574] However, taking into account Article 1(4) Directive on Electronic Commerce, the ECJ has ruled for the implementation of Article 3 Directive on Electronic Commerce not to require an implementation in the form of a conflict-of-laws rule.[575] Even though the judgment has been met with significant criticism by some,[576] it is now only occasionally argued for this provision to qualify as a conflict-of-laws

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573 See Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 2.31; Jan Oster, *European and International Media Law* (Cambridge University Press 2016) 225 et seq.; Martin Illmer, 'Art. 6', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 56 et seq. and Peter Mankowski, 'Art. 27', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 7, each with further references.

574 For a list of legal systems whose transposition laws are considered to be potentially relevant in terms of conflict of laws, see Peter Mankowski, 'Internationales Wettbewerbs- und Wettbewerbsverfahrensrecht', in Peter W. Heermann and Jochen Schlingloff (eds), *Münchener Kommentar zum Lauterkeitsrecht, Band 1* (3rd edn, C.H. Beck 2020) para 73; see also on the transposition in England and Germany Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 16.15 et seq.

575 ECJ, C-509/09 and C-161/10 *eDate Advertising* [2011] ECLI:EU:C:2011:685 para 61-63, 68.

576 Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-081.

rule.[577] As a consequence of the ECJ's decision, the assumption of Article 3 Directive on Electronic Commerce providing for a multilateral conflict-of-laws rule is no longer possible.[578]

(2) Conflict-of-Laws Applicability of the Directive on Electronic Commerce

Accordingly, pursuant to the case law of the ECJ, the country-of-origin principle does not necessarily need to constitute a conflict-of-laws rule when it is implemented in the member states. However, this does not preclude Article 1(1) Directive on Electronic Commerce from separately regulating the applicability of the Directive on Electronic Commerce under conflict of laws.

The Directive on Electronic Commerce could therefore regulate its conflict-of-laws applicability itself. In contrast, such regulation could also be absent. In the latter case, the Directive on Electronic Commerce, and hence the country-of-origin principle it enshrines, would apply to a private-law relationship only as part of the member-state law applicable according to the general conflict-of-laws acts of the European Union.

Yet, if the case law of the ECJ on the conflict-of-laws content of the Directive on Electronic Commerce is followed, conclusions might be drawn for the applicability of the Directive on Electronic Commerce itself under conflict of laws. Furthermore, it needs to be ascertained whether the provisions are to be categorised as overriding mandatory regulations.

(a) The Provision on the Territorial Scope as Unilateral Conflict-of-Laws Rule

Again, the starting point is the ECJ's statement that Article 3 Directive on Electronic Commerce does not necessarily require an implementation by a conflict-of-laws rule. Nevertheless, this provision prohibits stricter requirements for service providers than those laid down by substantive law in force in the member state in which that service provider is established.[579] The ECJ has thus ruled in favour of a comparison of the rules applicable to service provider also with regard to those provisions of the Directive on Electronic Commerce having an effect on a private-law relationship.

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577 However probably still assuming the existence of a conflict-of-laws element Peter Mankowski, 'Internationales Wettbewerbs- und Wettbewerbsverfahrensrecht', in Peter W. Heermann and Jochen Schlingloff (eds), *Münchener Kommentar zum Lauterkeitsrecht, Band 1* (3rd edn, C.H. Beck 2020) para 48-73.

578 Xandra E. Kramer, 'The interaction between Rome I and mandatory EU private rules – EPIL and EPL: communicating vessels?', in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2017) 248, 261; Martin Illmer, 'Art. 6', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 59 states that the ECJ's decision in *eDate Advertising* "puts an end to the dispute over the nature of the country-of-origin principle".

579 ECJ, C-509/09 and C-161/10 *eDate Advertising* [2011] ECLI:EU:C:2011:685 para 61-63, 67 et seq.

In principle, these findings do not necessarily preclude to establish the applicability of the Directive on Electronic Commerce by means of the general conflict-of-laws acts of the European Union. Even the decision concluding the proceedings on which the reference for a preliminary ruling was based states that the law governing the private-law relationship is determined solely by the general conflict-of-laws provisions.[580]

There is also no need for a specific conflict-of-laws rule in view of the regulatory purpose of the Directive on Electronic Commerce. The Directive is intended to simplify the cross-border performance of information society services between the member states in order to promote the internal market.[581] According to its regulatory purpose, the Directive is thus tailored to situations where the parties to the legal relationship are located in different member states of the European Union. In these cases, however, the general conflict-of-laws rules typically refer to the law of a member state of the European Union. Thus, the Directive on Electronic Commerce – in the form it has been given by the implementing acts of the respective legislator – is regularly applicable in all situations envisaged by Article 3 Directive on Electronic Commerce. Due to the purely intra-European dimension in these cases, this also holds true if the parties choose the law of a third state.[582]

In the light of the above, there is no reason why the Directive on Electronic Commerce should determine its own scope of application under conflict of laws. Article 1(1) Directive on Electronic Commerce does not therefore contain a conflict-of-laws element.

(b) Classification of the Provisions as Overriding Mandatory Provisions

Whether the Directive on Electronic Commerce contains overriding mandatory provisions is answered in different ways. Some reject such a classification, pointing out the fact that compliance with the provisions of the Directive on Electronic Commerce is not regarded by the European legislator as crucial for the enforcement of public interests.[583] Others affirm the general possibility of categorising the provisions of the directive as overriding mandatory provisions.[584]

A classification as overriding mandatory provisions could also be in line with the case law of the ECJ. In the context of the conflict-of-laws classification of the provisions of the Directive on Electronic Commerce, the ECJ referred *inter alia* to its *Ingmar* decision.[585] The ECJ later

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580 Bundesgerichtshof, Judgment of 8. May 2012 − VI ZR 217/08 para 21-30.

581 See above B.III.3.a).

582 Article 3(4) Rome I Regulation, Article 14(3) Rome II Regulation.

583 Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 333.

584 Considering such a classification possible for the transposition of the Directive on Electronic Commerce, Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 16.35.

585 ECJ, C-509/09 and C-161/10 *eDate Advertising* [2011] ECLI:EU:C:2011:685 para 65.

held in *Unamar* that the provisions at issue in *Ingmar* to be classified as overriding mandatory provisions within the meaning of Article 7(2) Rome Convention[586] and also referred to Article 9(1) Rome I Regulation. In its decision on the Directive on Electronic Commerce, the ECJ therefore referred to *Ingmar* and subsequently attributed the provisions addressed in *Ingmar* the quality of an overriding mandatory provision. The reference to *Ingmar* should therefore be understood to indicate that the ECJ considers it generally possible to categorise the provisions of the Directive on Electronic Commerce as overriding mandatory provisions.

However, the possibility to achieve the objectives sought by the Directive on Electronic Commerce also at the level of substantive law argues against the assumption of overriding mandatory provisions contained in the Directive of Electronic Commerce. The Directive on Electronic Commerce seeks to protect service provider from stricter requirements than those provided for by the substantive law in force in the member state of its establishment. This objective may also be achieved by interpreting the law applicable according to the general conflict-of-laws rules in the light of European Union law. In interpreting the substantive law, the principle of the free movement of services under Article 56 TEU must be particularly considered.[587] Therefore, it is not necessary to classify the provisions of the Directive on Electronic Commerce as overriding mandatory provisions to achieve the objective pursued by Article 3 Directive on Electronic Commerce. Moreover, the existence of overriding mandatory provisions can only be cautiously presumed. The principle of proportionality must also be observed in this context.[588] Taking these two principles into account, the provisions of the Directive on Electronic Commerce cannot be classified as overriding mandatory provisions.

As a result, the Directive on Electronic Commerce does not contain a multilateral conflict-of-laws rule in favour of the law of the member state in which the service provider is established. Nor does the Directive on Electronic Commerce contain a unilateral conflict-of-laws rule governing the conflict-of-laws applicability of the Directive as such or an overriding mandatory provision.

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586 ECJ, C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663 para 40-44, 48.

587 See already Jan-Jaap Kuipers, 'Joined Cases C-509/09 & 161/10, *eDate Advertising v. X and Olivier Martinez and Robert Martinez v. MGN Limited*, Judgment of the Court of Justice (Grand Chamber) of 25 October 2011, nyr.', (2012) 49 Common Market Law Review 1211, 1224 et seq.

588 See on the relevance of this principle already above B.I.2.

b) Audiovisual Media Services Directive

A similar observation can be made regarding the Audiovisual Media Services Directive.[589] The Directive contains various provisions concerning audiovisual media services.[590] It stipulates, *inter alia*, that member states ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other member states.[591] To this end, each member state shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law in that member state.[592]

(1) Similarities and Differences with the Directive on Electronic Commerce

The rules of the Audiovisual Media Services Directive are thus largely in line with the country-of-origin principle found in the Directive on Electronic Commerce. However, there are two important differences between the Audiovisual Media Services Directive and the Directive on Electronic Commerce.

First, whereas the Directive on Electronic Commerce repeatedly emphasises the promotion of the internal market as its objective[593], the Audiovisual Media Services Directive is rather oriented towards the cross-border nature of a media service.[594] This corresponds to the limitation of the territorial scope of application of both directives. While the Directive on Electronic Commerce is restricted to "the free movement of information society services between the Member States"[595], the Audiovisual Media Services Directive does not contain such a limitation. Consequently, the latter is in principle also applicable to the performance of an audiovisual media service to a third country.

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589 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) as amended by Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L 303/69 (Audiovisual Media Services Directive).

590 It is unclear to what extent the regulations of the Audiovisual Media Services Directive have an influence on private law and are thus potentially subject to conflict of laws. However, at least Article 28(2) Audiovisual Media Services Directive provides for a claim under private law. In this respect, at least, it is therefore necessary to determine the law applicable to a legal relationship between private parties.

591 Article 3(1) Audiovisual Media Services Directive.

592 Article 2(1) Audiovisual Media Services Directive; Article 2(2) Audiovisual Media Services Directive defines when such a jurisdiction exists.

593 Cf. already the official name of the Directive on Electronic Commerce as well as Recital 8, Article 1(1) Directive on Electronic Commerce.

594 Cf. Recital 1 Audiovisual Media Services Directive, the objective of completing the internal market is only mentioned in Recital 11 Audiovisual Media Services Directive.

595 Article 1(1) Directive on Electronic Commerce.

Second, while Articles 2(1), 3(1) Audiovisual Media Services Directive contain a provision on the country-of-origin principle, a large number of provisions of the Audiovisual Media Services Directive provide for an additional restriction of their territorial scope of application. They limit the Audiovisual Media Services Directive to those media service providers that are subject to the jurisdiction[596] of the respective member state.[597] The Audiovisual Media Services Directive therefore comprises a twofold reference with regard to its territorial scope of application. At best, the Audiovisual Media Services Directive thus provides for a clearly limited country-of-origin principle compared to the Directive on Electronic Commerce.

(2) The Impact of the Audiovisual Media Services Directive on Conflict of Laws

As with the Directive on Electronic Commerce, a distinction needs to be drawn for the Audiovisual Media Services Directive between the conflict-of-laws effect of the country-of-origin principle and the conflict-of-laws applicability of the provisions of the Audiovisual Media Services Directive.

(a) The Country-of-origin Principle Enshrined in the Audiovisual Media Services Directive

With regard to the country-of-origin principle – similarly to the Directive on Electronic Commerce – Articles 2(1), 3(1) Audiovisual Media Services could be understood as requiring the applicability of the law of the state to whose jurisdiction the respective audiovisual media service is subject.[598] Yet, it is assumed that the case law of the ECJ on Article 3 Directive on Electronic Commerce may also be applied to the Audiovisual Media Services Directive.[599] Therefore, the country-of-origin principle enshrined in Articles 2(1), 3(1) Audiovisual Media Services Directive may also not be inferred any conflict-of-laws element.[600] Furthermore, Recital 63 Directive 2018/1018[601], which amends the Audiovisual Media Services Directive, clarifies that the Audiovisual Media Services Directive does not concern rules of private international law. Thus, also the country-of-origin principle provided in the Audiovisual Media Services Directive does not have a conflict-of-laws dimension.

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596 See Article 2(2)-(5) Audiovisual Media Services Directive for a definition of this term.

597 Articles 5-9, 10(3), 11(4) lit. b), 12, 13(1), 14(1),(3), 15(1), 27(1), 28(2) Audiovisual Media Services Directive.

598 For such an understanding of these provisions and a comprehensive analysis of the different positions on these questions, see Karl-Heinz Fezer and Stefan Koos, *Staudinger Internationales Wirtschaftsrecht* (De Gruyter 2019) para 571.

599 Jan Oster, *European and International Media Law* (Cambridge University Press 2016) 164, 226.

600 See for the case law of the ECJ regarding the Directive on Electronic Commerce ECJ, C-509/09 and C-161/10 *eDate Advertising* [2011] ECLI:EU:C:2011:685 para 61-63, 68.

601 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L 303/69.

(b) The Provision on the Territorial Scope as Unilateral Conflict-of-Laws Rule

In contrast, with regard to the applicability of the Audiovisual Media Services Directive as such under conflict of laws, the considerations made under the Directive on Electronic Commerce are of little help as they cannot be transferred without further ado. With regard to the territorial scope of application, both directives differ too significantly.

First, the Audiovisual Media Directive lacks a restriction of the territorial scope of application to the internal market.[602] Given the Directive's territorial scope of application is not restricted to these situations, there may be an increased need for an independent determination of the conflict-of-laws applicability of the Audiovisual Media Directive. In pure internal market cases – in the absence of a choice of law – typically the law of a member state applies. However, this is not necessarily the case – particularly with regard to claims arising from non-contractual obligations – in cases involving third countries. To ensure a provision of substantive Union law also applies in these cases, a separate conflict-of-laws rule could be required. Second, the Audiovisual Media Services Directive expressly defines a territorial scope of application in various provisions.[603] This could reflect an increased need for application precisely in these cross-border situations.

However, against any conflict-of-laws significance of the Directive argues firstly that Recital 63 Audiovisual Media Services Directive explicitly denies any conflict-of-laws effect of the Directive. Moreover, the mere definition of a territorial scope of application in several provisions of the Audiovisual Media Services Directive does not necessarily indicate a conflict-of-laws element.[604] These two arguments argue in favour of an absence of any conflict-of-laws rule in the Audiovisual Media Services Directive. There are also no indications for the existence of overriding mandatory provisions in this Directive.

As a consequence, the Audiovisual Media Services Directive does not contain a conflict-of-laws rule in the form of the country-of-origin principle, nor does it provide for any other conflict-of-laws rule. Furthermore, as far as can be seen, it is not argued that the Directive contains any overriding mandatory rules.

602 See above B.III.b)(1).

603 See the references above fn. 215, 216.

604 See on the difference of a provision on the territorial scope of application and a conflict-of-laws provision above A.II.1.a).

c) Services Directive

The Services Directive[605] establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.[606] It applies "to services supplied by providers established in a Member State".[607] Similarly to the Directive on Electronic Commerce and the Audiovisual Media Services Directive, the Services Directive requires member states to respect the right of providers to perform services in a member state other than that in which they are established.[608] Furthermore, it also stipulates an obligation for the member state in which the service is provided to ensure free access to and free exercise of a service activity within its territory.[609] Finally, the Services Directive – likewise Article 1(4) Directive on Electronic Commerce and Recital 63 Audiovisual Media Services Directive – states that the directive does not concern rules of private international law.[610]

Thus, the potential conflict-of-laws elements of the Directive on Electronic Commerce and the Services Directive are formulated in a similar way. However, even before the ECJ's decision on the conflict-of-laws substance of the Directive on Electronic Commerce, it was widely undisputed that the Services Directive contains neither a conflict-of-laws rule nor an overriding mandatory provision.[611]

(a) The Country-of-origin Principle Enshrined in the Services Directive

With respect to a potential conflict-of-laws content of the country-of-origin principle enshrined in the Services Directive, this is supported by the wording of Article 16 in the Commission's draft of the Directive. The wording in the Commission's draft was even more closely aligned

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605 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/36 (Services Directive).

606 Article 1(1) Services Directive.

607 Article 2(1) Services Directive.

608 Article 16(1) subpara 1 Services Directive; see on the Directive on Electronic Commerce above B.III.3.a)(1).

609 Article 16(1) subpara 2 Services Directive; an equivalent provision can be found in Article 3(2) Directive on Electronic Commerce.

610 Article 3(2) Services Directive; see also Article 17(15) Services Directive.

611 Ralf Michaels, 'Eu Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory' (2006) 2 JPIL 195, 203; for the absence of a unilateral conflict-of-laws rule, see Sebastian Omlor, 'Article 23', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 5; Peter Mankowski, 'Art. 23', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 7; Peter Stone, 'Internet transactions and activities', in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2017) 1, 11, 21; Xandra E. Kramer, 'The interaction between Rome I and mandatory EU private rules – EPIL and EPL: communicating vessels?', in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2017) 248, 261; Karsten Thorn, 'Art. 23 Rom I-VO', in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band III* (5th edn, ottoschmidt 2023) para 10.

with Article 3 Directive on Electronic Commerce,[612] but during the legislative process was softened with the declared aim of abandoning the country-of-origin principle.[613] Against this legislative background and the clearly more restrained wording, the assumption of the Services Directive requiring a compulsory comparison of the applicable law with the law of the state, in which the service provider is established, – corresponding to the Directive on Electronic Commerce[614] – is farfetched. Therefore, the country-of-origin principle in the Services Directive lacks any conflict-of-laws relevance.

(b) The Provision on the Territorial Scope as Unilateral Conflict-of-Laws Rule

With respect to the conflict-of-laws applicability of the Services Directive, the European legislator explicitly determined the territorial scope of application.[615] This explicit determination could indicate an intention of the European legislator to regulate the applicability of the Services Directive also with respect to the conflict of laws. However, the title of the Services Directive includes the term "internal market" and the directive refers to the internal market several times.[616] Further, the directive applies only to those service relationships, in which the parties are nationals of the member states or legal persons established there.[617] These factors argue in favour of an intention of the European legislator to primarily regulate matters relating to the internal market with the Services Directive. However already under the general conflict-of-laws acts of the European Union[618], the law of a member state and thus the Services Directive as implemented in the respective member state regularly applies in these situations. A dedicated conflict-of-laws rule is therefore typically superfluous. Due to the restriction of a choice of law in these cases by Article 3(4) Rome I Regulation, Article 14(3) Rome II Regulation, this also applies in the case of a choice of law.

Therefore, no conflict-of-laws rule of any kind can be derived from the Services Directive. Nor is it argued that the provisions of the Services Directive are to be categorised as overriding mandatory provisions.[619]

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612 Cf. Article 16(1)-(4) Commission of the European Communities, 'Proposal for a Directive of the European Parliament and of the Council on services in the internal market', COM(2004) 2 final/3 <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0002:FIN:EN:PDF> accessed 5 March 2024.

613 Commission of the European Communities, 'Amended proposal for a Directive of the European Parliament and of the Council on services in the internal market', COM(2006) 160 final, p 10, 12 <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0160:FIN:EN:PDF> accessed 5 March 2024.

614 See above B.III.3.a)(1).

615 Article 2(1) Services Directive.

616 Recital 1-7, 18, 46, 64, 69, 83, 95, 105 Services Directive.

617 Article 4(2)(3) Services Directive.

618 Especially Article 4(1) lit. b) Rome I Regulation.

619 Olaf Deinert, *International Labour Law under the Rome Conventions* (Nomos 2017) chapter 10 para 50.

4. Labour Law Directives

In the area of labour law, the European legislator has enacted several directives which also address the relationship between employee and employer.[620] Whether these directives contain dedicated conflict-of-laws provisions is particularly of significance as Article 8 Rome I Regulation already provides for a specific conflict-of-laws rule for the law applicable to contracts of employment. Against this background, it could be argued that in this respect the special characteristics of conflict of laws for the law applicable to employment contracts have already been sufficiently taken into account. Thus, there would be no need for a further-reaching conflict-of-laws regulation in substantive Union law.

a) Posted Workers Directive

The provisions governing the territorial scope of application of the Posted Workers Directive have a conflict-of-law element. In addition, the Posted Workers Directive is also relevant when categorising provisions as overriding mandatory provisions.

(1) The Provision on the Territorial Scope as Unilateral Conflict-of-Laws Rule

The Posted Workers Directive[621] defines its territorial scope in Article 1(1),(3) Posted Workers Directive. Pursuant to this provision, it applies territorially to undertakings established in a member state which, in the framework of the transnational provision of services, post workers to the territory of a member state.[622] This provision is assigned a conflict-of-laws content which takes precedence over the Rome I Regulation pursuant to Article 23 Rome I Regulation.[623] Such a classification is also supported by the explicit mention of the Posted Workers Directive in the

620 See for example Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [1998] OJ L 14/9; Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L 183/1; Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1989] OJ L 393/1.

621 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1 (Posted Workers Directive).

622 Article 1(1) Posted Workers Directive.

623 Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 11-065; Guillermo Palao Moreno, 'Art. 8', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 14; ECJ, C-620/18 *Hungary v European Parliament* [2020] ECLI:EU:C:2020:1001 para 179 et seq.; Xandra E. Kramer, 'The interaction between Rome I and mandatory EU private rules – EPIL and EPL: communicating vessels?', in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2017) 248, 254; Jürgen Basedow, 'European Private International Law of Obligations and Internal Market Legislation - a Matter of Coordination', in Jürgen Basedow, Johan Erauw, Vesna Tomljenović and Paul Volken (eds), Liber Memorialis Petar Šarčević (Sellier 2006) 13, 16; Olaf Deinert, *International Labour Law under the Rome Conventions* (Nomos 2017) chapter 1 para 13; different, however, Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 237 et seq.

draft of Article 23 Rome I Regulation, which still contained an enumerative list of the primary special conflict-of-laws rules in other legal acts of Union law.[624] Thus, the European legislator has clearly expressed that it has at least recognized the potential conflict-of-laws dimension of the provisions of the Posted Workers Directive.

(2) The Posted Workers Directive and Overriding Mandatory Provisions

Furthermore, the Posted Workers Directive also establishes the overriding mandatory nature of certain provisions. According to Article 3(1) Posted Workers Directive, the terms and conditions of employment shall apply irrespective of the law applicable to the respective employment relationship. This provision should allow for efficient competition, avoid social dumping within the internal market and ensure a minimum level of protection for posted workers.[625] Also, Recital 13 Posted Workers Directive emphasizes the need for mandatory provisions on a minimum level of protection for posted workers. Article 3(1) Posted Workers Directive accordingly establishes the overriding mandatory nature of certain provisions in force at the place where the work is performed.[626]

Also the European legislator seems to assume the existence of overriding mandatory provisions in situations subject to the Posted Workers Directive.[627] Such an understanding is further strengthened by the supplementation of the Posted Workers Directive by a paragraph according to which the directive is to ensure the protection of posted workers during their posting in relation to the freedom to provide services.[628] This paragraph emphasises the importance of the Posted Workers Directive with regard to fundamental freedoms and thus a public interest of the European Union. The relevance of a provision for a public interest is, however, a requirement for the assumption of the quality of an overriding mandatory provision.[629]

Article 1 Posted Workers Directive thus provides for a special conflict-of-laws provision. Further, according to Article 3(1) Posted Workers Directive effect is given to specific

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624 Article 22 lit. a) in conjunction with Annex I Commission of the European Communities, 'Proposal of the Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)', COM(2005) 650 final, p. 25 <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005PC0650> accessed 5 March 2024.

625 Guillermo Palao Moreno, 'Art. 8', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 15.

626 Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 237; Felipe Temming, 'Article 8', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 20 et seq.; Olaf Deinert, *International Labour Law under the Rome Conventions* (Nomos 2017) chapter 10 para 52, chapter 12 para 68, 114.

627 Cf. Recital 34 Rome I Regulation.

628 Cf. Article 1(1)(b) Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173/16.

629 See above B.II.2.a)(2)(a)-(b).

provisions in force at the place of performance via Article 9(2),(3) Rome I Regulation as overriding mandatory provisions.

b) Transfers of Undertakings Directive

The Transfers of Undertakings Directive[630] serves the protection of employees in the event of a transfer of an undertaking.[631] According to its Article 1(2), the directive applies "where and in so far as the undertaking, business or part of the undertaking or business to be transferred is situated within the territorial scope of the Treaty".

(1) The Provision on the Territorial Scope as Unilateral Conflict-of-Laws Rule

The question as to whether this provision has a conflict-of-laws content may be answered in different ways. This is already evident from the differing implementation of Article 1(2) Transfers of Undertakings Directive in the various member states. Some member states have refrained from implementing Article 1(2) Transfers of Undertakings Directive at all and thus made the application of the directive implementing rules dependent on the general conflict-of-laws rules from the outset. In contrast, the implementing acts of other member states contain a provision on its territorial scope of application.[632] These implementing provisions on the territorial scope of application could be understood as providing for an element of conflict of laws. In the literature, however, a conflict-of-laws dimension of Article 1(2) Transfers of Undertaking Directive is in any case unanimously rejected even though no further reasoning is provided.[633]

(2) The Transfers of Undertakings Directive and Overriding Mandatory Provisions

The Transfers of Undertakings Directive is also of no significance in terms of overriding mandatory provisions. The German Federal Labour Court (BAG) has assumed for a provision which serves to transpose the Transfers of Undertakings Directive into national law that this

630 Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L 82/16 (Transfers of Undertakings Directive).

631 Recital 3 Transfers of Undertakings Directive.

632 On the implementation of Article 1(2) Transfers of Undertakings Directive in the Member States, see Malcom Sargeant, 'Implementation Report Directive 2001/23/EC on the approximation of laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses', p 8 et seq. <ec.europa.eu/social/BlobServlet?docId=2938&langId=en> accessed 5 March 2024.

633 María Campo Comba, *The Law Applicable to Cross-border Contracts involving Weaker Parties in EU Private International Law* (Springer 2021) 263, 270 et seq.; Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 233; Olaf Deinert, *International Labour Law under the Rome Conventions* (Nomos 2017) chapter 13 para 5, 9; see also CMS Employment Practice Area Group, 'Study on the Application Of Directive 2001/23/EC to Cross Border Transfers Of Undertakings', p 61 <ec.europa.eu/social/BlobServlet?docId=2445&langId=en> accessed 5 March 2024.

provision has not the quality of an overriding mandatory provision, since it does not pursue public interests at all.[634] The directive would only serve to strike a balance between the interests of employees in protecting their continued employment and the freedom of contract of the employer.[635] However, the relevance of this decision in the context of Article 9 Rome I Regulation might be called into question, as German case law tends towards a restrictive understanding of the concept of overriding mandatory provisions.[636] In any case, the classification of a provision of European Union law as an overriding mandatory provision is not a matter for the national courts, but for the ECJ.[637] However, the ECJ has not yet ruled on this question.

In contrast, the literature has addressed the issue of whether these provisions qualify as overriding mandatory provisions. The prevailing view in the literature also rejects the categorisation of provisions of the Directive as overriding mandatory provisions on the grounds that they do not protect public interests but the main aim is to protect the rights of the employees.[638] The opposing view argues that, due to the different criteria in Article 8 Rome I Regulation and Article 1(2) Transfers of Undertakings Directive, the scope of the Directive would in some cases be given while Article 8 Rome I Regulation refers to the law of a third country.[639] This would limit the territorial scope of the Transfers of Undertakings Directive and require it to be categorised as containing overriding mandatory provisions. However, this argument fails to recognise that it would be more in favour of a conflict-of-laws element contained in Article 1(2) Transfers of Undertakings Directive than in favour of classifying the provisions as overriding mandatory provisions. A mere limitation of the scope of application cannot overcome the fact that the existence of an overriding mandatory provision presupposes a certain quality of the interest protected by the provision.

Therefore, the Transfers of Undertakings Directive does not contain a conflict-of-laws rule, nor can its provisions be classified as overriding mandatory provisions.

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634 BAG NZA 1993, 743, 748; the decision of the BAG was still based on Article 7 Rome Convention. However, as the content of the definition of the overriding mandatory provision has not changed in this respect – at least in the opinion of the ECJ – the case law on Article 7 Rome Convention may also be applied to Article 9 Rome I Regulation, cf. ECJ, C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663 para 47-48.

635 BAG NZA 1993, 743, 748.

636 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 75.

637 See in this respect the references above B.II.2.a)(1).

638 María Campo Comba, *The Law Applicable to Cross-border Contracts involving Weaker Parties in EU Private International Law* (Springer 2021) 278; Olaf Deinert, *International Labour Law under the Rome Conventions* (Nomos 2017) chapter 3 para 43.

639 Olaf Deinert, *International Labour Law under the Rome Conventions* (Nomos 2017) chapter 13 para 9.

5. European Banking and Capital Markets Law

European banking and capital markets law is – originating from the financial services action plan[640] and the action plan on building a capital markets union[641] of the European Commission – subject to comprehensive harmonisation efforts. Numerous legal acts in the form of regulations[642] and directives[643] but also tertiary acts within the meaning of Articles 290, 291 TFEU[644] have been adopted in this area, which aim to harmonise various aspects of banking and capital markets law.

European banking and capital market law affects legal relationships between private individuals and the determination of the law applicable to them in various ways. To date, the focus of unification efforts in the area of European banking and capital market law has been

640 Commission of the European Communities, 'Implementing the Framework for Financial Markets: Action Plan', COM(1999) 232 final <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51999DC0232> accessed 5 March 2024.

641 European Commission, 'Action Plan on Building a Capital Markets Union', COM(2015) 468 final <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0468> accessed 5 March 2024.

642 E.g. Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L 168/12; Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1 (MAR); Regulation (EU) 2019/1238 of the European Parliament and of the Council of 20 June 2019 on a pan-European Personal Pension Product (PEPP) [2019] OJ L 198/1.

643 E.g. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) [2014] OJ L 173/349; Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L 390/38; Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 [2011] OJ L 174/1.

644 Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2015] OJ L 12/1; Commission Delegated Regulation (EU) 2020/1272 of 4 June 2020 amending and correcting Delegated Regulation (EU) 2019/979 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal [2020] OJ L 300/1; Commission Delegated Regulation (EU) 2019/565 of 28 March 2019 amending Delegated Regulation (EU) 2015/2205, Delegated Regulation (EU) 2016/592 and Delegated Regulation (EU) 2016/1178 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council as regards the date at which the clearing obligation takes effect for certain types of contracts [2019] OJ L 99/6; Commission Delegated Regulation (EU) 2016/861 of 18 February 2016 correcting Commission Delegated Regulation (EU) No 528/2014 supplementing Regulation (EU) No 575/2013 of the European Parliament and of the Council with regard to regulatory technical standards for non-delta risk of options in the standardised market risk approach and correcting Commission Delegated Regulation (EU) No 604/2014 supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile [2016] OJ L 144/21.

predominantly in the area of regulatory law.[645] However, also such legal acts, which at least primarily deal with regulatory law, may be relevant for private law. With regard to substantive private law, a legal act of European banking and capital markets law may, for example, establish duties of conduct that are potentially subject to civil liability claims.[646] Occasionally, however, legal acts of European banking and capital markets law even provide a basis for claims under private law.[647] Insofar as these legal acts provide rules for a private-law relationship, the applicability of these rules in cross-border situations is subject to conflict of laws.[648]

With respect to conflict of laws, European banking and capital markets law occasionally contains dedicated rules of conflict of laws.[649] Beyond this, however, the significance of European banking and capital market law for conflict of laws is unclear. For this purpose, it will first be considered in the abstract according to which provisions the applicability of European banking and capital markets law is determined in a private-law relationship. Then, the conflict-of-laws relevance of individual legal acts will be analysed.

a) The Conflict of Laws of European Banking and Financial Markets Law

While only two legal acts of European banking and capital markets law contain explicit – and multilateral – conflict-of-laws provisions,[650] a multitude of legal acts determines their territorial scope of application explicitly in dedicated provisions dealing with the scope of a legal act.[651] Despite the multiple existence of such provisions on the territorial scope of application, it is hardly discussed at all whether a conflict-of-laws content is to be derived from those rules.

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645 Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 21.

646 See, for example, the MAR, according to which insider dealing (Article 14 MAR) and market manipulation (Article 15 MAR) must be subject to a public law sanction (Article 30 MAR), but a breach of these provisions may also result in civil liability claims, cf. Vassilios D. Tountopoulos, 'Market Abuse and Private Enforcement' (2014) 11 European Company and Financial Law Review 297, 307-328; see also Article 69(2) subpara 3 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) [2014] OJ L 173/349 (MiFID II), which imposes civil liability for breaches of MiFID II, cf. Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 15.

647 Article 35a Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies [2013] OJ L 146/1 (CRA Regulation); Article 15, 26, 52, 75(8) MiCA Regulation.

648 See above B.I.1.

649 Article 9(2) Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems [1998] OJ L 166/45 (Settlement Finality Directive); Article 9 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements [2002] OJ L 168/43 (Financial Collateral Directive).

650 Article 9(2) Settlement Finality Directive; Article 9 Financial Collateral Directive.

651 See for example Article 1(1) Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 [2020] OJ L 347/1 (ECSP Regulation); Article 2(1) CRA Regulation; Article 2(1) MiCA Regulation; Article 1(1) Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L 168/12 (Prospectus Regulation); Article 1(1) MiFID II.

Instead, the applicability of European banking and capital markets law to cross-border private-law relationships is determined by recourse to the conflict-of-laws acts of the European Union.[652] In this context, the non-applicability of the limitations of the substantive scope of application in the Rome I Regulation and Rome II Regulation[653] to those situations in which European banking and capital markets law might apply is especially emphasised.[654]

Particularly with regard to the Rome II Regulation, however, it is regularly highlighted at the same time that the law typically deemed applicable under these rules does not meet the needs of European banking and capital markets law.[655] Instead, various other ways for determining the applicable law are proposed to satisfy the needs of the European banking and capital markets. For example, by way of Article 4(1) Rome II Regulation, 4(3) Rome II Regulation or Article 27 Rome II Regulation, the law of the place of the affected market is supposed to apply.[656] Others argue, in some cases, for the application of the law of country of origin according to a respectively assumed principle enshrined in European banking and capital markets law.[657] In this context, it is also disputed whether the duties of conduct resulting from European banking and capital market law should be regarded as an independent preliminary

652 Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 7, 16; Matthias Lehmann, 'Financial Instrument', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law, Volume 1* (Edward Elgar 2017) 739, 744; Wolf-Georg Ringe and Alexander Hellgart, 'The International Dimension of Issuer Liability—Liability and Choice of Law from a Transatlantic Perspective' (2011) 31 Oxford Journal of Legal Studies 23, 43 et seq., 51 et seq., 57 et seq.; Matthias Lehmann, 'Internationales Finanzmarktrecht', in Jan v. Hein (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 13* (8th edn, C.H. Beck 2021) para 534, 539.

653 Article 1(2) lit. d), f) Rome I Regulation and Article 1(2) lit. c), d) Rome II Regulation.

654 Francisco Garcimartín, 'The law applicable to prospectus liability in the European Union' (2011) 5 Law and Financial Markets Review 449, 451 et seq.; Dorine Johanna Verheij, *Credit rating agency liability in Europe* (Eleven International Publishing 2021) 180; Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 8; Wolf-Georg Ringe and Alexander Hellgart, 'The International Dimension of Issuer Liability—Liability and Choice of Law from a Transatlantic Perspective' (2011) 31 Oxford Journal of Legal Studies 23, 42 et seq.; Matthias Lehmann, 'Financial Instrument', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law, Volume 1* (Edward Elgar 2017) 739, 744.

655 With respect to Article 4(1) Rome II Regulation, see Wolf-Georg Ringe and Alexander Hellgart, 'The International Dimension of Issuer Liability—Liability and Choice of Law from a Transatlantic Perspective' (2011) 31 Oxford Journal of Legal Studies 23, 52; Francisco Garcimartín, 'The law applicable to prospectus liability in the European Union' (2011) 5 Law and Financial Markets Review 449, 451 et seq.; see also Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 18 et seq., 25; generally on the capital markets law and conflict of laws Herbert Kronke, 'Capital Markets and Conflict of Laws' (2000) 286 Recueil des Cours 245, 374 et seq., 380.

656 Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 22-23; arguing in favour of an application of Article 4(3) Rome II Regulation Wolf-Georg Ringe and Alexander Hellgart, 'The International Dimension of Issuer Liability—Liability and Choice of Law from a Transatlantic Perspective' (2011) 31 Oxford Journal of Legal Studies 23, 54.

657 Francisco Garcimartín, 'The law applicable to prospectus liability in the European Union' (2011) 5 Law and Financial Markets Review 449, 454; critically Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 21.

question[658], as overriding mandatory provisions[659] or as factual circumstances according to Article 12(2) Rome I Regulation, Article 17 Rome II Regulation[660]. As far as a categorisation as an overriding mandatory provision is considered, however, the classification of the individual provision is often answered not uniformly and usually only rudimentarily justified.[661] Overall, the situation of conflict of laws in European banking and capital markets law is opaque. In general, the applicable law is not determined by special conflict-of-laws rules, but by the general conflict-of-laws acts of the European Union. The connecting factors of those general conflict-of-laws acts, however, are considered unsuitable for European banking and capital markets law. The qualification of provisions of European banking and capital markets law as overriding mandatory provisions is disputed in detail and often denied.

b) Conflict of Laws in Selected Legal Acts of European Banking and Capital Markets Law

In the following, three legal acts of European banking and capital markets law will be examined in more detail. First, the conflict-of-laws dimension of the Prospectus Regulation will be analysed (1). The Prospectus Regulation is particularly relevant for this analysis because its provisions have already been subject to a comprehensive debate. Moreover, the Regulation is at the same time an archetype for those provisions of European banking and capital markets law that are alleged to be based on a country-of-origin principle. Subsequently, the conflict-of-laws content of the Credit Rating Agency Regulation (2) will be examined. The Credit Rating Agency Regulation is one of the few legal acts of European banking and capital markets law which expressly provide for civil liability rules and thus also contains provisions which may be allocated exclusively to private law. Finally, the implications of the Markets in Crypto-Assets (MiCA) Regulation on conflict of laws will be explored in more detail (3). The MiCA Regulation takes an intermediate position in that, among other things, it also deals with prospectus liability, but in this respect, it provides explicit civil liability rules at the European level.

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658 Chris Thomale, 'Internationale Kapitalmarktinformationshaftung' (2020) 49 Zeitschrift für Unternehmens- und Gesellschaftsrecht 332, 353 et seq.

659 Article 9 Rome I Regulation; Article 16 Rome II Regulation; emphasising the particular importance of overriding mandatory provisions for European banking and capital market law, but at the same time critical Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 8, 19.

660 Dorothee Einsele, 'Internationales Prospekthaftungsrecht – Kollisionsrechtlicher Anlegerschutz nach der Rom II-Verordnung –' (2012) 20 Zeitschrift für Europäisches Privatrecht 23, 39; critical Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 20.

661 See e.g. Tim W. Dornis, 'Internationales und europäisches Finanzmarktrecht', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Internationales Gesellschaftsrecht* (C.H. Beck 2022) para 620 et seq.

(1) Prospectus Regulation

The Prospectus Regulation "lays down requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market"[662]. The scope of the Prospectus Regulation thus circumscribes the country-of-origin principle[663] by linking its applicability to the place where the security is first offered. It sets out various requirements, *inter alia*, for the drawing up of a prospectus[664] and stipulates that a breach of these requirements must give rise to civil liability[665]. In this way, the Prospectus Regulation also affects private-law relationships. Therefore, to the extent that the applicability of the obligations set out in the Prospectus Regulation is at issue in a private-law relationship, the applicability of the Prospectus Regulation is subject to conflict of laws. The territorial scope of application of the Prospectus Regulation is limited in a twofold way. First, the Regulation applies to securities admitted to a regulated market only, if this market is situated or operating within a member state.[666] Second, in case of an offering to the public, the application of the Prospectus Regulation requires the securities to be offered to the public to a significant extent in the European Union.[667]

(a) The Provision on the Territorial Scope as Unilateral Conflict-of-Laws Rule

The limitation of the territorial scope of the Prospectus Regulation according to Article 1(1) Prospectus Regulation is not to be interpreted as a conflict-of-laws rule.[668] This is evident from the legislative history of the Rome II Regulation.

When the Rome II Regulation was created, the exclusion of claims in connection with the issuance of securities from the scope of application of the Rome II Regulation was the subject of some discussion, but was finally discarded.[669] Two conclusions can be drawn from the fact that the European legislator considered, but rejected, the exclusion of securities issuance liability from the Rome II Regulation. First, it follows that, at least in the view of the European legislator, liability for the issuance of securities is in principle subject to the Rome II Regulation, otherwise its express exclusion under Article 1(2) Rome II Regulation would not have been necessary. Second, it follows from the deletion of the exception that the European

662 Article 1(1) Prospectus Regulation.
663 So explicitly Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 21.
664 Article 6-10, 13-19 Prospectus Regulation.
665 Article 11 Prospectus Regulation.
666 Article 1(1) Prospectus Regulation.
667 Article 1(3) subpara 1 Prospectus Regulation.
668 Francisco Garcimartín, 'The law applicable to prospectus liability in the European Union' (2011) 5 Law and Financial Markets Review 449, 454.
669 See Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 3.171 et seq.

legislator intended the law applicable to the liability for the issuance of securities to be determined in accordance with the Rome II Regulation.

It is further argued that the legislator's intention in adopting the Prospectus Regulation was not to create special conflict-of-laws rules for prospectus liability under private law, but to determine the competent supervisory authority.[670] Accordingly, there is also a lack of unification of liability under private law in this area. Ascribing a conflict-of-laws element to Article 1(1) Prospectus Regulation would have the consequence that the tortfeasor could influence the applicable law by selecting the public to or the regulated markets on which the securities are offered. In order to avoid a circumvention of the regulating function of the civil law claims existing in this respect, the Rome II Regulation has to determine the relevant law.[671] Furthermore, contrary to the regulatory concept of the Prospectus Regulation, European conflict of laws does not distinguish between cases within and outside the EU but applies universally.[672] However, conflict-of-laws rules limited to purely internal European situations would run counter to the objective of the general conflict-of-laws acts of the European Union, which is to establish a uniform rule for all situations.[673] Irrespective of the merits of the latter arguments, it follows from the legislative history of the Rome II Regulation that Article 1(1) Prospectus Regulation is not to be regarded as a unilateral conflict-of-laws provision.

(b) The Prospectus Regulation and Overriding Mandatory Provisions

A classification of the provisions of the Prospectus Regulation as overriding mandatory provisions is also rejected. This is again justified by the fact of the provisions of the Prospectus Regulation not sufficiently unifying the prerequisites of liability.[674] In this context, reference is also made to the law against unfair competition and antitrust law, which – like the Prospectus Regulation – serve general interests, but which are not classified as overriding mandatory provisions.[675]

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670 This argument was made with regard to the predecessor directive of the Prospectus Regulation – the Prospectus Directive, Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 21.

671 Tim W. Dornis, 'Internationales und europäisches Finanzmarktrecht', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Internationales Gesellschaftsrecht* (C.H. Beck 2022) para 585, 586.

672 Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 21.

673 Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 21; see on this objective of European conflict of laws e.g. Article 2 Rome I Regulation, Article 3 Rome II Regulation.

674 Andreas Engel, *Internationales Kapitalmarktdeliktsrecht* (Mohr Siebeck 2019) 210.

675 Jan von Hein, 'Finanzkrise und Internationales Privatrecht' (2011) 45 Berichte der Deutschen Gesellschaft für Völkerrecht 369, 412.

The provisions of the Prospectus Regulation therefore neither independently determine their international scope of application by recourse to a special conflict-of-laws rule, nor are they to be classified as overriding mandatory provisions.

(2) Credit Rating Agency Regulation

The Credit Rating Agency Regulation[676] deals with the supervision of credit rating agencies and the issuing of credit ratings. In Article 2(1) Credit Rating Agency Regulation – entitled "Scope" – the regulation limits its applicability to "credit ratings issued by credit rating agencies registered in the Community and which are disclosed publicly or distributed by subscription." By limiting its application to "credit rating agencies registered in the Community", the Regulation at the same time defines its territorial scope of application. The Credit Rating Agency Regulation is of significance for private-law relationships already because it provides for a civil law liability of credit rating agencies in Article 35a Credit Rating Agency Regulation. However, it is disputed whether Article 2(1) Credit Rating Agency Regulation defines its international scope of application and therefore also contains an element of conflict of laws. The existence of such an element is denied by some authors[677], while affirmed by others.[678] For the assumption of such an element of conflict of laws, reference is made in particular to Article 35a(4) Credit Rating Agency Regulation. According to this provision the conflict-of-laws acts are to be applied only for certain partial questions of the liability claim against a credit rating agency. Conversely, it would follow that the Rating Agency Regulation for any other question itself decides on its applicability.[679]

However, the legislative history of Article 35a Credit Rating Agency Regulation contradicts the existence of such a conflict-of-laws element. In its initial version, the regulation did not provide for provisions establishing at least partially an autonomous European civil liability of credit rating agencies. Such a provision was only introduced into the Credit Agency Regulation

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676 See on the liability of rating agencies in general Matthias Lehmann, 'Civil liability of rating agencies—an insipid sprout from Brussels' (2016) 11 Capital Markets Law Journal 60.

677 Dorine Johanna Verheij, *Credit rating agency liability in Europe* (Eleven International Publishing 2021) 178 et seq.; Manuel Gietzelt and Johannes Ungerer, 'Die neue zivilrechtliche Haftung von Ratingagenturen nach dem Unionsrecht' (2013) 10 Zeitschrift für das Privatrecht der Europäischen Union 333, 338; Matthias Lehmann, 'Private international law and finance: nothing special?' (2018) NIPR 3, 21 fn 86.

678 Anatol Dutta, 'Die neuen Haftungsregeln für Ratingagenturen in der Europäischen Union: Zwischen Sachrechtsvereinheitlichung und europäischem Entscheidungseinklang' (2013) Zeitschrift für Wirtschafts- und Bankrecht 1729, 1732 et seq.; Tim W. Dornis, 'Internationales und europäisches Finanzmarktrecht', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Internationales Gesellschaftsrecht* (C.H. Beck 2022) para 696.

679 Anatol Dutta, 'Die neuen Haftungsregeln für Ratingagenturen in der Europäischen Union: Zwischen Sachrechtsvereinheitlichung und europäischem Entscheidungseinklang' (2013) Zeitschrift für Wirtschafts- und Bankrecht 1729, 1733.

in 2013 with Article 35a Credit Rating Agency Regulation.[680] At the same time, Article 2(1) Credit Rating Agency Regulation has remained unchanged since the Credit Rating Agency Regulation came into force.[681] This indicates that the European legislator, at least when creating the Credit Rating Agency Regulation, did not yet envisage an enforcement of the liability of credit rating agencies by private parties on the basis of the Credit Rating Agency Regulation. Therefore, Article 2(1) Credit Rating Agency Regulation could not yet be drafted with a view to litigation between private parties. Hence, it cannot be assumed that the European legislator with Article 2(1) Credit Rating Agency Regulation intended to establish a conflict-of-laws rule. Furthermore, neither the legislative history nor the legislative material on the regulation amending the Credit Rating Agency Regulation indicates the European legislator's intention to assign a more far-reaching meaning to Article 2(1) Credit Rating Agency Regulation. The legislative history of Article 2(1) and Article 35a Credit Rating Agency Regulation therefore argues against assigning a conflict-of-laws dimension to Article 2(1) Credit Rating Agency Regulation.

The classification of provisions of the Credit Rating Agency Regulation as overriding mandatory provisions is hardly addressed. However, the general possibility of such a classification, at least for parts of the regulation, is supported at least in principle.[682]

(3) MiCA Regulation

The MiCA Regulation lays down uniform requirements for the offer to the public and admission to trading on a trading platform of crypto-assets and requirements for crypto-asset service providers.[683] Among other aspects, it comprises rules on civil liability[684] *vis-à-vis* investors in crypto-assets.[685] It applies to natural and legal persons and certain other undertakings that are engaged in the issuance, offer to the public and admission to trading of crypto-assets or that provide services related to crypto-assets in the Union.[686]

This definition of the territorial scope of application of the MiCA Regulation is not considered to be relevant in terms of conflict of laws.[687] Instead, the applicability of the MiCA Regulation

680 Article 1(22) CRA Regulation.

681 Cf. Article 2(1) Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies [2009] OJ L 302/1.

682 Peter Mankowski, 'Art. 27', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 15.

683 Article 1 MiCA Regulation.

684 Cf. Recital 39 MiCA Regulation.

685 Cf. Articles 15, 26, 52, 75(4),(8) MiCA Regulation.

686 Article 2(1) MiCA Regulation.

687 Bianca Lins and Sébastien Praicheux, 'Digital and Blockchain-Based Legal Regimes: An EEA Case Study Based on Innovative Legislation' (2021) 22 Financial Law Review 2, 7; also the ECB proposed during the consultation proceedings on the MiCA Regulation the additional implementation of conflict-

to a legal relationship between private parties is to be determined solely by the general conflict-of-laws instruments of the European Union, namely the Rome I Regulation and the Rome II Regulation.[688]

Whether provisions of the MiCA Regulation are to be classified as overriding mandatory provisions has, apparently, not been discussed so far. Civil liability claims for incorrect information in a white paper under the MiCA Regulation[689] share similarities with the prospectus liability. For the latter, the lack of the quality of an overriding mandatory provision is, however, largely undisputed. This indicates that claims based on false information in the white paper are also not to be classified as overriding mandatory provisions.

6. Digital Single Market

In 2015, the European Commission published its Digital Market Strategy for Europe.[690] This strategy is a response to the increasing relevance of the Internet and digital services. It aims to ensure better access for consumers and business to online goods and services across Europe, creating the right conditions for digital networks and services to flourish and maximizing the growth potential of the European digital economy.[691] As part of this strategy, the European legislator has created the Digital Services Act (a), the Geoblocking Regulation (b) and the P2B Regulation (c), *inter alia*. These legal acts have in common that they regulate cross-border issues and each contain a provision on its territorial scope of application.

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of-laws provisions, cf. European Central Bank, 'European System of Central Banks (ESCB) response to the European Commission's public consultation on EU framework for markets in crypto-assets', p 8, available at <ecb.europa.eu/paym/intro/publications/pdf/ecb.miptopical200424.en.pdf> accessed 5 March 2024; this suggests that the ECB has recognised the significance of the MiCA Regulation for private-law relationships and, at the same time, has rejected the assumption of a corresponding conflict-of-laws element contained in Article 2(1) MiCA Regulation.

688 Tim W. Dornis, 'Internationales und europäisches Finanzmarktrecht', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Internationales Gesellschaftsrecht* (C.H. Beck 2022) para 747; different Matthias Lehmann, 'Internationales Finanzmarktrecht', in Jan v. Hein (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 13* (8th edn, C.H. Beck 2021) para 591.

689 Article 15, 26, 52 MiCA Regulation.

690 European Commission, 'A Digital Single Market Strategy for Europe', COM(2015) 192 final <ec.europa.eu/commission/presscorner/api/files/attachment/8210/DSM_communication.pdf> accessed 5 March 2024.

691 European Commission, 'A Digital Single Market Strategy for Europe', COM(2015) 192 final <ec.europa.eu/commission/presscorner/api/files/attachment/8210/DSM_communication.pdf> accessed 5 March 2024, p 3 et seq.

a) Digital Services Act

The Digital Services Act[692] establishes a legal framework for the providing of intermediary services in the internal market.[693] According to Article 2(1) Digital Services Act, the territorial scope of the Digital Services Act is limited to "intermediary services offered to recipients of the service that have their place of establishment or are located in the Union". Article 54 Digital Services Act provides a legal basis for claims for compensation in a private-law relationship for damage or loss due to an infringement of the obligations under the Digital Services Act. The Digital Services Act therefore also contains provisions relating to a private-law relationship. The law applicable to such a relationship in a cross-border situation is determined by the conflict of laws.

The question of whether a conflict-of-laws element can be derived from Article 2(1) Digital Services Act has rarely been addressed to date. Some assume – without further argumentation – the existence of such an element of conflict of laws in Article 2(1) Digital Services Act.[694] However, Recital 10 and Article 2(4)(h) Digital Services Act emphasize that the Digital Services Act is not intended to affect European Union law in the field of conflict of laws. This is a strong indication for Article 2(1) Digital Services Act not to have any conflict-of-laws significance either. Moreover, in the context of the Directive on Electronic Commerce[695], the ECJ has ruled for a comparable set of rules that the implementation of the Directive would not require the adoption of a conflict-of-laws rule.[696] These two factors argue in favour of denying the existence of a conflicts-of-laws element contained in Article 2(1) Digital Services Act.

In the absence of any reasoning in favour of a conflict-of-laws element and in view of the weighty counter-arguments, it is unclear whether a conflict-of-laws element can be derived from Article 2(1) Digital Services Act by way of interpretation. The question of the classification of provisions of the Digital Services Act as overriding mandatory provisions has not yet been addressed.

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692 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

693 Article 1(2) Digital Services Act.

694 Tobias Lutzi, 'The Scope of the Digital Services Act and Digital Markets Act. Thoughts on Conflict of Laws' (2023) Dalloz IP/IT 278, 279; Christian Heinze, 'Der internationale Anwendungsbereich des digitalen Binnenmarktes', in Sebastian Kubis, Karl-Nikolaus Peifer, Benjamin Raue and Malte Stieper (eds), *Ius Vivum: Kunst – Internationales – Persönlichkeit* (Mohr Siebeck 2022) 440, 445.

695 See above B.III.3.a)(1).

696 ECJ, C-509/09 and C-161/10 *eDate Advertising* [2011] ECLI:EU:C:2011:685 para 58-63.

b) Geoblocking Regulation

The Geoblocking Regulation[697] aims to contribute to the proper functioning of the internal market by preventing unjustified geoblocking and other forms of discrimination.[698] Article 8 Geoblocking Regulation provides that "[e]ach Member State shall designate a body or bodies responsible for providing practical assistance to consumers in the case of a dispute between a consumer and a trader arising from the application of this Regulation." Conversely, it follows from this provision that the rules set out in Articles 3-5 Geoblocking Regulation are also relevant to a private-law relationship. Otherwise, there would be no need to assist consumers in enforcing these rules.

The Geoblocking Regulation does not contain a positive definition of its territorial scope of application, but excludes its applicability to purely domestic situations.[699] In this respect, it follows from Recital 7 Geoblocking Regulation that the concept of a purely domestic situation is understood very narrowly and that nationality – an atypical connecting factor for European private international law – is also taken into account in this context. Despite the wording in Article 1(1) Geoblocking Regulation, according to which the regulation is to ensure the proper functioning of the internal market, the regulation applies irrespective of whether the trader is domiciled in the European Union. Rather, it is the trader's activity within the Union that is decisive.[700]

It is doubtful whether the negative limitation of the territorial scope of application to cross-border situations according to Article 1(1) Geoblocking Regulation may be interpreted as a unilateral conflict-of-laws rule. In addition, it is debatable whether the Geoblocking Regulation provides indications that at least some of its provisions are to be classified as overriding mandatory provisions. Such a classification would lead to the application of the Geoblocking Regulation, or at least some of its provisions, before European courts in terms of conflict of laws as soon as the relevant facts have a connection with more than one member state.

However, Recital 13 and Article 1(6) Geoblocking Regulation contradict the assumption of such a unilateral conflict-of-laws rule or overriding mandatory provision. According to these provisions, the Geoblocking Regulation shall be without prejudice to Union law concerning judicial cooperation in civil matters. However, European Union law on judicial cooperation in

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697 Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC [2018] OJ L 60I/1 (Geoblocking Regulation).

698 Article 1(1) Geoblocking Regulation.

699 Article 1(2) Geoblocking Regulation.

700 Recital 17 sentence 2 Geoblocking Regulation.

civil matters also includes European conflict-of-laws acts. Moreover, the existence of a conflict-of-laws element in the Geoblocking Regulation is also contradicted by the fact that the European legislator understands this regulation as a specification of the Services Directive.[701] For the latter, however, the absence of an inherent conflict-of-laws element is largely undisputed.[702]

The above supports the conclusion that the Geoblocking Regulation itself contains neither a unilateral conflict-of-laws rule nor an overriding mandatory provision. Therefore, there is a strong case for its applicability to be determined by European courts in accordance with the conflict-of-laws acts of the European Union.[703]

c) P2B Regulation

The P2B Regulation[704] seeks to "[…] contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediary services and users of business websites are afforded adequate transparency, fairness and effective redress in relation to online search engines."[705] To this end, the Regulation establishes, in particular, requirements for the general terms and conditions of online intermediation services.[706] Further, it regulates the requirements for the procedure of restriction, suspension and termination of services of online intermediation services.[707] It also contains rules for the ranking of search results in online search engines[708] and provides for specific rules for the enforcement of claims against online intermediation services and online search engines.[709]

The Regulation limits its territorial scope of application to "[…] online intermediary services and online search engines that are provided or offered for provision to business users or users of business websites that have their registered office or place of residence in the Union and that offer goods or services to consumers in the Union through these online intermediary services or online search engines, irrespective of the registered office or place of residence of the

701 See Article 1(1),(7) Geoblocking Regulation; Recitals 4, 8, 9 Geoblocking Regulation.
702 See above B.III.3.c)(b).
703 On the difficulty of classifying damage claims resulting from a violation of the Geoblocking Regulation and the enforcement of such claims under private law, see Karin Sein, 'The draft Geoblocking Regulation and its possible impact on B2C contracts' (2017) 6 Journal of European Consumer and Market Law 148, 152 et seq.
704 Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency to business users of online intermediary services [2019] OJ L 186/57 (P2B Regulation).
705 Article 1(1) P2B Regulation.
706 Articles 3, 5(1), 6, 7(1), 8-10, 11(3), 12(1) P2B Regulation.
707 Article 4(1)-(3) P2B Regulation.
708 Articles 5(2)-(5), 7(2)-(3) P2B Regulation.
709 Articles 11-14 P2B Regulation.

providers of these services […]"[710]. This provision also contains a unilateral conflict-of-laws rule determining the application of the P2B Regulation in terms of conflict of laws.[711] This already follows from the wording of the P2B Regulation itself, according to which it "[…] applies irrespective of the otherwise applicable law."[712] More specifically, Recital 9 P2B Regulation states that "[…] this Regulation should apply independently of the law otherwise applicable to a contract." Because of the unambiguous wording in Article 1(2) P2B Regulation and Recital 9 P2B Regulation, the subordinance of the P2B Regulation to any other European Union law[713] does not contradict the classification of Article 1(2) P2B Regulation as a unilateral conflict-of-laws rule.

Furthermore, it is generally assumed for the provisions of the P2B Regulation to be classified as overriding mandatory provisions.[714] In this respect, it is equally referred to the wording of Recital 9 P2B Regulation, which assumes the application of the P2B Regulation "[…] irrespective of the law otherwise applicable to a contract […]".[715] However, it remains unclear whether a public interest is served by the P2B Regulation. Yet, such an interest would be necessary in order to qualify provisions of the P2B Regulation as overriding mandatory provisions.

IV. The Conflict-of-Laws Element in Substantive Union Law

1. Unilateral Conflict-of-Laws Rules in Substantive Law of the EU

Regarding the substantive Union laws analysed here, only a minority of these acts are currently uniformly considered in literature and case law to provide for a unilateral conflict-of-laws rule

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710 Article 1(2) P2B Regulation.

711 Tobias Lutzi, 'The Scope of the Digital Services Act and Digital Markets Act. Thoughts on Conflict of Laws' (2023) Dalloz IP/IT 278, 281; Christian Heinze, 'Der internationale Anwendungsbereich des digitalen Binnenmarktes', in Sebastian Kubis, Karl-Nikolaus Peifer, Benjamin Raue and Malte Stieper (eds), *Ius Vivum: Kunst – Internationales – Persönlichkeit* (Mohr Siebeck 2022) 440, 446; Christian Alexander, 'Art. 1 P2B-VO', in Helmut Köhler, Joachim Bornkamm, Jörn Feddersen, Christian Alexander, Bernd Odörfer and Inge Scherer, *Gesetz gegen Unlauteren Wettbewerb* (42th edn, C.H. Beck 2024) para 9; misleading in this respect Alexander Tribess, 'Art. 1 P2B-VO', in Jörg Fritzsche, Reiner Münker and Christoph Stollwerck (eds), *BeckOK UWG* (23rd edn, C.H. Beck 2024) para 29; European Law Institute, 'Report of the European Law Institute, Model Rules on Online Platforms', p 46 <perma.cc/PDL8-5TJ9> accessed 5 March 2024 also seems to assume a conflict-of-laws dimension of Article 1(2) P2B Regulation, as they base Article 28 ELI Model Rules on Online Platforms – which deals with identifying the applicable law – on this article.

712 Article 1(2) P2B Regulation.

713 Article 1(5) P2B Regulation.

714 Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 6.192; Pietro Franzina, 'Promoting Fairness and Transparency for Business Users of Online Platforms: The Role of Private International Law', in Ilaria Pretelli (ed), *Conflict of Laws in the Maze of Digital Platforms* (Schulthess 2018) 147, 151.

715 Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 6.192.

in their provision on the territorial scope of application. These are the Passenger Transport Regulations, the Posted Workers Directive and the P2B Regulation. The classification of the provisions on the territorial scope of application in the Credit Rating Agency Regulation, the Geoblocking Regulation and the Digital Services Act remains unclear. It has also been shown that the assessment of whether the provisions on the territorial scope of application in the respective legal acts constitute a unilateral conflict-of-laws rule is characterised by criteria determined by the respective individual legal act.

In the following, it will first be analysed which common criteria the provisions on the territorial scope of application only of those legal acts, which undisputedly comprise a unilateral conflict-of-laws rule, share. This might allow to define abstract criteria by means of which a unilateral conflict-of-laws rule in a provision on the territorial scope of application in substantive Union law may be identified.

a) Criteria for a Categorization as Unilateral Conflict-of-Laws Rule

First of all, no indication of the existence of a unilateral conflict-of-laws rule follows from the form – regularly regulation or directive – in which the respective legal act of the European Union was adopted. Those legal acts whose provisions on the territorial scope of application are deemed to contain a unilateral conflict-of-laws rule have been adopted as directives[716] as well as regulations.[717]

Nor can anything be derived from the specific wording of the provision on the territorial scope of application for the conflict-of-laws significance of this provision. The provisions on the territorial scope of application of the three legal acts, whose provisions on the territorial scope of application are considered to have a conflict-of-laws dimension, differ significantly with regard to their connecting factors. Also, the connecting factors of only two of these legal acts refer to third countries.[718] Even the express provision for the legal act to apply "irrespective of the otherwise applicable law" is not mandatory for the assumption of a unilateral conflict-of-laws rule. Such a provision is found in the Posted Workers Directive and the P2B Regulation, but not in the Passenger Transport Regulations.

Likewise, it is insignificant for the assumption of an element of conflict of laws whether the respective legal act also contains provisions of public law and whether the enforcement of these provisions is fostered by means of public enforcement. In this respect, it has already become

716 Posted Workers Directive.
717 Passenger Transport Regulations; P2B Regulation.
718 Cf. the Passenger Transport Regulation and the P2B Regulation on the one hand, and the Posted Workers Directive on the other.

clear that provisions typically classified as public law may equally be referred to by means of conflict of laws.[719] With regard to the enforcement of the respective legal acts, the possibility of both *private* and *public enforcement* is provided for, irrespective of whether the provisions on the territorial scope of application of a legal act have a conflict-of-laws element.[720] Further, legal acts sometimes only specify the necessity of enforcement, without clarifying whether this is to be ensured by way of *public* or *private enforcement*.[721]

Moreover, for the assumption of a conflict-of-laws element in a provision on the territorial scope of application, it is also immaterial whether the respective legal act is subject to the general or special conflict-of-laws rules of the conflict-of-laws acts of the European legislature. It is also of no relevance whether the applicable law is to be determined on the basis of the Rome I Regulation or the Rome II Regulation and whether a general or a special conflict-of-laws rule would be pertinent. For example, the Posted Workers Directive and the Transfers of Undertakings Directive both concern areas of law for which Article 8 Rome I Regulation would determine the applicable law. For the Passenger Transport Regulations and the Cabotage Transport Regulations, Article 5 Rome I Regulation and Article 4 Rome II Regulation would be the relevant provisions. Both regulations concern contracts of carriage that may give rise to contractual and non-contractual claims. In contrast, in the absence of specific provisions, the area of law dealt with under the P2B Regulation is principally governed by Article 4 Rome I Regulation, Article 4 Rome II Regulation and thus by the general conflict-of-laws rules.

The area of law to which the respective legal act may be assigned is also inconclusive. For example, there are legal acts in the area of labour law for which the existence of a unilateral conflict-of-laws provision is denied and affirmed. The existence of a unilateral conflict-of-laws rule is recognised for the Posted Workers Directive, while no conflict-of-laws element is attributed to the provision on the territorial scope of application in the Transfers of Undertakings Directive.[722] But also legal acts in the area of the digital single market are assessed differently. While the provision on the territorial scope of application of the P2B Regulation is ascribed a corresponding element of conflict of laws, such an element is to be denied for the provisions on the territorial scope of application of the Geoblocking Regulation.[723]

Furthermore, nothing can be inferred from the relevance of the respective legal act with regard to the fundamental rights for the classification of a provision on the territorial scope of

719 See above A.II.2.a).

720 Cf. Articles 17-18, 20 Directive on Electronic Commerce; Article 16 Air Passengers Rights Regulation; Article 11(2), 38 et seq. Prospectus Regulation.

721 Cf. Article 15 P2B Regulation.

722 See above B.III.4.a)(1) and B.III.4.b)(1).

723 See above B.III.6.c) and B.III.6.b).

application as a unilateral conflict-of-laws provision. While the Posted Workers Directive aims to protect employees[724] and accordingly has a certain bearing on fundamental rights[725], such a relevance is lacking in the P2B Regulation, whose scope of application is limited to business transactions. The Passenger Transport Regulations also do not differentiate between passengers in terms of the protection needed. Therefore, under the Passenger Transport Regulations consumers are protected to the same extent as persons transported for business reasons.

Finally, the substantive content of the rules laid down in the legal act in question is irrelevant to the existence of a conflict-of-laws dimension of the provision on the territorial scope of application. In this respect, it could be argued that Article 12 Rome I Regulation and Article 15 Rome II Regulation – even if these provisions do not contain an exhaustive regulation of the statute – indicate the possibility of the law referred to being limited with regard to its subject matter. If such a limitation exists, an independent conflict-of-laws provision would be required, which would have to be taken from substantive Union law. It may therefore be possible to draw conclusions from the substantive content of the act of substantive Union law in question as to the existence of a conflict-of-laws element in a provision on the territorial scope of application in that act.

However, the P2B Regulation highlights the invalidity of such a consideration. The P2B Regulation primarily contains rules regarding the requirements for general terms and conditions of platform operators and subjects them to a unilateral conflict-of-laws rule. In contrast, the Unfair Terms Directive does not contain a provision on its territorial scope of application and therefore may not contain a unilateral conflict-of-laws provision[726], although it also deals with the regulation of general terms and conditions. Thus, even though both legal acts deal with the same subject matter – the regulation of general terms and conditions – only the P2B Regulation provides a unilateral conflict-of-laws rule. The mere fact of the P2B Regulation containing special regulations for platform operators cannot justify, from a conflict-of-laws perspective, why this subject matter should not be covered by the law applicable according to the provisions of the Rome I Regulation.

Overall, therefore, there are no criteria common to the various legal acts indicating the existence of a conflict-of-laws element in a provision on the territorial scope of application in a legal act

724 Recital 13, 17 Posted Workers Directive.

725 Article 15(2),(3) Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

726 Although Article 6(2) Unfair Terms Directive includes a provision which potentially influences the applicable law in terms of conflict of laws, this provision is not relevant in the present context, as it does not extend the scope of application of the directive in cross-border situations beyond the objective connecting factors; see above B.II.2.c).

of substantive Union law. This raises the question of whether such a conflict-of-laws element in a provision on the territorial scope of application can be determined in the abstract at all.

b) The Rule on the Territorial Scope of Application as an Additional Filter in Determining the Law Applicable to Cross-Border Situations

An abstract determination of the conflict-of-laws content cannot be founded on the so-called alternative test (1). However, it could be based on the legal function of the rules on the territorial scope of application (2). The appropriateness of an assessment of the conflict-of-laws dimension of provisions on the territorial scope of application based on this function is then to be evaluated for the legal acts of the substantive Union law already addressed above (3).

(1) The Alternative Test

The reliance on the alternative test[727] for identifying a conflict-of-laws element in a provision on the territorial scope of application of European Union law is not an option.[728] According to this test, there is no conflict-of-laws element inherent in a provision on the territorial scope of application if this provision is merely intended to ensure a distinction from other legal provisions within a legal system. In contrast, a conflict-of-laws element is to be assumed if the provision is intended precisely to delimit the legal act from other legal systems.[729]

Yet, the alternative test is not suitable for determining the conflict-of-laws content of provisions on the territorial scope of application in legal acts of the European Union for various reasons. First of all – because of the principle of conferral and the principle of subsidiarity[730] – the law of the EU is designed to regulate only individual specific facts, but not to provide a holistic regulatory system. Therefore, situations in which provisions on the territorial scope of application of substantive Union law serve to delimit these provisions from other provisions of substantive Union law usually do not exist. The provisions on the territorial scope of application in substantive Union law thus generally do not fulfil the typical function of provisions on the territorial scope of application in national law, namely the delimitation from other provisions of the same legislator. At the level of substantive Union law, an essential characteristic of the provisions on the territorial scope of application is therefore missing. Hence, one of the premises of the alternative test is not given. Consequently, this test may not be relied upon for

727 See on this test in the context of national law already above A.II.3.c)(3)(a)(ii)(c).

728 Different for the GDPR Martina Melcher, 'Es lebe das Territorialitätsprinzip?', in Susanne Gössl (ed), *Politik und Internationales Privatrecht* (Mohr Siebeck 2019) 129, 138; Marian Thon, 'Transnationaler Datenschutz: Das Internationale Datenprivatrecht der DS-GVO' (2020) 84 Rabels Zeitschrift für ausländisches und internationales Privatrecht 25, 40.

729 See above on the alternative test A.II.3.c)(3)(a)(ii)(c).

730 Articles 4(1), 5(1)-(3) TEU.

substantive Union law to assess whether there is an inherent element of conflict of laws in the respective provision on the territorial scope of application.

Furthermore, a multitude of legal acts of substantive Union law, which at least also establish rules relevant to private law, contain provisions of public law or those which are enforced by means of public law. These legal acts of substantive Union law are *inter alia* referred to as regulatory private law.[731] However, these legal acts may also be limited in their territorial scope of application in order to restrict the competence of the authorities in cross-border enforcement by means of public law. Moreover, such a restriction might serve to prevent the extraterritorial application of European Union law. Insofar as a rule on the territorial scope of application is based on this reasoning, no conflict-of-laws element can be derived from this provision. Thus, also for those legal acts, the alternative test cannot be relied upon.

The function of the provisions on the territorial scope of application in substantive Union law therefore differs from those in national law in two respects. Firstly, they generally are not intended to distinguish the respective legal acts from other provisions of substantive Union law. Secondly, they may also reflect the clear regulatory tendencies of European Union law, which gives authorities extensive powers to enforce substantive Union law. In this respect, provisions on the territorial scope of application in substantive Union law may also merely be an indication of a territorial limitation of the competences of authorities. Thus, because of these different functions the alternative test may not be applied to determine the existence of a conflict-of-laws element in a provision on the territorial scope of application in substantive Union law.

(2) The Limitation of the Territorial Scope of Application in Cross-Border Situations

Recourse to the alternative test is therefore precluded. Instead, for the determination of the conflict-of-laws content of a provision on the territorial scope of application of substantive Union law, the approach developed for the identification of the conflict-of-laws character of a self-limiting rule may be made fruitful.[732]

If this approach is transferred to the provisions on the territorial scope of application in substantive Union law, it first needs to be assessed what conflict-of-laws content such a provision would have. Then it is to be verified whether there is a corresponding dedicated conflict-of-laws provision expressly regulating precisely those facts falling within this scope of application. In the absence of such a dedicated provision, it has to be examined whether the

731 See on this Jürgen Basedow, *EU Private Law* (Intersentia 2021) I-46.

732 See in detail above above A.II.3.c)(3)(a)(iii).

general conflict-of-laws rules render the law of a member state applicable in all cases in which the criteria of the rule on the territorial scope of application are also met.

When it comes to the relationship between substantive Union law and the general conflict-of-laws acts of the European Union, it has become clear that substantive Union law largely lacks explicit conflict-of-laws rules. Moreover, the general conflict-of-laws acts of the European Union do not provide for any conflict-of-laws rules which are specifically tailored to substantive Union law. Nor do their connecting factors correspond to the criteria underlying the territorial scope of application of the respective act of substantive Union law. These factors therefore generally militate in favour of attributing a conflict-of-laws element to the provisions on the territorial scope of application in substantive Union law.

Following the approach developed above, the final stage requires an analysis by way of interpretation whether the rules on the territorial scope of application in substantive Union law contain a conflict-of-laws element. The interpretation of the provision on the territorial scope of application needs to consider in particular the specific drafting of the general conflict-of-laws rule. It further has to take into account the quantitative extent to which the rule on the territorial scope derogates from the general conflict-of-laws rules, and the different interests pursued by substantive law and the conflict of laws. Especially, the scope of application for a legal act of the European Union resulting from the interaction of conflict of laws and the provision on its territorial scope of application is of importance.[733] In this respect, the conflict of laws of the European Union is decisive. It is only this law which the legislator of the substantive Union law may typically have had in mind when drafting the provision on the territorial scope of application. Moreover, this conflict of laws will regularly interact with the provisions on the territorial scope of application of the substantive Union law. Insofar as the interaction of the primary objective connecting factor of the general conflict-of-laws rule and the rule on the territorial scope of a legal act substantially limits the scope of application of the respective legal act, this argues for a conflict-of-laws element in the particular rule on territorial scope. In these cases, the territorial scope of application of the substantive Union law is regularly limited by the conflict of laws.

c) The Relation of the Definition of the Territorial Scope and Conflict of Laws in Substantive Union Law

Whether this multi-stage approach developed in the first chapter[734] leads to accurate results will be examined in the following. For this purpose, the assumption or rejection of a conflict-of-

733 See on this already above A.II.3.c)(3)(a)(iv).

734 See above A.II.3.c)(3)(a)(iii).

laws element in the provisions on the territorial scope in the legal acts of substantive Union law analysed above will be reviewed by means of this approach. To this end, only those legal acts will be examined for which there is largely consensus on the conflict-of-laws classification of the respective provision on the territorial scope of application. Therefore, the Credit Rating Agency Regulation and the Digital Services Act will not be considered in the following.

(1) Internal Market-Related Legal Acts

The relevance of the function of the rules on the territorial scope for the assumption of a unilateral conflict-of-laws rule will first be analysed for those legal acts whose rules on the territorial scope of application are undisputedly not attributed a conflict-of-laws element. This applies to some substantive Union laws which are closely related to the internal market of the European Union. The legal acts examined in the following are the Directives on the Performance of Services in the Internal Market, the Cabotage Transport Regulations, the Transfers of Undertakings Directive and the Prospectus Regulation.

(a) Directives on the Performance of Services in the Internal Market

For those legal acts dealing with the provision of services in the internal market, a conflict-of-laws dimension of their provisions was rejected altogether.[735] The provisions on the territorial scope of application of these legal acts link their applicability in each case to the service provider residing in a member state.[736] Also, these legal acts emphasise – with different weight – their objective of promoting the internal market.[737] In accordance with their scope and objective, these legal acts should therefore primarily apply if the facts to be regulated relate to the internal market. In these cases, however, the primary objective connecting factors of the conflict-of-laws legal acts of the European Union also lead to the law of a member state of the European Union.[738] Thus, also according to these conflict-of-laws rules the respective legal act regulating services in the internal market applies in situations relating to the internal market in the form it has acquired through the implementation by the member states. The objectives and the scope of application of those legal acts dealing with the provision of services in the internal market are thus sufficiently served. They are referred to by the conflict-of-laws acts of the European Union if the service provider has his habitual residence in a state of the European Union. Therefore, these legal acts do not need to be referred to separately by special conflict-of-laws rules.

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735 See above B.III.3.

736 Article 1(1) Directive on Electronic Commerce; Articles 5-9, 10(3), 11(4) lit. b), 12, 13(1), 14(1),(3), 15(1), 27(1), 28(2) Audiovisual Media Services Directive; Article 2(1) Services Directive.

737 See the references above in fn. 186.

738 Article 4(1) lit. b) Rome I Regulation.

(b) Cabotage Transport Regulations and Transfers of Undertakings Directive

Similarly, the Cabotage Transport Regulations are limited to those carriers established in a member state transporting goods or passengers in another member state.[739] The same applies to the Transfers of Undertakings Directive, which is limited to the transfer of undertakings situated in a member state of the European Union.[740] Those legal acts are likewise intended to promote the internal market.[741] However, according to the conflict-of-laws acts of the European Union, the law of a member state of the European Union is regularly applicable to the facts specified in the provisions on the territorial scope of application in the respective legal act.[742] Thus, these legal acts do not require a separate reference under conflict of laws in order to achieve the objective expressed in their corresponding territorial scope of application. Therefore, to achieve the objective of the territorial scope of the relevant act of substantive Union law, no conflict-of-laws element must be attributed to the provision on the territorial scope of application of that act. Accordingly, a conflict-of-laws dimension of the provisions on the territorial scope of application is not assumed for these legal acts. Their applicability in cross-border private-law relationships is therefore determined by the general conflict-of-laws acts of the European Union.

(c) Prospectus Regulation

In the field of European banking and capital markets law, the absence of a conflict-of-laws element in the provisions on the territorial scope of the Prospectus Regulation follows from its territorial scope of application. This scope is limited to public offers with a certain volume in the European Union or to admittance for trading on a regulated market situated or operating within a member state.[743] Moreover, the Prospectus Regulation constitutes an essential step towards the completion of the Capital Markets Union as set out in the European Commission's Action Plan on Building a Capital Markets Union.[744] It thus aims to promote the single market.[745] However, insofar as the subject matter addressed by the Prospectus Regulation

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739 Article 1 Cabotage by Waterways Regulation; Article 1(1) Transportation by Bus Regulation; Article 1(1),(2),(4), 2(2) Cabotage by Road Regulation.

740 Article 1(2) Transfers of Undertakings Directive.

741 Cf. Recital 1, 4, 5, 7 Transfers of Undertakings Directive; Preamble Cabotage by Waterways Regulation; Recital 2 Cabotage by Road Regulation; the Transportation by Bus Regulation applies in principle to international carriage of passengers, but differentiates with regard to the requirements between carriages in the internal market and with a connection to third states, Article 5(1) Transportation by Bus Regulation; this differentiation highlights the objective of the regulation to promote the internal market.

742 Articles 5, 8(2) Rome I Regulation.

743 Article 1(1) Prospectus Regulation.

744 Cf. European Commission, 'Action Plan on Building a Capital Markets Union', COM(2015) 468 final 3, 30 <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0468> accessed 5 March 2024.

745 European Commission, 'Action Plan on Building a Capital Markets Union', COM(2015) 468 final 3, 6 <eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0468> accessed 5 March 2024.

concerns a single market, the law of a member state of the European Union, and thus also the Prospectus Regulation, applies on the basis of the conflict-of-laws acts of the European Union. If a subject matter thus relates to the internal market, the general conflict-of-laws acts of the European Union regularly lead to the application of the law of a member state of the European Union. A distinct conflict-of-laws provision in a legal act of substantive Union law, which serves the establishment or the promotion of the internal market, is therefore not necessary. If the latter provides for a rule on the territorial scope of application, there is therefore regularly no element of conflict of laws to be inferred from it.

(2) Geoblocking Regulation

The approach suggested here also justifies why the provision on the territorial scope of application of the Geoblocking Regulation does not possess a conflict-of-laws element. According to its Article 1(2), the Geoblocking Regulation is intended to apply to cross-border situations. However, according to Article 6 Rome I Regulation, the conflict-of-laws acts of the European Union also provide for the application of the law of a member state in the cases covered by the Geoblocking Regulation if the customer is a consumer.[746] In this respect, the general conflict of laws of the European Union does not restrict the scope of application as defined by Article 1(2) Geoblocking Regulation. If, in contrast, the customer is a business and the trader is domiciled in a third country, the law of the trader's registered office or habitual residence, not the law of a member state, is applicable.[747] To this extent, there is a restriction of the scope of application of the Geoblocking Regulation by the conflict-of-laws acts of the European Union.

However, this restriction of the scope of application of the Geoblocking Regulation is not of significance. The Geoblocking Regulation clarifies in its recitals that traders from third countries should be covered as well by this regulation.[748] At the same time, however, the Geoblocking Regulation also emphasises its purpose to serve the internal market.[749] Yet, if a situation relates exclusively to the internal market, the general conflict-of-laws rules of the European Union refer to the law of a member state.[750] Also, according to Recital 26 Geoblocking Regulation "[i]n all those situations, […], where a trader does not pursue activities in the Member State of the consumer or does not direct activities there, compliance with this Regulation does not entail any additional costs for the trader associated with jurisdiction or

746 Cf. Article 2(12),(13) Geoblocking Regulation.
747 Article 4(1) lit. a), b) Rome I Regulation.
748 Recital 17 Geoblocking Regulation.
749 Cf. the title of the regulation, which contains the term "internal market", as well as Recitals 1-3, 5, 18, Article 1(1) Geoblocking Regulation.
750 See already above B.IV.1.c)(1).

differences in applicable law". It thus follows from Recital 26 Geoblocking Regulation that, according to the legislator's intention, in case of a legal relationship with a consumer the Geoblocking Regulation should only apply if Article 6 Rome I Regulation refers to the law of a member state. If the Geoblocking Regulation were to apply independently of the general conflict-of-laws rules of the European Union, compliance with the Geoblocking Regulation could otherwise give rise to additional costs, even where the general conflict-of-law rules of the European Union refer to the law of a third country. However, this would be contrary to Recital 26 Geoblocking Regulation. This implies firstly that the European legislator was aware of the conflict-of-laws dimension of the Geoblocking Regulation and secondly that it wanted to subject the Geoblocking Regulation to being referred to by the conflict-of-laws acts of the European Union.

Thus, the restriction of the scope of application of the Geoblocking Regulation by the conflict-of-laws acts cannot be regarded as significant. Accordingly, based on the approach suggested here, Article 1(2) Geoblocking Regulation does not have a conflict-of-laws dimension.

(3) MiCA Regulation

If the approach proposed here is taken as a basis, for the determination of the conflict-of-laws element in the provision of the territorial scope of application of the MiCA Regulation, a distinction is to be drawn with regard to the relevant liability regimes.

(a) Liability of the Crypto Service Provider for Loss

Insofar as civil liability under Article 75(4),(8) MiCA Regulation is at issue, the application of Article 4(1) lit. b) Rome I Regulation as a rule results in the law of the habitual residence or seat of the depositary. However, if the further requirements of Article 6 Rome I Regulation are met, the law of the client's habitual residence will apply. The MiCA Regulation themselves limits its territorial scope of application to "natural and legal persons and certain other undertakings [...] that provide services related to crypto-assets in the Union". It shall only apply to third-country service providers if they have directed their activities towards the European Union.[751]

Thus, the territorial scope of application of the MiCA Regulation is limited by the general conflict-of-laws rules if the client is not a consumer, the service provider has its registered office or habitual residence in a third country and directs its business activities to clients in the European Union. In these situations, the general conflict of laws of the European Union refers

751 Recital 75, Article 61 MiCA Regulation.

to the law of a third country and therefore does not result in the application of the MiCA Regulation.

It is arguable whether this restriction of the scope of application of the MiCA Regulation is so significant that an element of conflict of laws must be inferred from Article 2 MiCA Regulation in order for the MiCA Regulation to achieve its regulatory objective. The general conflict of laws would result in the MiCA Regulation not applying to private-law relationships between a third-country service provider, which has directed its business activities towards the European Union, and a business. The fact that the MiCA Regulation itself only allows third-country actors to operate within the framework of the MiCA Regulation to a very limited extent[752] militates against such significance. Accordingly, there are few provisions in the MiCA Regulation explicitly referring to third-country actors.[753] Moreover, the recitals of the MiCA Regulation emphasise the importance of consumer protection.[754] Those factors indicate that a situation between a third-country service provider, which has directed its business activities towards the European Union, and a business were not at the focus of the European legislator's regulatory activity. Thus, at least in this respect, the limitation of the scope of application of the MiCA Regulation by the general conflict of laws cannot be considered significant.

Hence, for claims under Article 75(4),(8) MiCA Regulation, the general conflict-of-laws rules of the European Union do not result in a significant limitation of the territorial scope of application specified by Article 2 MiCA Regulation. The liability of the crypto service provider in the event of loss pursuant to Article 75(8) MiCA Regulation therefore does not require an element of conflict of laws to be read into Article 2 MiCA Regulation.

(b) Liability for Incorrect Information Provided in the White Paper

From a conflict-of-laws perspective, the limitation of the territorial scope of application of the liability for the white paper provided for in the MiCA Regulation[755] by the general conflict-of-laws rules might require a different assessment.

Article 4(1) Rome II Regulation as the primary objective connecting rule refers to the place where the damage occurred and thus typically to the location of the asset which is damaged or lost.[756] If the liability in the context of prospectus liability – which is functionally comparable

752 See, for example, the restriction in Articles 16(1) lit. a), 59(2) MiCA Regulation.

753 See e.g. Articles 3(1) No. 33 lit. c), 41(5) subpara 3, 63(6) lit. b), 83(6) subpara 3, 140(2) lit. v) MiCA Regulation.

754 See Recitals 4, 79, 80, 85, 89, 109 MiCA Regulation.

755 Articles 15, 26, 52 MiCA Regulation.

756 See the case law of the ECJ on international jurisdiction in prospectus liability ECJ, C-375/13 *Kolassa* [2015] ECLI:EU:C:2015:37 para 55; ECJ, C-304/17 *Löber* [2018] ECLI:EU:C:2018:701 para 36; in principle also, albeit with restrictions ECJ, C-709/19 *VEB* [2021] ECLI:EU:C:2021:377 para 32-34; see also on the localisation of purely financial loss Peter Mankowski, 'Art. 7', in Ulrich Magnus and Peter

to the liability for a white paper – is at issue, the ECJ has specified this location in several decisions. According to these decisions, the place of administration of the bank account from which the client has transferred assets by means of which the respective financial instrument was acquired is decisive, at least if other factors also point to this location.[757] In this context, the ECJ has emphasised in particular that the foreseeability for the tortfeasor is also a significant criterion for identifying the place where the lost or damaged asset is located.[758]

Thus, when it comes to liability in the context of a white paper, Article 4(1) Rome II Regulation usually only refers to the law of a member state of the European Union if a specific asset is damaged or lost and this asset is located in a member state of the European Union. If the principles developed for prospectus liability are transferred to the liability for a white paper, this asset will typically be located at the bank account from which the injured party acquires the crypto-assets, at least insofar as other factors point to this location.

However, it must be taken into account that the acquisition of crypto-assets, at least via a crypto exchange, typically requires a deposit to be made to the crypto exchange first, which may then be used to acquire crypto-assets. The direct purchase of crypto-assets by transferring funds from a bank account is regularly not possible. A transfer to the crypto exchange's bank account is required first in order to acquire crypto-assets with the assets then credited by the crypto exchange. This also applies if the purchase is to be made by means of other crypto-assets. Such a purchase regularly requires these crypto-assets to be sold first and then the desired crypto-assets to be purchased. A direct exchange between different crypto-assets is generally not possible.

For the identification of the applicable law pursuant to Article 4(1) Rome II Regulation, the damage in these cases could only be seen in the acquisition of the crypto-assets. Thus, under Article 4(1) Rome II Regulation, the law of a member state of the European Union is applicable to liability for a white paper if the crypto exchange provides a bank account in the European Union to which the payments are to be made. This will usually be the case if the respective crypto exchange seeks to address clients in the European Union. The MiCA Regulation, in contrast, is intended to apply to the issuance, offer to the public and admission to trading of

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Mankowski (eds), *European Commentaries on Private International Law, vol. I* (2nd edn, ottoschmidt 2022) para 328-339; Matthias Lehmann, 'Where does Economic Loss Occur?' (2011) 7 JPIL 527.

757 Summarising the case law of the ECJ in this respect Matteo Gargantini, 'Competent Courts of Jurisdiction and Applicable Law', in Danny Busch, Guido Ferrarini and Jan Paul Franx (eds), *Prospectus Regulation and Prospectus Liability* (Oxford University Press 2020) para 19.18-19.29; see also Matthias Lehmann, 'Where does Economic Loss Occur?' (2011) 7 JPIL 527, 544.

758 ECJ, C-375/13 *Kolassa* [2015] ECLI:EU:C:2015:37 para 56; ECJ, C-304/17 *Löber* [2018] ECLI:EU:C:2018:701 para 35.

crypto-assets or providing of services related to crypto-assets in the Union.[759] It is therefore essentially geared towards activities in the European Union.

The criteria by which the general conflict-of-laws rules determine the applicable law and the criteria deployed to determine the territorial scope of application of the MiCA Regulation are therefore not congruent, at least according to their wording. Thus, it is at issue whether this restriction of the territorial scope of application beyond Article 2(1) MiCA Regulation by Article 4(1) Rome II Regulation is so severe as to confer an element of conflict of laws on Article 2(1) MiCA Regulation.

Regarding the gravity of limitation of the scope of application of the MiCA Regulation, situations in which Article 4(1) Rome II Regulation refers to the law of a third country, although the requirements of Article 2(1) MiCA Regulation are given, are likely to be rather rare. In principle, the MiCA Regulation links its territorial scope of application to the provision of services relating to crypto-assets in the European Union. In contrast – under the Rome II Regulation – the location of the damaged or lost assets determines the applicable law. If the crypto-assets are acquired via a crypto exchange, the bank account of the crypto exchange is regularly decisive. For liability in connection with a white paper, this leads to a limitation of the scope of the MiCA Regulation by the Rome II Regulation only if the tortfeasor provides its services in the European Union but does not hold an account in the European Union for deposits of its clients. However, these cases are likely to be rare simply because the operator of the crypto exchange typically wants to provide its clients in the European Union with a fast and inexpensive deposit option. It also does not constitute an unreasonable detriment to the client if it can only rely on the MiCA Regulation when the bank account of the tortfeasor is located inside the European Union. If the account is located outside the European Union, the client will be able to establish that the law of a member state of the European Union and consequently the MiCA Regulation does not apply. In addition, the MiCA Regulation provides for enforcement not only by way of *private enforcement*, but also by way of *public enforcement*. Compliance with the provisions of the MiCA Regulation may hence be enforced by way of *public enforcement* in cases where the conflict-of-laws legal acts avert *private enforcement*. The enforcement of the MiCA Regulation is therefore not entirely ineffective, but is assigned solely to the authorities in these cases.

All in all, this shows that the MiCA Regulation cannot be considered to contain a unilateral conflict-of-laws rule. This is supported by the fact that the restriction of the territorial scope of application of the MiCA Regulation by the general conflict-of-laws acts of the European Union

759 Article 2(1) MiCA Regulation.

is not particularly severe. The international applicability of the MiCA Regulation to a private-law relationship is thus determined by the conflict-of-laws acts of the European Union, namely the Rome I Regulation and the Rome II Regulation.

(4) P2B Regulation

The P2B Regulation applies to business users and corporate website users, which have their place of establishment or residence in the Union and offer goods or services to consumers located in the European Union.[760] The territorial scope of the P2B Regulation is explicitly determined "irrespective of the place of establishment or habitual residence of the providers of those services".[761] Yet, according to the conflict-of-laws acts of the European Union, the law of a member state and thus the P2B Regulation would only apply to the legal relationship regulated by the P2B Regulation if the provider had its habitual residence or establishment in the European Union.[762] The territorial scope of the P2B Regulation would therefore be limited in all cases where the service provider is established or habitual resident outside the European Union. It would thus be structurally significantly restricted. However, this is contrary to the wording of Article 1(2) P2B Regulation, which explicitly states that the place of establishment or habitual residence is irrelevant for its territorial scope. Such a limitation may only be avoided by simultaneously attributing a conflict-of-laws content to Article 1(2) P2B Regulation and in this respect displacing the conflict-of-laws acts of the European Union. Accordingly, this provision is considered to comprise a conflict-of-laws content.[763]

(5) Posted Workers Directive

The approach proposed here may also justify why Article 1(1),(3) Posted Workers Directive is assigned a conflict-of-laws dimension. According to this provision, the directive only applies if an undertaking in a member state posts a worker temporarily to another member state. At first glance, therefore, it merely addresses an internal market situation which, according to Article 8 Rome I Regulation, is generally governed by the law of a member state of the European Union. According to the previous analysis[764], there would therefore be no need for a unilateral conflict-of-laws rule contained in Article 1(1),(3) Posted Workers Directive.

However, the situation is different, firstly, in those cases in which the employee does not usually perform his work in the member state in which the posting undertaking is established, but the usual place of performance is located in a state outside the European Union. According to

760 Article 1(2) P2B Regulation.
761 Article 1(2) P2B Regulation.
762 Article 4(1) lit. b) Rome I Regulation.
763 See above B.III.6.c).
764 See above B.IV.1.c)(1) and B.IV.1.c)(2).

Article 8(2) Rome I Regulation, in these situations the law of the third state would in principle apply. In these cases, the posting of the worker to a member state as such does not change the law applicable to the employment contract.[765] Yet, these cases would also be covered by the territorial scope of application of the Posted Workers Directive. The fact that precisely such cases are to be addressed by the Posted Workers Directive is shown by the clear differentiation in the Directive between "Member State" and "State".[766] It would be contradictory to this differentiation if those cases relating to a third country were generally excluded from the Posted Workers Directive.

An application of the Posted Workers Directive in this situation can only be ensured if the provision on the territorial scope of the Posted Workers Directive is at the same time given a conflict-of-laws element. Therefore, also on the basis of the approach proposed here, Article 1(1),(3) Posted Workers Directive inheres a conflict-of-laws element.

(6) Passenger Transport Regulations

However, the multi-stage approach suggested in the first chapter fails with regard to the Passenger Transport Regulations. Their territorial scope of application depend on the passenger's place of departure or destination.[767] Yet, the conflict-of-laws acts of the European Union – if one qualifies the corresponding claims as contractual[768] – also primarily determine the applicable law on the basis of the passenger's place of departure or destination in connection with his or her habitual residence.[769] Therefore, the application of the Passenger Rights Regulation and the applicability of the law of a member state of the European Union regularly coincide. Accordingly, there would be no need for a conflict-of-laws element in the provisions on the territorial scope of the Passenger Rights Regulations. Nevertheless, it is largely undisputed that such an element is inherent in these regulations.[770]

However, this inconsistency with the approach proposed here can be explained historically. The Rome Convention did not yet contain any special rules for identifying the law applicable to contracts of carriage of passengers.[771] On the contrary, it was assumed for these contracts that the closest relationship regularly exists with the law of the carrier's principal place of

765 Article 8(2) sentence 2 Rome I Regulation.
766 Cf. in particular Recital 3, Article 2(1) Posted Workers Directive.
767 See above B.III.1.a).
768 This classification is assumed by the ECJ for the determination of the competent court, ECJ, C-215/18 *Primera Air Scandinavia* [2020] ECLI:EU:C:2020:235 para 39-49.
769 Article 5(2) Rome I Regulation.
770 See above B.IV.1.c)(1).
771 Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 11.15.

business.[772] If this legal situation, which was still decisive at the time of the creation of the Air Passengers Rights Regulation, is taken as a basis, the Air Passengers Rights Regulation would only have applied if the carrier had its habitual residence in a member state.[773] However, this would have considerably limited the scope of application of the Air Passengers Rights Regulation, which was supposed to apply to any departure from a member state of the European Union.[774] The carrier's seat is only relevant for the application of the Air Passengers Rights Regulation if the place of departure is located outside the European Union but the place of destination is situated within the European Union.[775] The explicit relying on the carrier's seat if the place of destination, but not the place of departure is located in the European Union, highlights the European legislator's intention to deliberately not link the applicability of the Air Passengers Rights Regulation to the carrier's seat.

In the absence of a specific conflict-of-laws rule determining the law applicable to a contract of carriage of passengers, it was hence necessary – under the Rome Convention – to assume a conflict-of-laws element in the provision on the territorial scope of application of the Air Passengers Rights Regulation. This historical peculiarity explains why it is widely assumed for the provision on the territorial scope of the Air Passengers Rights Regulation to contain an element of conflict of laws, although its scope is not limited by the general conflict of laws of the European Union. Even if the other Passenger Transport Regulations were created after the Rome I Regulation was adopted, the assumption of a conflict-of-laws element in the respective provisions on the territorial scope of application follows from the interpretation of the Air Passengers Rights Regulation being taken as a basis.

2. Overriding Mandatory Provisions in Substantive Union Law

The categorisation as an overriding mandatory provision is only unambiguously accepted for the Posted Workers Directive and the P2B Regulation.[776] Beyond this, there is controversy as to whether provisions of the Credit Rating Agency Regulation, the Digital Services Act, the Passenger Transport Regulations and the Geoblocking Regulation are to be classified as overriding mandatory provisions. This confirms that rules of European Union law – irrespective of the form in which they are enacted – may also have the quality of an overriding mandatory

772 Mario Giuliano and Paul Lagarde, 'Report on the Convention on the law applicable to contractual obligations' [1980] OJ C 282/1, 22.

773 Article 4(1),(2) Rome Convention.

774 Article 3(1) lit. a) Air Passengers Rights Regulation.

775 Article 3(1) lit. b), 2 lit. c) Air Passengers Rights Regulation; Article 4 lit. a) Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) [2008] OJ L 293/3.

776 See above B.III.4.a)(2) and B.III.6.c).

provision.[777] Furthermore, it becomes apparent that the affirmation of such a quality is undisputed only for very few legal acts, while the classification of many legal acts is disputed. A comprehensive discussion of the prerequisites for the assumption of an overriding mandatory provision for each individual rule of substantive Union law usually does not take place.[778] Particularly with regard to the addressees of the P2B Regulation, which covers business users and corporate website users, it is not immediately clear to what extent compliance with this regulation is crucial for the protection of public interests. A classification as overriding mandatory provision – and thus an additional way of giving effect beside the conflict-of-laws rules – is only necessary if these are to be applied in cross-border situations in all cases and irrespective of the legal system called upon to apply. However, there is no justification as to why such a classification would be necessary in the case of the P2B Regulation.

Searching for commonalities among provisions indisputably classified as overriding mandatory provisions, one notices that such a classification is only considered if their provisions on the territorial scope of application are categorised as unilateral conflict-of-laws rules. Unilateral conflict-of-laws rules and overriding mandatory provisions differ in their requirements. While the former presuppose only a formal criterion – the express or implicit requirement of their application in a cross-border situation – the latter are primarily linked to a substantive criterion – the significance of the respective substantive provision for the enacting legislator.[779] The distinction is also important as the way in which a provision unfolds conflict-of-laws effects may have different consequences.[780] However, it is not logically compelling that the assumption of an overriding mandatory provision presupposes the existence of a unilateral conflict-of-laws rule in the respective legal act. Rather, overriding mandatory provisions are also to be found in legal acts which do not regulate their territorial scope of application or whose provisions on the territorial scope do not provide for unilateral conflict-of-laws rules.[781] For giving effect to an overriding mandatory provision, it is not important which law is referred to for application by the conflict of laws. Instead, the decisive factor is the significance of the provision for the public interests of the respective legal system.[782] Accordingly, both the Posted Workers Directive and

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777 See above B.II.a).

778 See e.g. above B.III.2.b), B.III.3.b)(2)(b), B.III.5.b)(2), B.III.5.b)(3), B.III.6.

779 See in detail above A.II.3.c)(3)(b).

780 See above B.II.4.

781 This is discussed, for example, for the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L 210/29 (Product Liability Directive), see Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 15.20.

782 Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. II* (ottoschmidt 2017) para 51 also emphasises the importance of the classification of European Union provisions as overriding mandatory provisions in addition to a reference by means of special conflict-of-laws rules.

the P2B Regulation contain a provision requiring the application of the legal act "irrespective of the law otherwise applicable to a contract"[783] and "whatever the law applicable to the employment relationship"[784] respectively.
Thus, the classification of provisions of substantive Union law as overriding mandatory provisions is possible in principle, but highly controversial. If a provision of substantive Union law is considered to classify as overriding mandatory provision, this categorisation is regularly expressly stipulated by the European legislator.[785]

V. Remaining Field of Application for the General Conflict of Laws of the EU

Regarding the remaining field of application of the general conflict-of-laws rules of the European Union, a distinction is to be drawn according to whether the substantive Union law is referred to on the basis of a conflict-of-laws element in the provision on the territorial scope of application (1.) and whether its provisions are to be characterised as overriding mandatory rules (2.).

1. Reference to Substantive Union Law by a Unilateral Conflict-of-Laws Provision

If a conflict-of-laws element can be attributed to the respective provision on the territorial scope of application, the conflict-of-laws rules of the conflict-of-laws acts of the European Union are superseded.[786] Yet, it is questionable to what extent the remaining provisions of the conflict-of-laws act of the European Union remain applicable. In principle, a conflict-of-laws act of the European Union "[…] shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules […]"[787]. Such a rule does not, however, indicate at the same time the irrelevance of the conflict-of-laws acts as a whole. It is therefore necessary to determine which rules of those acts apply beside the unilateral conflict-of-laws rules derived from substantive Union law. Two issues in particular are of relevance: Firstly, whether a choice of law according to the conflict-of-laws acts is still permissible, and secondly, the role of such rules within conflict-of-laws act that accompany the conflict-of-laws rules, such as the rules on public policy (*ordre public*).
To the extent that conflict-of-laws acts contain accompanying rules, those rules apply without further ado. This already follows from the absence of a direct influence on the application of

783 Article 1(2) P2B Regulation.
784 Article 3(1) Posted Workers Directive.
785 Cf. Article 3(1) Posted Workers Directive and Article 1(2) P2B Regulation.
786 Cf. Article 23 Rome I Regulation; Article 27 Rome II Regulation.
787 Article 23 Rome I Regulation; Article 27 Rome II Regulation.

the unilateral conflict-of-laws rules. They merely specify their application and correct the result found at the substantive level. In addition, these rules codify generally recognised conflict-of-laws rules, e.g. on overriding mandatory provisions or public policy.[788] Therefore, they allow for a comprehensive determination of the law applicable to a cross-border situation.

The admissibility of a choice of law is also not affected by unilateral conflict-of-laws rules derived from substantive Union law. The principle of party autonomy, on which its justification is based, is of paramount importance for European conflict of laws. It has emerged as a "key methodological concept"[789] and is omnipresent in European conflict-of-laws act.[790] This is also highlighted by the structure of the conflict-of-laws acts of the European Union: In these acts, the provisions on choice of law are separated from the other conflict-of-laws rules or are even placed under a distinct heading. The entire absence of provisions permitting a choice of law outside of conflict-of-laws acts of the European Union also indicates an understanding by the European legislator of the comprehensive and authoritative nature of choice of law in these acts. Furthermore, the fact of some legal acts of substantive Union law containing provisions limiting the effect of a choice of law underlines an awareness of the European legislator of the general possibility of a choice of law also affecting substantive Union law.[791] Moreover, general conflict-of-laws acts of the European Union provide for the application of substantive rules which are of particular importance, without prejudice to a choice of law.[792] The European legislator has therefore stipulated that substantive law provisions only evade the effects of a choice of law under certain conditions.

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788 See on the general acceptance of these two instruments of conflict of laws Symeon C. Symeonides, *Codifying Choice of Law Around the World* (Oxford University Press 2014) 158, 241 et seq., 299 et seq.; Ioana Thoma, 'Public policy (*ordre public*)' in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law, Volume 1* (Edward Elgar 2017) 1453, 1454 et seq.

789 Horatia Muir Watt, 'Party autonomy' in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law, Volume 1* (Edward Elgar 2017) 1337; see also Symeon C. Symeonides, *Codifying Choice of Law Around the World* (Oxford University Press 2014) 110 et seq. and Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press 2018) 313, 388 et seq., 391, 453 et seq.

790 See e.g. Article 3 Rome I Regulation; Article 14 Rome II Regulation; Article 5 Rome III Regulation; Article 22 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L 183/1; Article 22 Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201/107.

791 Article 6(2) Unfair Terms Directive; Article 22(4) 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 [2008] OJ L 133/66; Article 12(2) 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 [2002] OJ L 271/16.

792 See e.g. Article 3(3),(4), 6(2), 9 Rome I Regulation; Article 14(2),(3), 16 Rome II Regulation.

Thus, the conflict-of-laws acts of the European Union retain a field of application even if the rules on the territorial scope of application in substantive Union law contain a conflict-of-laws element. The priority of conflict-of-laws rules in substantive Union law over conflict-of-laws acts is limited to conflict-of-laws rules – i.e. Articles 3-8, 10-18 Rome I Regulation and Articles 4-12, 14 Rome II Regulation. The other conflict-of-laws rules remain in principle applicable beside these unilateral conflict-of-laws rules.[793]

2. Substantive Union Law containing Overriding Mandatory Provisions

To the extent to which provisions of substantive Union law are to be classified as overriding mandatory provisions, they apply in addition to the law otherwise referred to by the conflict-of-laws act of the European Union.[794] Thus, in principle – as has already been the case with substantive Union law being referred to by unilateral conflict-of-laws provisions – the provisions of the conflict-of-laws acts of the European Union remain applicable in other respects. In general, this holds true also for those provisions in the respective conflict-of-laws acts allowing for a choice of law. Yet, a choice of law does not render the overriding mandatory provisions inapplicable. This already follows from the wording of Article 9(2) Rome I Regulation, Article 16 Rome II Regulation, which exclude any influence of the conflict-of-laws acts on the application of an overriding mandatory provision of the *lex fori*. Moreover, the European legislator limits even the effects of the choice of law for mandatory rules.[795] All the more, these restrictions must apply *a fortiori* if the provision is not only mandatory but overriding mandatory.

Therefore, the provisions of general conflict-of-laws acts of the European Union also apply if, in an individual case, a provision of substantive Union law is given effect as an overriding mandatory provision. However, it follows from both Article 9(2) Rome I Regulation, Article 16 Rome II Regulation as well as those provisions limiting the effects of a choice of law for mandatory rules, that provisions of conflict-of-laws acts of the European Union do not limit the effect given to overriding mandatory provisions.

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793 Götz Joachim Schulze and Matthias Fervers, 'Art. 23 Rom I-VO', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Rom I-VO* (C.H. Beck 2023) para 6; Götz Joachim Schulze and Matthias Fervers, 'Art. 27 Rom II-VO', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Rom II-VO* (C.H. Beck 2023) para 4; Abbo Junker, 'Art. 27 Rom II-VO', in Jan v. Hein (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 13* (8th edn, C.H. Beck 2021).

794 Patrick Wautelet, 'Art. 16', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law, vol. III* (ottoschmidt 2019) para 56.

795 Article 3(3),(4), 6(2) Rome I Regulation; Article 14(2),(3) Rome II Regulation.

VI. Interim Conclusion

This chapter considered how the fact that the GDPR is part of the substantive law of the European Union affects its cross-border application with third countries. It has been shown that substantive Union law – and therefore also the GDPR – is subject to the rules of conflict of laws in a cross-border private-law relationship. In this respect, the specific legal form in which substantive Union law was enacted is irrelevant. Substantive Union law may thus be applied as part of the legal system of the member states declared applicable by the conflict-of-laws rules or on the basis of a conflict-of-laws rule contained in the provisions on the territorial scope of the respective legal acts. It may also be given effect as an overriding mandatory provision, as a provision on the manner of performance and the measures to be taken in the event of defective performance, and as a rule of safety and conduct. The GDPR may therefore be given effect in a variety of ways under the general conflict-of-laws acts.

Where a provision of substantive Union law is to be given effect on the basis of multiple conflict-of-laws rules, the application as an overriding mandatory provision of the *lex fori* pursuant to Article 9(2) Rome I Regulation, Article 16 Rome II Regulation takes precedence. If different provisions are to be given effect on the basis of different conflict-of-laws rules, the provisions applicable pursuant to Article 9(2) Rome I Regulation, Article 16 Rome II Regulation take precedence over those giving effect pursuant to Article 9(3), Article 12(2) Rome I Regulation, Article 17 Rome II Regulation. In the context of data protection law, this implies that the data protection law of the European Union or one of its member states takes precedence over the data protection law of a third country before European courts if those provisions have the quality of an overriding mandatory provision. This also applies if the data protection law of the third country likewise has the quality of an overriding mandatory provision.

To the extent that a provision of substantive Union law is given effect in different ways by the general conflict-of-laws acts, the precise determination of the way in which it is given effect is relevant with regard to the prerequisites and the respective legal consequences. Therefore, it is always necessary to examine whether a provision of substantive Union law has been declared applicable by a conflict-of-laws rule and whether the respective provision is to be classified as an overriding mandatory provision. This also applies to the provisions of the GDPR, which are part of substantive Union law.

Insofar as the GDPR is thus subject to the conflict of laws, the question arises as to whether the general conflict-of-laws rules apply or whether the GDPR itself contains a conflict-of-laws rule in its provision on the territorial scope. Furthermore, the question arises as to whether the

provisions of the GDPR have the quality of an overriding mandatory provision. Both issues are a matter of interpretation. An examination of various acts of substantive Union law reveals a lack of uniformity in the assessment of whether the territorial rules contained in these acts are to be regarded as conflict-of-laws rules. It is also unclear, which, if any, provisions of the respective acts are to be classified as overriding mandatory provisions. Moreover, in particular as regards the presumption of a unilateral conflict-of-laws rule, it is not possible to identify a system for assessing the existence of a conflict-of-laws element contained in a provision on the territorial scope. However, the multi-stage test developed for analysing the existence of such an element in self-limiting rules in the previous chapter can be used to justify the attribution of a conflict-of-laws element to rules on the territorial scope of application in individual cases. This shows that the considerations made in the first chapter with regard to self-limiting rules also apply to acts of substantive Union law. As regards the categorisation of provisions of substantive Union law as overriding mandatory provisions, such a categorisation is possible in principle but is highly controversial in detail. Typically, such a categorisation is only accepted if the European legislator expressly provides for the classification as an overriding mandatory provision.

To the extent that substantive Union law – and therefore also the GDPR – contains a unilateral conflict-of-laws rule, it takes precedence over conflict-of-laws rules contained in the general conflict-of-laws acts of the European Union. Otherwise, the general conflict-of-laws acts of the European Union remain applicable. This means, *inter alia*, that a choice of law with regard to the substantive Union law is possible. The general conflict-of-laws acts remain also applicable, where a provision of substantive Union law is to be classified as an overriding mandatory provision. However, having regard to the meaning and purpose of overriding mandatory provisions, the application of the general conflict-of-laws acts must not reduce the effect of overriding mandatory provisions.

Having established that the provisions of the GDPR are subject to conflict of laws, and having identified the criteria for determining the conflict-of-laws relevance of the GDPR, the following chapter examines how to determine the law applicable to data protection claims in cross-border situations. First, it will be analysed which conflict-of-laws rules determine the law applicable to data protection claims. Subsequently, it will be examined how the GDPR fits into the determination of the applicable data protection law. This requires an assessment of both the potential conflict-of-laws element in Article 3 GDPR, and the classification of the provisions of the GDPR as overriding mandatory provisions. Finally, it will be examined whether the determination of the applicable law for data protection claims is appropriate *de lege lata* or

whether a dedicated conflict-of-laws rule for data protection claims is required *de lege ferenda* and how such a provision could be structured.

C. The Conflict of Laws of Data Protection

As has been shown, the legal acts of the European Union, insofar as they regulate a private-law relationship, also integrate into the system of conflict-of-laws rules. These legal acts may be applied by means of conflict-of-laws rules or may be taken into account in addition to the law referred to by conflict-of-laws rules. To this extent, they may also be given effect as overriding mandatory rules. Where a provision of substantive Union law is to be classified as an overriding mandatory provision, it is always given effect as such before the European courts. As an overriding mandatory provision, it supersedes any provision to which effect is attributed by other means of conflict of laws. To assess whether and to what extent European Union law is relevant under the conflict of laws in a cross-border situation, it must thus be examined whether these provisions are given effect by conflict-of-laws rules and whether they are to be classified as overriding mandatory rules.

If a legal act of substantive Union law contains a provision on its territorial scope of application, this provision may have an impact on the conflict of laws. Those provisions on the territorial scope of application might incorporate an element of conflict of laws. Whether this is the case is to be established by way of interpretation. Decisive in this respect is the extent to which the territorial scope of application of the legal act of substantive Union law is restricted by the interaction of the conflict of laws of the European Union and the provision on the territorial scope of application of the legal act.

The previous considerations are of particular relevance for the conflict of laws of data protection.[796] A closer examination of the GDPR is also of specific interest since the determination of the applicable data protection law is considered to be particularly problematic.[797] Therefore, in the following, it will be examined how the applicable data protection law besides the GDPR is to be established (I.). This issue is of importance regardless of how the applicability of the GDPR is determined in the context of conflict of laws specifically for three reasons. Firstly, it is essential for the establishment of the conflict-of-laws relevance of the provision on the territorial scope of application of the GDPR on the basis of the multi-stage test proposed above.[798] Secondly, the provisions applicable under the general conflict-of-laws rules are in any event relevant in situations where the scope of application of the GDPR is

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796 In the following, the term "data protection law" is used to describe the legal matter relating to regulations concerning data which can be directly or indirectly associated with a natural person, see on this term already Introduction I.

797 Lee Bygrave, *Data Privacy Law* (Oxford University Press 2014) 199.

798 See A.II.3.c)(3)(a)(iii) and B.IV.1.b)(2).

not opened.[799] In these cases, data protection claims may arise from national data protection law, which must however be referred to by the conflict of laws[800]. Thirdly, the GDPR does not provide for a conclusive and exhaustive regulation of data protection claims.[801] For claims for damages, this already follows from Recital 146 sentence 3 GDPR. Pursuant to this Recital the assessment of the existence of a damage under Article 82(1) GDPR "is without prejudice to any claims for damage deriving from the violation of other rules in Union or Member State law". According to a contested view, even with regard to all other claims, the provisions of the GDPR are not intended to provide for a conclusive regulation.[802] In any case, the applicability of national data protection law is contingent upon the free movement of personal data within the European Union being neither restricted nor prohibited.[803] To the extent that national data protection law thus applies besides the GDPR, the applicable data protection law must also be determined on the basis of the general conflict-of-laws rules.

Subsequently, the applicability of the GDPR under conflict of laws will be addressed. Especially, it needs to be investigated whether the GDPR by itself determines its applicability under conflict of laws or whether it is also subject to the general conflict-of-laws acts of the European Union (II.). Finally, it will be explored whether *de lege ferenda* an independent conflict-of-laws rule for data protection claims is required (III.).

I. The Determination of the Law Applicable to Data Protection Claims

In order to assess the applicable law to matters involving an infringement of the right to data protection, it is first necessary to examine whether the conflict-of-laws acts of the European Union or national law apply to a data protection claim. To that end, it is first necessary to ascertain the substantive scope of application of the European Union's conflict-of-laws act in relation to data protection claims (1.). Then, it is to be considered whether data protection claims are excluded from the scope of application of this conflict-of-laws act (2.). Further, it must be examined by means of which conflict-of-laws provisions the respective act determines the applicable data protection law and which law it refers to (3.). Finally, it is analysed to what

799 Luís De Lima Pinheiro, 'Law Applicable to Personal Data Protection on the Internet: Some Private International Law Issues' (2008) 18 Anuario español de Derecho internacional privado 163, 179.

800 See above A.II.2.

801 Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 206; Carlo Piltz, 'Art. 82', in Peter Gola and Dirk Heckmann (eds), *Datenschutzgrundverordnung, Bundesdatenschutzgesetz* (3rd edn, C.H. Beck 2022) para 27; Gerald Spindler and Anna Horváth, 'Art. 82 DSGVO', in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (4th edn, C.H. Beck 2019) para 4-5.

802 Sabine Quaas, 'Art. 82 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg (eds), *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 8 et seq.

803 Article 1(3) GDPR.

extent the law identified in this way provides rules for the respective facts and which further conflict-of-laws rules govern the legal assessment of those facts and declare rules to be applicable (4.).

1. The Relevant Conflict-of-Laws Act under the Law of the European Union

In the area of the law of obligations, to which matters regulated by data protection law belong, the European legislator has comprehensively harmonised conflict of laws through the Rome I Regulation and the Rome II Regulation. The law applicable to data protection claims is therefore determined by either the Rome I Regulation or the Rome II Regulation. Thus, prior to identifying the relevant conflict-of-laws rule, it is to be examined by which of these two regulations the law applicable to data protection claims is determined.

a) The Rome II Regulation as Decisive Legal Act in Identifying the Applicable Law

The Rome I Regulation and the Rome II Regulation govern the law applicable to contractual and non-contractual obligations respectively. Claims based on data protection law can arise both in situations where there is a contractual relationship between the parties and in situations where there is no such relationship. However, data protection claims are anyways regularly derived from a non-contractual obligation and thus not subject to the Rome I Regulation. The Rome I Regulation is only authoritative if the protection of personal data is precisely the subject matter of a contract.

This categorisation is supported firstly by the legislative history of the Rome II Regulation. For a long time during the legislative process, the Rome II Regulation provided for a special conflict-of-laws provision for claims relating to the processing of personal data at various points and in different forms. This provision was only deleted from the Rome II Regulation towards the end of the legislative process.[804] Thus, the European legislator also seemed to assume that the law applicable to data protection claims would generally be subject to the Rome II Regulation. Secondly, this categorisation also follows from the case law of the ECJ on the demarcation of contractual and non-contractual obligations under Article 7 Brussels I*bis* Regulation. This case law can also be applied to the conflict of laws.[805] Pursuant to these

804 See on the legislative history of this provision François Meier, 'Unification of choice-of-law rules for defamation claims' (2016) 12 Journal of Private International Law 492, 495-499; Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 3.217 et seq.

805 Cf. Recital 7 Rome II Regulation and the comments in the Commission's draft Rome II Regulation, Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"), COM(2003) 427, 9; this is also in line with the established case law of the ECJ, cf. ECJ, C-359/14 and C-475/14 *ERGO Insurance* [2016] ECLI:EU:C:2016:40 para 43 et seq.; ECJ, C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612 para 36 et seq. and is the unanimous view in the literature

decisions, a contractual obligation is "a legal obligation freely consented to by one person towards another".[806] To the extent to which such an obligation exists, the decisive factor for the characterisation of the individual claim is whether an interpretation of that obligation is indispensable to determine whether conduct is lawful or unlawful.[807] Crucial is whether the contract can be disregarded without liability ceasing to exist.[808]

In light of the delimitation criteria developed by the ECJ, claims based on data protection law are to be classified as stemming from a non-contractual obligation. For their establishment – as a rule – a freely consented obligation is not required; instead, they are based on the rules of data protection law as such. Something else only applies if an obligation to protect personal data has been made the subject matter of a contract. In these cases, these data protection obligations are established by the contract and the applicable data protection law in this respect is defined by the Rome I Regulation.

b) Relevance of a Consent and a Contractual Obligation for the Lawfulness of Data Processing

No objection may be raised to this finding on the grounds that the absence of consent to the data processing is often a prerequisite for the establishment of claims under the data protection law.[809] It could be argued that this consent is of a contractual or at least contract-like nature and that a claim under data protection law typically presupposes the absence of such consent as a negative condition. Based on the ECJ case law on the distinction between contractual and non-contractual obligations, it could be reasoned that an interpretation of this consent is required to ascertain the validity of the claim and that the claim should therefore be categorised as contractual.

However, in the vast majority of cases, consent precludes the assertion of a claim for a tortious violation of legal interests. If one were to conclude from the requirement of the absence of consent that the respective claim originates from a contractual obligation, there would hardly be any scope of application for the Rome II Regulation in tort claims.

Ivo Bach, 'Art. 4', in Peter Huber (ed), *Rome II Regulation Pocket Commentary* (sellier 2011) para 15; Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 3.104; Francisco Garcimartín Alférez, 'The Rome II Regulation: On the way towards a European Private International Law Code' (2007) 7 European Legal Forum I-77, 80 et seq.; Axel Halfmeier, 'Article 1 Rome II', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 28.

806 ECJ, C-359/14 and C-475/14 *ERGO Insurance* [2016] ECLI:EU:C:2016:40 para 44; ECJ, C-59/19 *Wikingerhof* [2020] ECLI:EU:C:2020:950 para 23; ECJ, C-307/19 *Obala i lučice* [2021] ECLI:EU:C:2021:236 para 83; ECJ, C-242/20 *HRVATSKE ŠUME* [2021] ECLI:EU:C:2021:985 para 44.

807 ECJ, C-548/12 *Brogsitter* [2014] ECLI:EU:C:2014:148 para 24 et seq.

808 ECJ, C-59/19 *Wikingerhof* [2020] ECLI:EU:C:2020:950 para 35.

809 See e.g. Article 6(1) lit. a) GDPR.

The categorisation of a claim based on data protection law as a non-contractual obligation is also not excluded as data protection law itself partially ties the lawfulness of data processing to the existence of a contract.[810] As such, liability under data protection law exists independently of the respective contract. A contract may at most lead to a waiver of liability, provided that the data processing is necessary for the performance of a contract. For this purpose, the specific contract must be examined to establish this necessity.[811]

Admittedly, the specific type of contract and its provisions are essential for determining whether the data processing is necessary for the performance of the contract. However, the type of contract and its provisions do not directly decide on the lawfulness or unlawfulness of the data processing. In contrast, the lawfulness is determined solely by the standards of the applicable data protection law. In this respect, however, the ECJ has already ruled – at least for antitrust law – that claims arise from a non-contractual obligation even if the existence of a specific infringement must be determined by reference to a contractual obligation, but they are based on a statutory obligation.[812] Such an understanding is also supported by the consideration that the classification of data protection claims as arising from a contractual or non-contractual obligation cannot depend on the grounds of permission listed in the relevant data protection law given in the individual case. This becomes all the more true since, according to the conception at least of the GDPR, several grounds of permission may be given at the same time.[813]

Thus, claims under data protection law are typically – and in the absence of a contract whose subject matter is the protection of personal data[814] – to be classified as being based on a non-contractual obligation.[815] They therefore fall within the substantive scope of application of the Rome II Regulation.

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810 See e.g. Article 6(1) lit. b) GDPR.

811 Waltraut Kotschy, 'Article 6', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 331.

812 ECJ, C-59/19 *Wikingerhof* [2020] ECLI:EU:C:2020:950 para 33-35.

813 Cf. Article 6(1) GDPR "Processing shall be lawful only if and to the extent that at least one of the following applies".

814 Where data protection obligations are the subject matter of a contract and the Rome I Regulation therefore applies, the applicable law is determined by the law of the data processor in accordance with Article 4 Rome I Regulation. As the identification of the applicable law in this respect is generally straightforward, it will not be discussed further below.

815 In conclusion also Jan Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' (2018) 117 Zeitschrift für vergleichende Rechtswissenschaft 50, 75.

2. Data Protection Claims and Article 1(2) lit. g) Rome II Regulation

If the Rome II Regulation is thus in principle authoritative for determining the applicable data protection law, claims based on this legal matter could, however, be excluded from its scope of application pursuant to Article 1(2) lit. g) Rome II Regulation. According to this provision, "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation"[816], are excluded from the scope of application of the Rome II Regulation. If data protection claims were to be classified as violations of privacy in this sense, a determination of the applicable law for those claims by means of the Rome II Regulation would be excluded. The assessment of the applicable law would then be based on the national conflict of laws.

To ascertain whether data protection claims are covered by the exception of Article 1(2) lit. g) Rome II Regulation, it will first be explored which arguments are put forward in this respect and whether they are cogent (a). Further investigating this issue, however, requires a precise delimitation of the relationship between privacy and data protection (b).

a) The Applicability of Article 1(2) lit. g) Rome II Regulation to Data Protection Claims

It is often argued for claims arising out of data protection law to be excluded from the scope of application of the Rome II Regulation.[817] In this respect, it is submitted for data protection to be a central part of privacy to which it is explicitly referred to in Article 1(2) lit. g) Rome II

816 Article 1(2) lit. g) Rome II Regulation.

817 Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 798; Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 2 (16th edn, Sweet & Maxwell 2022) para 34-03; Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 3.108; Peter Mankowski, 'Art. 1', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 171; Christian Kohler, 'Conflict of Laws Issues in the 2016 Data Protection Regulation of the European Union' (2016) Rivista di diritto internazionale privato e processuale 653, 673; Luís De Lima Pinheiro, 'Law Applicable to Personal Data Protection on the Internet: Some Private International Law Issues' (2008) 18 Anuario español de Derecho internacional privado 163, 185; Maja Brkan, 'Data Protection and European Private International Law', EUI Working Papers RSCAS 2015/40, 27 et seq.; Jan Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' (2018) 117 Zeitschrift für vergleichende Rechtswissenschaft 50, 75 et seq.; Andreas Engel, 'Art. 27 Rom II-VO', in Markus Würdinger (ed), *juris PraxisKommentar BGB*, Band 6 (10th edn) para 6 fn. 9; Florian Jotzo, *Der Schutz personenbezogener Daten in der Cloud* (2nd edn, Nomos 2020) para 244; Jan Oster, 'Gefällt Facebook nicht: Die Zähmung eines Datenriesen durch Internationales Datenschutz-Privatrecht' (2023) Praxis des Internationalen Privat- und Verfahrensrechts 2023, 198, 205; Matteo Fornasier, 'Art. 40 EGBGB', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR EGBGB* (C.H. Beck 2024) para 97; Maja Brkan, 'Data Protection and Conflict-of-Laws: A Challenging Relationship' (2016) 2 European Data Protection Law Review 324, 330; Jiahong Chen, 'How the best-laid plans go awry: the (unsolved) issues of applicable law in the General Data Protection Regulation' (2016) 6 International Data Privacy Law 310, 318.

Regulation and for data protection rules to be encompassed by rules relating to privacy.[818] Furthermore, the wording of the DPD is invoked, which dealt with the "right to privacy with respect to the processing of personal data".[819] In addition, several drafts of the Rome II Regulation provided for a special conflict rule for "violations of privacy or of rights relating to the personality resulting from the handling of personal data".[820] This would imply that data protection is part of privacy or personal rights. Moreover, Article 30(2) Rome II Regulation – which places data protection in a context with privacy – would also show that the law applicable to data protection was not intended to be governed by the Rome II Regulation.[821] All this would demonstrate how data protection and privacy are inextricably linked. Furthermore, also the ECJ would not strictly distinguish between the two concepts but regularly uses them as a pair of concepts.[822] Finally, a distinction between privacy and data protection to determine the scope of application of the Rome II Regulation would be associated with considerable difficulties of delimitation.[823]

However, in contrast, it is partly assumed for claims arising out of data protection law to be subject to the Rome II Regulation.[824] To this end, it is argued in particular that Article 1(2) lit. g) Rome II Regulation has been primarily aimed at violations of privacy in relation to freedom of the press and freedom of expression in other media than to data protection.[825] It is also sometimes considered of privacy and data protection in the law of the European Union being

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818 Maja Brkan, 'Data Protection and European Private International Law', EUI Working Papers RSCAS 2015/40, 27 et seq.; see for a transatlantic comparison of the relationship between privacy and data protection also Chris Hoofnagle, Bart van der Sloot and Frederik Borgesius, 'The European Union general data protection regulation: what it is and what it means' (2019) 28 Information & Communications Technology Law 65, 70.

819 Article 1(1) DPD.

820 See e.g. European Parliament, 'Recommendation for Second Reading on the Council common position for adopting a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("ROME II")', 9751/7/2006 – C6 0317/2006 – 2003/0168(COD) Article 7a(3).

821 Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 3.108; Florian Jotzo, *Der Schutz personenbezogener Daten in der Cloud* (2nd edn, Nomos 2020) para 244.

822 ECJ, C-131/12 *Google Spain and Google* [2014] ECLI:EU:C:2014:317 para 38, 68 et seq.; ECJ, C-362/14 *Schrems* [2015] ECLI:EU:C:2015:650 para 39; see also comprehensively Juliane Kokott and Christoph Sobotta, 'The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR' (2013) 3 International Data Privacy Law 222, who, however, derive an independent meaning to both legal concepts from the case-law of the ECJ.

823 Maja Brkan, 'Data Protection and Conflict-of-Laws: A Challenging Relationship' (2016) 2 European Data Protection Law Review 324, 332.

824 Dulce Lopes, 'GDPR – Main International Implications' (2020) European Journal of Privacy Law & Technology 9, 19; Florian Sackmann, 'Die Beschränkung datenschutzrechtlicher Schadensersatzhaftung in Allgemeinen Geschäftsbedingungen' (2017) Zeitschrift für Wirtschaftsrecht 2450, 2452; Thomas Becker, 'Artikel 82 DSGVO', in Kai-Uwe Plath (ed), *DSGVO/BDSG/TTDSG* (4th edn, ottoschmidt 2023) para 17.

825 Dulce Lopes, 'GDPR – Main International Implications' (2020) European Journal of Privacy Law & Technology 9, 19.

two at least partly independent concepts.[826] This would also be reflected in the Charter of Fundamental Rights of the European Union[827] which distinguishes between these two rights from a fundamental rights perspective by providing a separate provision for each.[828] Furthermore, the right to data protection is not merely a specific type of the right to privacy, as not all personal data and data processing necessarily would fall into the sphere of privacy.[829]

b) The Relation of Data Protection and Privacy

Especially those who advocate for an exclusion of claims arising out of data protection law from the scope of application of the Rome II Regulation pursuant to Article 1(2) lit. g) Rome II Regulation regularly point to the relationship between data protection and privacy. To assess whether the arguments based on such considerations are convincing, it is first necessary to examine in more detail the meaning the European legislator attaches to privacy (1). This requires to identify how the term "privacy" within the meaning of Article 1(2) lit. g) Rome II Regulation is defined and which phenomena are covered by it by way of autonomous interpretation.[830] Due to the particular significance of data protection and privacy in terms of fundamental rights[831], the interpretation of the corresponding concepts of fundamental rights – which are stipulated in Article 7 CFR and Article 8 CFR[832] – are to be drawn upon in particular. Subsequently, it will be examined which phenomena are covered by data protection (2). Based on this, the relationship between privacy and data protection is considered (3).

826 Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 3.01; this is, however, disputed, see comprehensively Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2016) 89 et seq.

827 Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 (last consolidated version) (CFR).

828 Cf. Article 7 CFR and Article 8 CFR; see also Herke Kranenborg, 'Article 8', in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (2nd edn, Hart Publishing 2021) para 08.36 et seq. on the distinction from a fundamental rights perspective which is also relevant in the present case, since secondary law is to be interpreted in the light of fundamental rights; cf. ECJ, C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECLI:EU:C:2003:294 para 68.

829 Maria Tzanou, 'Is Data protection the same as privacy? An analysis of telecommunications' metadata retention measures' (2013) 17 Journal of Internet Law 21, 26.

830 See on autonomous interpretation Hannes Rösler, 'Interpretation autonomous', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 1337.

831 See for data protection Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 3.01 and for privacy in terms of Article 1(2) lit. g) Rome II Regulation Peter Mankowski, 'Art. 1', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 167, 172.

832 The right to data protection is also guaranteed by Article 16 TFEU. However, as there are no differences to Article 8 CFR with regard to the object of protection, in the following only Article 8 CFR is referred to.

(1) The Meaning of Privacy under Article 1(2) lit. g) Rome II Regulation

In determining the meaning of privacy under Article 1(2) lit. g) Rome II Regulation, it becomes apparent that the underlying problem as to whether data protection claims are excluded from the scope of the Rome II Regulation lies in the absence of a definition of the term "privacy". Despite an extensive discussion of the scope of Article 1(2) lit. g) Rome II Regulation[833] a positive and comprehensive definition of privacy for European conflict of laws is lacking.[834] This follows not least from the missing consensus on the legal nature and content of this right.[835] Accordingly, it is also maintained that – apart from the fundamental right established in the European Convention on Human Rights (ECHR)[836] and the CFR – privacy is merely a collective term for various phenomena which bundles a wide variety of legal remedies.[837]

The attribution to this collective term is supposed to be oriented less "[…] on the nature of the event on which the claim is based, but on its consequences for the plaintiff in the form of an invasion of his privacy or damage to his reputation […]".[838] In essence, privacy covers claims which are directed to prevent the disclosure of information concerning the private life of an individual or to compensate an individual for the consequences of unauthorised disclosure.[839] This includes, in particular, cases of "[…] misuse of private information borne out of non-

833 See e.g. only David Kenny and Liz Heffernan, 'Defamation and privacy and the Rome II Regulation', in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2015) 315; Javier Carrascosa González, 'The Internet – Privacy and Rights Relating to Personality' (2016) 378 Recueil des Cours 263, 337, 390 et seq.; Jan von Hein and Anna Bizer, 'Social Media and the Protection of Privacy: Current Gaps and Future Directions in European Private International Law' (2018) 6 International Journal of Data Science and Analytics 233; Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 17-060 et seq.

834 Geert van Calster, *European Private International Law* (3rd edn, Hart Publishing 2020) para 4.25.

835 Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 3.110; Thomas Thiede, 'A Topless Duchess and Caricatures of the Prophet Mohammed: A Flexible Conflict of Laws Rule for Cross-Border Infringements of Privacy and Reputation' (2012/2013) 14 Yearbook of Private International Law 247, 250.

836 Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 005) <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=005> accessed 4 May 2024.

837 Burkhard Hess, 'The Protection of Privacy in the Case Law of the CJEU', in Burkhard Hess and Cristina Mariottini (eds), *Protecting Privacy in Private International and Procedural Law and by Data Protection* (Nomos 2015) 81, 84; so also generally Jan von Hein and Anna Bizer, 'Social Media and the Protection of Privacy: Current Gaps and Future Directions in European Private International Law' (2018) 6 International Journal of Data Science and Analytics 233 et seq., according to who "[p]rivacy as a legal term comprises various aspects worthy of protection that essentially determine the personality of a human being, [...]".

838 Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 3.226.

839 Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 3.225; Anna Bizer, *Persönlichkeitsrechtsverletzungen in sozialen Medien* (Mohr Siebeck 2022) 126; see from a fundamental rights perspective also ECJ, C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECLI:EU:C:2010:662 para 58, according to which "[b]ecause the information becomes available to third parties, [...] constitutes an interference with their private life within the meaning of Article 7 of the Charter".

contractual breach of confidence […]" and "[…] rights related to the name, to one's image and voice, or the right to one's honour […]".[840] Thus, in principle, privacy can also be affected by the processing of personal data.[841]

Approaching the concept of privacy by way of an excluding definition, such acts of infringement do not constitute an interference with privacy which are accompanied by physical harm to the injured party.[842] Furthermore, the right to privacy does not protect publicly available data.[843] Infringement of commercial honour, alleging defamatory facts about a competitor in the course of trade[844] and disclosure of trade secrets[845] are governed by Article 6 Rome II Regulation and thus do not form part of privacy within the meaning of Article 1(2) lit. g) Rome II Regulation.[846]

When creating Article 1(2) lit. g) Rome II Regulation, the European legislator primarily had the publication of information by mass media in mind.[847] It therefore aimed to exclude a very specific aspect of the right to privacy. In accordance with the scope of application primarily envisaged by the European legislator, Article 1(2) lit. g) Rome II Regulation should therefore serve to protect freedom of speech and, in particular, freedom of the press.[848]

Overall, privacy within the meaning of Article 1(2) lit. g) Rome II Regulation is to be understood narrowly.[849] On the basis of the preceding, it emerges that the right to privacy within the meaning of Article 1(2) lit. g) Rome II Regulation is primarily violated by such acts which invade one's private sphere or by making information relating to one's private life or affecting one's claim to social status accessible to a group of persons. In addition, Article 1(2) lit. g)

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840 Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 798.

841 ECJ, C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECLI:EU:C:2010:662 para 52; Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2016) 107 et seq. with regard to Article 8 ECHR.

842 Peter Mankowski, 'Art. 1', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 173.

843 Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2016) 124.

844 Axel Halfmeier, 'Article 1 Rome II', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 58; Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 798.

845 Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 3.227.

846 Anna Bizer, *Persönlichkeitsrechtsverletzungen in sozialen Medien* (Mohr Siebeck 2022) 127.

847 Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"), COM(2003) 427, 17.

848 Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 798.

849 Ivo Bach, 'Art. 1', in Peter Huber (ed), *Rome II Regulation Pocket Commentary* (sellier 2011) para 59; Luís De Lima Pinheiro, 'Law Applicable to Personal Data Protection on the Internet: Some Private International Law Issues' (2008) 18 Anuario español de Derecho internacional privado 163, 187.

Rome II Regulation was also specifically designed with a view to the publication of information by mass media.

(2) The Meaning of Data Protection in the Law of the European Union

In contrast, data protection law – at least as it has been developed under the GDPR – deals exclusively with the processing of personal data and the free movement of such data.[850] Data protection is intended to safeguard the individual's interest in keeping information secret.[851]
It is irrelevant what kind of information is at issue.[852] Data protection covers all data which might be linked to an individual.[853] It also covers data which can be attributed to a natural person only by a single person with a reasonable effort.[854] Accordingly, already the storage of an IP address constitutes a processing of personal data which may be subject to the rules of data protection law.[855] This is even true if the person storing the IP address cannot directly attribute it to a natural person.[856] In order to be protected by data protection law, therefore, the information does not need to have a particular quality beyond its personal connection – in particular, it does not require to be directly attributable to a natural person.
Also, the activities covered are not limited to certain types of conduct, but only presuppose a processing by partly automated means or a processing of personal data which are stored or are intended to form part of a file system.[857]

(3) The Relation of Privacy and Data Protection in Article 1(2) lit. g) Rome II Regulation

At the outset, it therefore follows from the above definitions that both privacy and data protection are pertinent when personal data are processed. With regard to the Article 1(2) lit. g) Rome II Regulation, however, a distinction is to be drawn between the two legal interests.

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850 Article 1(1) GDPR.
851 Herke Kranenborg, 'Article 8', in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (2nd edn, Hart Publishing 2021) para 08.28.
852 Herke Kranenborg, 'Article 8', in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (2nd edn, Hart Publishing 2021) para 08.113 with reference to ECJ, C-434/16 *Nowak* [2017] ECLI:EU:C:2017:994 para 34.
853 Still on the DPD Commission of the European Communities, Commission Communication on the protection of individuals in relation to the processing of personal data in the Community and Information security, COM(90) 314, 19; Article 27 Data Protection Working Party, 'Opinion 4/2007 on the concept of personal data' (01248/07/EN WP 136) 6.
854 Recital 26 GDPR; ECJ, C-582/14 *Breyer* [2016] ECLI:EU:C:2016:779 para 40-44 on the provisions of the DPD which are identical in content.
855 ECJ, C-582/14 *Breyer* [2016] ECLI:EU:C:2016:779 para 49.
856 ECJ, C-582/14 *Breyer* [2016] ECLI:EU:C:2016:779 para 44.
857 Article 2(1), 4(2) GDPR.

(a) Privacy and Data Protection in the ECHR and CFR

The European legislator's fundamental rights understanding of the right to privacy contained in Article 7 CFR is decisively shaped by Article 8 ECHR and the case law of the ECtHR.[858] However, the ECHR lacks an explicit provision on data protection as provided for in Article 8 CFR. In its interpretation of Article 8 ECHR, the ECtHR was thus forced to understand the concept of privacy in a generally broad way. Such a broad understanding has allowed the ECtHR to also subject such situations to fundamental rights protection which are in fact subject to the data protection under Article 8 CFR. Given that European Union law provides for an independent fundamental rights provision on data protection in Article 8 CFR, it is questionable whether such a broad understanding of privacy is also necessary for privacy under Article 7 CFR and for European Union law as a whole.[859]

But even if one were to assume an interpretation of privacy in Article 7 CFR which must follow that of Article 8 ECHR, data protection also has an independent scope of application at the level of European fundamental rights. This scope extends, in particular, to those acts and personal data not governed by the right to privacy and moreover grants further rights to the data subject in this respect.[860] For these reasons, there is a strong case for giving data protection its own area of regulation at the level of European fundamental rights.

(b) Privacy and Data Protection under the Rome II Regulation

Regarding Article 1(2) lit. g) Rome II Regulation, the separability of both legal interests at the fundamental rights level argues against the assumption of privacy also comprising data protection in its entirety. Such an understanding is also contradicted by the fact that – at the level of fundamental rights – the scope of protection with regard to the acts and data covered by the right to data protection is broader than that of the right to privacy. This is further underlined by the fact of privacy only being mentioned in the GDPR as a right which needs to be balanced with the right to data protection.[861] In particular, to the extent that the GDPR refers to fundamental rights guarantees for its justification, privacy is not mentioned.[862] At least the more recent European legislator therefore distinguishes between the two rights on the level of secondary law. This suggests that a distinction should also be made for Article 1(2) lit. g) Rome II Regulation between claims arising from a violation of privacy and data protection.

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858 This already follows from Article 52(3) CFR.

859 Arguing for a different scope of application of Article 7 CFR and Article 8 CFR Gerrit Hornung and Indra Spieker gen. Döhmann, 'Art. 1', in Indra Spieker gen. Döhmann, Vagelis Papakonstantinou, Gerrit Hornung and Paul De Hert (eds), *General Data Protection Regulation* (Nomos 2023) para 35.

860 Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2016) 122-129.

861 Recital 4 sentence 2, 3 GDPR.

862 Recital 1 GDPR; Article 1(2) GDPR.

This is also supported by the fact that the arguments of those who consider infringements of the right to data protection to be covered by Article 1(2) lit. g) Rome II Regulation are not convincing. To the extent that it is argued for data protection to be addressed in Article 30(2) Rome II Regulation only in conjunction with privacy, it does not necessarily follow from this that data protection is merely a sub-category of privacy from a conflict-of-laws perspective. The wording of Article 30(2) Rome II Regulation[863] may also be read as indicating that data protection is part of "[…] rights relating to personality […]" and not privacy. In addition, Article 30(2) Rome II Regulation requires the "[…] taking into account […]" of the conflict-of-laws issues related to the DPD in the course of an enumeration, which also includes "[…] rules relating to freedom of the press and freedom of expression in the media […]". However, freedom of the press and freedom of expression are precisely two legal interests that have to be weighed against the right to privacy when determining whether the right to privacy has been infringed. The enumeration found in Article 30(2) Rome II Regulation is therefore silent as to whether the rights mentioned there belong to privacy and to rights relating to personality. Also, the reference to the joint use of both legal interests in the case law of the ECJ overlooks the fact of the ECJ basing some of its decisions exclusively on Article 8 CFR.[864]

The two legal interests are therefore closely related[865] and in some situations both legal interests are present, allowing for joint legal treatment. However, this does not result in the respective legal interests being merged and losing their legal independence. On the contrary, it could be argued if only one of the two legal interests – as in the case of Article 1(2) lit. g) Rome II Regulation – is mentioned, only this legal interest is supposed to be subject to regulation. Particularly in the light of the legislative history of Article 1(2) lit. g) Rome II Regulation it is not clear why privacy within this meaning should also include data protection claims. This exception was intended to protect English publishers especially from the application of foreign law in the course of their reporting.[866] Yet, it lacks a direct link to the processing of personal data.

Thus, at the level of European fundamental rights, a distinction must be made between privacy and data protection. The legislative history and the rationale underlying the introduction of

863 "[V]iolations of privacy and rights relating to personality, taking into account [...] conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 [...]".

864 See ECJ, C-543/09 *Deutsche Telekom* [2011] ECLI:EU:C:2011:279 para 49 et seq.; ECJ, C-614/10 *Commission v Austria* [2012] ECLI:EU:C:2012:631 para 36.

865 Maja Brkan, 'Data Protection and European Private International Law', EUI Working Papers RSCAS 2015/40, 27; see also the Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17, 20, which bases both Article 7 CFR and Article 8 CFR, *inter alia*, on Article 8 ECHR.

866 Peter Mankowski, 'Art. 1', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 165, 168-170; see above C.I.2.b)(1).

Article 1(2) lit. g) Rome II Regulation also favour a distinction between the two legal interests. Finally, the arguments in favour of an aggregation of data protection claims under Article 1(2) lit. g) Rome II Regulation are not convincing. Article 1(2) lit. g) Rome II Regulation therefore does not apply to claims arising from data protection law.

c) Situations Involving a Violation of the Right to Privacy and Data Protection

In situations where the right to privacy and the right to data protection overlap, Article 1(2) lit. g) Rome II Regulation does not exclude data protection claims from the scope of the Rome II Regulation. In this respect, it is necessary to distinguish whether the claim asserted in the individual case requires the processing of personal data. Even in situations where an act interferes with the right to privacy and the right to data protection, resulting data protection claims are subject to the Rome II Regulation if this claim requires the processing of personal data.

The exceptions in Article 1(2) Rome II Regulation are to be interpreted narrowly.[867] In addition, the European legislator intended this exception to serve to protect freedom of speech, and in particular, freedom of the press.[868] He therefore had a very specific substantive legal protection content in mind, which is limited to a tightly defined sub-area of privacy. In contrast, data protection law has a strong procedural element.[869] Because of this different aspect of protection, where a claim requires the processing of personal data, that claim is covered by the Rome II Regulation.

The advantage of the formal categorisation proposed here – according to whether the data protection claim presupposes a data processing – is that it allows for a precise and swift determination of the applicable law. Admittedly, such a formal distinction between claims arising from the same act is in principle alien to the Rome II Regulation itself. However, the fact that one and the same act can give rise to contractual and non-contractual claims, which are then subject to either the Rome I or the Rome II Regulation, already shows that such a different assessment of the scope of application of the Rome II Regulation is possible.

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867 European Commission, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"), COM(2003) 427 final, 9; Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 2 (16th edn, Sweet & Maxwell 2022) para 34-025; different however Peter Mankowski, 'Art. 1', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 86.

868 Cf. Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"), COM(2003) 427, 18; see on the legislative history of Article 1(2) lit. g) Rome II Regulation Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 3.217 et seq.

869 Tobias Lock, 'Article 8 CFR', in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) para 4.

3. The Applicable Law for Data Protection Claims under Article 4 Rome II Regulation

To the extent that the Rome II Regulation applies to a data protection claim, Article 4 Rome II Regulation determines the applicable law in the absence of specific conflict-of-laws rules. However, it is unclear whether Article 4 Rome II Regulation identifies the applicable law for all types of data protection claims (a). Furthermore, it needs to be analysed which law the rules of Article 4 Rome II Regulation deem applicable to data protection claims (b).

a) The Applicability of Article 4 Rome II Regulation to Data Protection Claims

Article 4 Rome II Regulation presupposes the existence of a "tort/delict". This term is to be interpreted autonomously[870] and broadly[871]. Typically, two elements are required for a tort/delict under Article 4 Rome II Regulation. Firstly, there must be some kind of damage to a person. Secondly, this damage must be the result of an event caused by the injuring party's conduct.[872] Tort/delict may therefore be defined as a "[…] non-contractual obligation establishing the defendant's responsibility to the claimant for [...] an act, [...] which (1) has adverse consequences for the claimant [...] and (2) is an act [...] of the defendant […]"[873]. The type of damage or how it is to be remedied is of no importance.[874] Even the mere threat of damage is sufficient to constitute a tort/delict.[875]

Data protection law provides a multitude of claims of various kinds.[876] According to the above definition, the categorisation of such claims under Article 4 Rome II Regulation may be

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870 Jonathan Hill and Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) para 5.20; Ivo Bach, 'Art. 4', in Peter Huber (ed), *Rome II Regulation Pocket Commentary* (sellier 2011) para 1.

871 Ulrich Magnus, 'Art. 4', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 12.

872 With differences in the wording in detail Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 805 et seq.; Ulrich Magnus, 'Art. 4', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 14; Jonathan Hill and Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press 2016) para 5.18.

873 Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 3.244; similar Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 2 (16th edn, Sweet & Maxwell 2022) para 35-021.

874 Adam Rushworth and Andrew Scott, 'Rome II: Choice of law for non-contractual obligations' (2008) Lloyd's Maritime and Commercial Law Quarterly 274, 302.

875 Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 2 (16th edn, Sweet & Maxwell 2022) para 35-021; Ulrich Magnus, 'Art. 4', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 17.

876 See, for example Article 13 et seq. GDPR; in the following, reference is made to claims of the GDPR for clarification, although their applicability may be subject to an independent regulatory regime (see below

problematic for two reasons. Firstly, data protection law provides for claims even if the data processing is lawful or at least was lawful at the time of processing. Secondly, claims may be asserted even if no damage has occurred.

(1) Lawful Data Processing and Article 4 Rome II Regulation

Insofar as claims under data protection law are linked to unlawful data processing, they are no different from other claims arising from non-contractual obligations in which a right is violated. This includes, for example, requests to correct inaccurate personal data or data collected through unlawful data processing.[877] In these cases, the data subject's right to the protection of its personal data has been impaired and damage might have occurred accordingly. However, even if the data processing was lawful at the time of the processing or is still lawful at the time of the assertion of the claim, this processing may still constitute a tort/delict within the meaning of Article 4 Rome II Regulation.

Firstly, the mere fact that conduct which is intrinsically unlawful may be lawful under certain conditions cannot alter the fact that the conduct is inherently unlawful and in principle constitutes a tort/delict within the meaning of Article 4 Rome II Regulation. This also applies to the processing of personal data, which is only lawful if certain conditions are met.[878] It is therefore, in principle, an unlawful act.

Secondly, under Article 4 Rome II Regulation, it is in any case immaterial whether the act as such is wrongful in the strict legal sense, or whether fault is required to give rise to a claim.[879] This already follows from Recital 11 sentence 3 Rome II Regulation, which states that strict liability is subject to the Rome II Regulation. However, the requirements and form of strict liability vary between jurisdictions.[880] This applies in particular to the question of whether strict liability presupposes the unlawfulness of the act giving rise to liability.[881] In view of the express intention of the European legislator to subject strict liability to the Rome II Regulation, the lawfulness of an act therefore cannot be relevant for the classification as tort/delict.

C.II.1.c). However, due to their conciseness and accessibility, the claims contained in the GDPR are particularly suitable to clarify the claims at issue in this respect.

877 Cf. for example Articles 16, 17 GDPR.

878 So explicitly Article 6(1) GDPR: "processing shall be lawful only if and to the extent that [...]"; see also Article 13 Chinese Personal Information Protection Law.

879 Ulrich Magnus, 'Art. 4', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 18.

880 Alexandru Daniel On, 'Strict Liability' in Jan Smits, Jaakko Husa, Catherine Valcke and Madalena Narciso (eds), Elgar Encyclopedia of Comparative Law, Volume 3 (Edward Elgar 2023) 441, 441 et seq.

881 Cf. the discussion under German law regarding the liability of the owner of a motor vehicle in § 7 Straßenverkehrsgesetz, Alexander Walter, 'Art. 7 StVG', in Andreas Spickhoff (ed), *beck-online.GROSSKOMMENTAR Rom II-VO* (C.H. Beck 2022) para 110.

Thus, the European legislator intended that the Rome II Regulation should also apply to conduct not generally legally disapproved and therefore lawful.[882] Even if the data were originally or are being processed lawfully, claims based on that processing may be subject to Article 4 Rome II Regulation. Therefore, the nature of the data processing, and in particular its lawfulness, is irrelevant for the classification of a resulting non-contractual obligation as arising out of a tort/delict within the meaning of Article 4 Rome II Regulation.

(2) Data Protection Claims and Damage Within the Meaning of the Rome II Regulation

A categorisation of data protection claims under Article 4 Rome II Regulation could also be precluded by the fact that Article 4 Rome II Regulation, according to its wording, presupposes a damage. This could be particularly relevant to data protection claims. These claims may exist independently of the lawfulness of the data processing and of any harm to the data subject. This is the case, for example, with claims for information about the personal data processed.[883] However, the law applicable to these claims will also be determined by Article 4 Rome II Regulation. While the lawfulness of the data processing – as seen – does not exclude the applicability of Article 4 Rome II Regulation, it cannot be argued in these situations that there is no damage as required by Article 4 Rome II Regulation.

Such a narrow understanding of damage would, firstly, overlook the fact that even the lawful processing of personal data constitutes an interference with the right to data protection, albeit justified in the individual case.[884] According to Article 2(1) Rome II Regulation, "[…] damage shall cover any consequence […]". In view of this broad understanding of damage underlying the Rome II Regulation[885], even an interference with the right to data protection by lawful data processing as such may be regarded as such damage. Secondly, claims for information in particular serve to effectively enforce a right. To this extent, they have, for one thing, a deterrent effect which is supposed to prevent an infringement. Particularly since the threat of a damage is sufficient for the existence of a tort/delict[886], it can be said that corresponding information claims have a comparable damage-preventing effect. Furthermore, such claims for information

882 In the result, also Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 3.245; Gisela Rühl, 'Art. 4 Rom II-VO', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR Rom II-VO* (C.H. Beck 2024) para 37.

883 Cf. e.g. Article 15 GDPR.

884 In this respect, see only the wording of Article 6 GDPR, according to which "[p]rocessing shall be lawful only if and to the extent that [...]"; processing of personal data is thus, at least according to the design of the GDPR, generally prohibited unless it is permitted by way of exception.

885 Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 3.46.

886 Cf. Article 2(3) Rome II Regulation.

constitute, as a rule, a mandatory preliminary stage for the assertion of further claims.[887] Only if the data subject is aware of the data processing that has taken place is it possible to take effective action against any violations of data protection law. In this context, if the applicable law were to be determined differently for information claims than for other data protection claims, there would be a risk that the applicable law would not recognise this type of claim. This could prevent more extensive claims from being brought.

Thus, in the absence of a more specific conflict-of-laws provision, data protection claims of any type are subject to Article 4 Rome II Regulation. This also applies where the data protection claim does not seek financial compensation but, for example, rectification, erasure or information.

(3) Delimitation of Claims for Unjust Enrichment under Article 10 Rome II Regulation

Article 10 Rome II Regulation provides for a conflict-of-laws rule for claims arising from unjust enrichment. Data protection claims could qualify as claims arising from unjust enrichment, but not from tort/delict. To distinguish Article 4 Rome II Regulation from Article 10 Rome II Regulation, some focus on whether the act is of a lawful nature.[888] Others consider the consequences of the claim.[889] For some, both criteria have to be applied.[890]

Data protection claims cannot be categorised as claims arising from unjust enrichment within the meaning of Article 10 Rome II Regulation, neither because of the act giving rise to them nor because of the consequences of this type of claim. Data processing, although legally approved, is fundamentally unlawful and therefore constitutes a tort/delict in nature.[891] With regard to the consequences of a data protection claim, these claims are not only established when the data processor or data controller has gained some kind of advantage from the data processing. Rather, they are linked to the processing as such, irrespective of any benefit that the data processor or data controller may derive from that processing. They are designed to protect data subjects from an infringement of their right to data protection, regardless of the motivation of the data processor or data controller. They therefore do not require the data processor or the

887 Emphasising the relevance of access to information as a requirement to the right of informational self-determination Alexander Dix, 'Art. 12', in Indra Spieker gen. Döhmann, Vagelis Papakonstantinou, Gerrit Hornung and Paul De Hert (eds), *General Data Protection Regulation* (Nomos 2023) para 3.

888 Boris Schinkels, 'Article 10 Rome II', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 14.

889 Peter Mankowski, 'Art. 10', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 10; Andrew Dickinson, *The Rome II Regulation* (Oxford University Press 2008) para 4.13.

890 Adam Rushworth and Andrew Scott, 'Rome II: Choice of law for non-contractual obligations' (2008) Lloyd's Maritime and Commercial Law Quarterly 274, 286; Peter Huber and Ivo Bach, 'Art. 10', in Peter Huber (ed), *Rome II Regulation Pocket Commentary* (sellier 2011) para 7.

891 See above C.I.3.a)(1).

data controller to be enriched and therefore do not serve to siphon off any enrichment. Thus, also in terms of their legal consequences, data protection claims are not to be classified as claims for unjust enrichment within the meaning of Article 10 Rome II Regulation.

b) The Law Applicable to Data Protection Claims under Article 4 Rome II Regulation

According to Article 4 Rome II Regulation[892], the law applicable to a data protection claim is determined by the common habitual residence of the data processor or data controller[893] and the data subject[894], or subsidiarily by the country in which the damage occurs (*lex loci damni*)[895]. If there is a manifestly closer connection with another place, the law of that place applies.[896] Such a manifestly closer connection exists in particular if there is a contractual relationship between the data processor and the data subject in the context of which data are processed.[897] Therefore, if there is a contractual relationship between the data processor and the data subject, the law applicable to this relationship will generally also be decisive for determining the law applicable to data protection claims.

(1) Possible Places Where the Damage Occurs in Case of Data Protection Claims

Determining a common habitual residence of the data processor and the data subject does not generally raise any particular issues in the context of a data protection claim. However, it is questionable how to determine the country where the damage occurs in the case of data protection claims. Since Article 4(1) Rome II Regulation explicitly declares the place where the event giving rise to the damage occurred (*loci delicti*) to be irrelevant, the data processing as the act that leads to the violation of the right to data protection is not decisive. Rather, the decisive factor is where the effects of data processing in the form of an infringement of the right to data protection occur (*loci damni*).

Assessing the country in which the damage occurs (*loci damni*) is particularly difficult in situations such as the present one, where there is usually no physical manifestation of the

892 The parties may also choose the applicable law under Article 14 Rome II Regulation; however, since there are no particularities compared to other non-contractual claims, this provision will not be dealt with separately.

893 Data subjects may have data protection claims against the data controller or the data processor. However, since the assessment of the conflict of laws does not depend on whether the claims are directed against the data controller or the data processor, only the data processor is referred to in the following, even though the relevant considerations apply to both the data controller and the data processor.

894 Article 4(2) Rome II Regulation.

895 Article 4(1) Rome II Regulation.

896 Article 4(3) Rome II Regulation.

897 Cf. Article 4(3) sentence 2 Rome II Regulation; in conclusion also Christian Kohler, 'Conflict of Laws Issues in the 2016 Data Protection Regulation of the European Union' (2016) Rivista di diritto internazionale privato e processuale 653, 671.

damage.[898] For determining the place where the damage occurs under Article 4(1) Rome II Regulation, the immediate and direct consequence of the violation of the right or interest is decisive.[899] Situations giving rise to data protection claims are typically characterised by different factors that may be taken into account in determining the place of the immediate and direct consequences of the infringement of the right to data protection. Firstly, the registered office or the habitual residence or the branch of the data processor may be deemed appropriate. Secondly, the place where the data are processed or where the data subject exercises control over his or her personal data could also be considered appropriate. Thirdly, the habitual residence of the data subject may also be regarded as an appropriate connecting factor.

When specifying the place where the damage occurs, it is to be taken into account that the European legislator itself has emphasised the importance of the predictability and the legally certain determinability of the applicable law as central criteria when identifying the applicable law.[900] For data protection claims, this militates at the outset against recourse to the place of data processing as well as the place of the habitual residence or registered office of the data processor as the place where the damage occurs. For the data subject, – unless data processing in the form of data collection is at issue – it is often neither foreseeable nor determinable by which data processor and where the data processing in the end takes place. The data subject also does not have any influence on this place. Moreover, this place – at least insofar as processing of digital personal data is involved – is also exposed to considerable possibilities of manipulation by the data processor. It is also unclear which part of the data processing in the case of digital data processing is relevant for the assessment of the applicable law. For example, the place where the personal data are stored or the place where the central processing unit is located could be taken into account.[901]

The manipulability of the connecting factor also precludes recourse to the registered office or habitual residence of the data processor. At first sight, these reasons argue in favour of

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898 Ulrich Magnus, 'Art. 4', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 94.

899 Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 811 et seq.; Ulrich Magnus, 'Art. 4', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 72; Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 2 (16th edn, Sweet & Maxwell 2022) para 35-026.

900 Recital 6 Rome II Regulation.

901 This issue is also emphasised by Herke Kraneborg, 'Article 8', in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (2nd edn, Hart Publishing 2021) para 08.105.

determining the applicable law on the basis of the data subject's habitual residence or the place where the data subject exercises control over his or her personal data.

(2) Applying the Principles Developed for Violations of Privacy

For data protection claims, the principles developed in case law and literature on violation of privacy under the Brussels I*bis* Regulation are sometimes used to assess the place where the damage occurs.[902] In cases of violation of this right[903], firstly, the respective place of distribution of the relevant information is considered to be the place where the damage occurs. Secondly, the injured party may also claim all of its damages under the law of the injured party's centre of interest, which is usually at its habitual residence.[904] In abstract terms, violations of privacy rights are thus linked firstly to the place where the direct and immediate consequences of the violation of privacy rights arise and secondly to the place where the centre of interest of the injured party is located.

The relevance of these principles for an infringement of the right to data protection is, however, unclear. Data protection and privacy differ with regard to conflict of laws in terms of their scope of application and are thus in principle two different legal phenomena.[905] A transfer of the principles developed for a violation of privacy to an infringement of the right to data protection is therefore not necessarily possible. In addition – insofar as a transfer of these principles to data protection law is being considered in the literature – the law applicable to data protection claims, in contrast, is assumed to be solely the law at the centre of interests of the injured party.[906] Therefore, even those who intend to transfer the considerations relating to a violation of privacy do not consistently undertake such a transfer for data protection claims.

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902 See explicitly Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 3.109; Jan Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' (2018) 117 Zeitschrift für vergleichende Rechtswissenschaft 50, 76 and Anna Bizer, *Persönlichkeitsrechtsverletzungen in sozialen Medien* (Mohr Siebeck 2022) 353; with regard to international jurisdiction Maja Brkan, 'Data Protection and European Private International Law', EUI Working Papers RSCAS 2015/40, 19.

903 The case law on this has been developed in the context of international jurisdiction under the Brussels I Regulation, but the considerations there can also be applied to the determination of the applicable law, see above C.I.1.a).

904 See comprehensively Peter Mankowski, 'Art. 7 Brussels Ibis Regulation', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. I (ottoschmidt 2016) para 346-373 and on the case law of the ECJ Burkhard Hess, 'The Protection of Privacy in the Case Law of the CJEU', in Burkhard Hess and Cristina Mariottini (eds), *Protecting Privacy in Private International and Procedural Law and by Data Protection* (Nomos 2015) 81, 89-99.

905 See above C.I.2.b)(3)(b).

906 Luís De Lima Pinheiro, 'Law Applicable to Personal Data Protection on the Internet: Some Private International Law Issues' (2008) 18 Anuario español de Derecho internacional privado 163, 187; Matteo Fornasier, 'Art. 40 EGBGB', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR EGBGB* (C.H. Beck 2024) para 102; Bernd von Hoffmann, 'Art. 40', in *Staudinger Internationales Recht der außervertraglichen Schuldverhältnisse* (De Gruyter 2001) para 6 and Karsten Thorn, 'Art. 40 EGBGB', in *Grüneberg Bürgerliches Gesetzbuch* (83th edn,

(3) Rights and Interest Served by Data Protection

In determining the place where the damage occurred (*loci damni*), the immediate and direct consequence of the infringement of the right or interest is decisive.[907] Thus, it must be ascertained first and foremost which right or interest is to be specifically enforced by means of a data protection claim and which purpose this right or interest serves.

The purpose of data protection legislation is to safeguard the right to data protection. In distinction to other rights, the right to data protection under European Union law is not to be equated with the right to informational self-determination which is an aspect of the right to privacy.[908] This already follows from the fact that a consent to data processing is only one of the grounds for justification for lawful data processing.[909] Furthermore, the European legislator chose not to design the right to data protection as a right to informational self-determination.[910] Rather, the right to data protection serves to control one's own data.[911] For this purpose, the interest of control over one's own data is weighed against those of the data processor, regardless of whether the latter can invoke interests protected by fundamental rights for the data processing.[912] The data subject is granted various rights to ensure that data are processed in accordance with this balancing of interests and only to the extent that there is a legally

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C.H. Beck 2024) para 10 on the relevant German conflict-of-laws provision, which, however, also refers to the place where the damage occurs and for the interpretation of which, in the case of a violation of privacy, recourse is made to the case-law of the ECJ on Article 7 Brussels I*bis* Regulation; different, however, Anna Bizer, *Persönlichkeitsrechtsverletzungen in sozialen Medien* (Mohr Siebeck 2022) 355, who differentiates according to the nature of the respective claim and, in the case of publication, alternatively – as in the case of a violation of privacy – focuses on the place of publication, and Jan Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' (2018) 117 Zeitschrift für vergleichende Rechtswissenschaft 50, 76, who fully transfers the principles developed for a violation of privacy.

907 See above C.I.3.b)(1).

908 Tobias Lock, 'Article 8 CFR', in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) para 4; Orla Lynskey, 'Control over Personal Data in a Digital Space' (2015) 78 Modern Law Review 522, 529; different Anna Bizer, *Persönlichkeitsrechtsverletzungen in sozialen Medien* (Mohr Siebeck 2022) 353; see also Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2016) 177 et seq. on the function of European data protection law as an instrument of control over personal data.

909 Cf. on the level of substantive law in this respect Article 6(1) GDPR; so already Herke Kranenborg, 'Article 8', in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (2nd edn, Hart Publishing 2021) para 08.34 et seq., who also emphasises the importance of the DPD's substantive legal design of the right to data protection for the emergence of Article 8 CFR.

910 Herke Kranenborg, 'Article 8', in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights* (2nd edn, Hart Publishing 2021) para 08.35.

911 Tobias Lock, 'Article 8 CFR', in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) para 4; Recital 7 GDPR.

912 Cf. e.g. in particular the necessity of data processing for the performance of a contract in Article 6(1) lit. b) GDPR, but also within the framework of the balancing of interests of Article 6(1) lit. f) GDPR, basically any interests are protected and not only those with a fundamental rights background, Waltraut Kotschy, 'Article 6', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 337.

recognised reason for doing so. The object of protection under right to data protection is thus not the non-processing of data as such. Rather, data protection law regularly merely imposes certain procedural requirements and obligations on data processing itself.

(4) *Loci Damni* under the Rights and Interests Served by Data Protection

In view of the procedural element of the right to data protection, there is a strong argument in favour of locating the immediate and direct consequences of the violation of the right or interest to data protection where the data subject's control over his or her personal data is affected.

(a) Consideration of the Principles Developed for a Violation of Privacy

The reference to the place of control over personal data is also supported by the principles developed in relation to violations of privacy. In the case of a violation of the right to privacy, the place where the information is distributed is one of the *loci damni*. This place, however, is characterised by the fact that a person loses the ability to determine how his or her personality is perceived. It shows therefore similarities with the place where the control over personal data is affected.

Although it is unclear whether these principles can be applied to an infringement of the right to data protection, a consideration of these principles is supported by the fact that even if the right to privacy and the right to data protection are distinct phenomena, they nevertheless overlap.[913] At least some of the claims asserted in this respect can therefore be classified both as a violation of the right to privacy and as an infringement of the right to data protection. While those claims are subject to Article 4 Rome II Regulation if they require a processing of personal data[914], the fact of these infringements also affecting the right to privacy argues for recourse to the legal principles developed for this purpose.[915]

(b) *Loci Damni* for Data Protection Claims

If the place of control over personal data is to be identified, a distinction must be drawn. It is necessary to distinguish whether the data processing to which the respective claim relates results in third parties potentially obtaining knowledge of the personal data or whether the personal data remain within the sphere of the data subject and the data processor. In other words, the identification of the place where the damage occurred depends on the type of data processing that has occurred.

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913 See already above C.I.2.b).
914 See above C.I.2.b)(3)(b).
915 See above C.I.3.b)(2).

The need for such a distinction follows, firstly, from the fact that the place where the data subject's control over his or her personal data is affected can only be determined in relation to the data processing in question. Secondly, the fundamental rights concerned – which have to be balanced in the context of the data protection claim[916] – also depend on the data processing in question. The fundamental rights interests involved in data processing that remains solely between the data subject and the data processor are different from those involved when data are potentially disclosed to third parties. In the latter case, for example, freedom of information and freedom of the press may also have to be taken into account in the balancing process.

Irrespective of the type of data processing, however, the data subject should have the right to pursue claims under the law of the centre of his or her interests as an alternative to the law of the place where the control over his or her personal data is affected. The centre of interests is usually located at the habitual residence of the data subject.[917] This is supported by the fact that the data subject often has no influence on the location of the data processing and typically cannot foresee it. This is also the case for violations of the right to privacy, where such a right of choice is also granted. Typically, this place is in any case also foreseeable for the data processor.[918]

(i) The Personal Data Remain Within the Sphere of Data Subject and Data Processor

To the extent that the personal data processed remain in the sphere of the data subject and data processor, the place where the data subject is affected in its control over his or her personal data is to be located at the location of the data subject at the time of the data processing.

This applies, for one thing, to those cases in which personal data are processed in a way in which they are collected directly from the data subject. In these cases, the data subject's control over the personal data is affected at the place where he or she is located at the time of the data collection. Therefore, for this type of data processing, the location of the data subject at the time of collection is the place where the damage occurs.

Secondly, the location of the data subject at the time of data processing is also authoritative for those cases in which personal data are processed by other means within the sphere of the data processor. In these cases, the control over the personal data is generally affected at the place where the specific data processing takes place. However, the fact that the data subject is generally not in a position to determine and foresee that location and the susceptibility of this

916 See above C.I.3.b)(3).

917 ECJ, C-509/09 and C-161/10 *eDate Advertising and Others* [2011] ECLI:EU:C:2011:685 para 49, 52

918 On the relevance of the criterion of foreseeability with regard to Article 7 No. 2 Brussels I*bis* Regulation, see ECJ, C-509/09 and C-161/10 *eDate Advertising and Others* [2011] ECLI:EU:C:2011:685 para 50.

place to manipulation by the data processor argues against relying on that location to determine the applicable law.[919] The location of the data subject is also supported by the fact that the right to data protection, at least from a European perspective, is – due to its fundamental rights foundation[920] – narrowly linked to the data subject. The right to data protection therefore has a close territorial connection also to the data subject.

(ii) Third Parties Obtaining Knowledge of the Personal Data

However, the situation is different if the data processing results in the personal data leaving the sphere of the data processor and – in particular – if third parties obtain knowledge of the personal data. In these cases as well, the immediate and direct consequences of a violation of the right to data protection occur at the place where the data subject is affected in its ability to exercise control over his or her personal data. In situations where personal data leave the sphere of the data processor, the place where the personal data leave the sphere of the data processor is the place where the control of the data subject is affected.[921] In contrast to those cases where personal data remain within the sphere of the data subject and data processor, the loss of control over personal data is particularly serious, precisely because third parties may obtain unauthorised knowledge of the data. Admittedly, the control over the data subject's personal data is also affected here by the data processing – the disclosure of personal data. This would suggest a reference to the location from which the data processor transfers the data to third parties. However, the loss of control results precisely from the knowledge or the possibility of knowledge by third parties and thus the involvement of a third party.

4. The Scope of the Law Applicable to Violations of Data Protection

Irrespective of which legal system is referred to by Article 4 Rome II Regulation, it is to be determined to what extent Article 4 Rome II Regulation designates this legal system for application.[922]

To the extent that the applicable law for infringements of the right data protection is determined pursuant to Article 4 Rome II Regulation, the Rome II Regulation comprehensively regulates the applicable law according to Article 15 Rome II Regulation.[923] This includes in particular

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919 See above C.I.3.b)(1).

920 Cf. Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2016) 38 et seq.

921 Similar Anna Bizer, *Persönlichkeitsrechtsverletzungen in sozialen Medien* (Mohr Siebeck 2022) 355; also, with regard to the Swiss conflict-of-laws rule on data protection – see on this rule in detail below C.III.3.a)(4) – David Rosenthal and Yvonne Jöhri, *Handkommentar zum Datenschutzgesetz* (2nd edn, Schulthess 2021) Art. 139 IPRG para 22.

922 See on this in abstract terms already above A.II.2.c).

923 Cf. "in particular" in Article 15 Rome II Regulation.

the respective obligations under data protection law to which the data controller and data processor are subject and the claims to which the data subject is entitled.

Furthermore, the law deemed applicable by Article 4 Rome II Regulation is applicable regardless of whether the designated data protection law is further specified in its substantive scope of application. For example, data protection rules may only apply to employees.[924] The Rome II Regulation indeed provides for special conflict-of-laws rules, in particular for tortious acts in certain areas of law.[925] However, unlike the Rome I Regulation[926], for example, these provisions are not linked to specific groups of persons, but to the legal interest affected. A corresponding distinction is therefore alien to the Rome II Regulation.

As far as the processing of data requires the data subject's consent, this consent is also governed by the law designated under the Rome II Regulation.[927] To the extent a consent to data processing is found in general terms and conditions, however, the admissibility of such a pre-formulation is assessed according to the Rome I Regulation.[928]

II. The Conflict-of-Laws Dimension of the GDPR

The GDPR as the central legal act[929] of data protection law[930] is a regulation of the European Union which contains a provision on its territorial scope of application.[931] In a legal dispute before European courts, it is thus first of all to be determined how the GDPR integrates into

924 Article 88 GDPR, for example, explicitly provides for the permissibility of such national regulations for employees.

925 Article 5-9 Rome II Regulation.

926 Article 6 Rome I Regulation.

927 Luís De Lima Pinheiro, 'Law Applicable to Personal Data Protection on the Internet: Some Private International Law Issues' (2008) 18 Anuario español de Derecho internacional privado 163, 168; Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 16-017 et seq.

928 ECJ, C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612 para 61-71; Jan Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' (2018) 117 Zeitschrift für vergleichende Rechtswissenschaft 50, 58.

929 Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 3.06.

930 Rules on the protection on personal data are *inter alia* also provided for in Regulation (EU) 2018/1725 of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC [2018] OJ L 295/39; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] OJ L 201/37 and Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119/89. In addition, European Union law also provides rules for non-personal data, see e.g. Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union [2018] OJ L 303/59.

931 See above A.I.2.

European conflict of laws (1.). Where the GDPR applies, it is to be established on a substantive level how the GDPR interacts with other legislation (2.) and to what extent the GDPR governs issues arising in the context of data protection (3.).

1. The GDPR in the Conflict of Laws of the European Union

To determine how the GDPR is integrated into the conflict of laws of the European Union, it is first necessary to examine the situations in which conflict of laws decides on the applicability of the GDPR (a). Subsequently, it is necessary to consider whether the applicable data protection law constitutes a preliminary question that requires an independent conflict-of-laws analysis at all, or whether it is subject to the applicable law (b). Irrespective of this, it must be examined in any case for data protection claims whether the provision on the territorial scope of application of the GDPR constitutes a unilateral conflict-of-laws provision (c). Finally, it is to be investigated whether individual provisions of the GDPR are to be applied nevertheless beside the law of a third country referred to by the conflict-of-laws rules (d).

a) The GDPR in the System of Conflict of Laws

For a provision on the territorial scope of application to be classified as a unilateral conflict-of-laws rule, the facts of the case must first be subject to conflict of laws as such.

(1) The Hybrid Legal Nature of the GDPR

For the GDPR in particular, it must be taken into account that it has a hybrid legal nature, as it typically contains provisions that can be classified as both public and private law.[932] For the applicability of the conflict of laws, it is in this context, however, irrelevant whether a provision is to be assigned to public or private law. Rather, the conflict of laws refers to a legal system in its entirety and thus renders the rules of this legal system applicable, regardless of whether they are assigned to public or private law.[933]

However, conflict of laws only determines the law applicable to private-law relationships.[934] While the dual nature of the GDPR has thus no impact on the question of determining the applicable law in the context of conflict of laws, something else may potentially follow from the fact of the GDPR's provisions being enforced by way of both *private* and *public*

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932 Felix Zopf, 'Two Worlds Colliding – The GDPR In Between Public and Private Law' (2022) 8 European Data Protection Law Review 210; Michael Müller, 'Amazon and Data Protection Law – The end of the Private/Public Divide in EU conflict of laws' (2016) 2 Journal of European Consumer and Market Law 215; Daniel Cooper and Christopher Kuner, 'Data Protection Law and International Dispute Resolution' (2015) 382 Recueil des Cours 9, 57; Florian Jotzo, *Der Schutz personenbezogener Daten in der Cloud* (2nd edn, Nomos 2020) para 243.

933 See above A.II.2.b)(1).

934 See above A.II.2.a)(2).

enforcement. Although the remedies available in this respect may regularly have the same effect, they must be based on different legal foundations.[935]

(2) The Twofold Nature of Enforcement of the GDPR

The GDPR contains provisions by which its rules are enforced both by private individuals in a private-law relationship, and by the authorities of a state in a public-law relationship. A relationship might either be of a genuinely private-law nature and the claims asserted are accordingly based on Chapter III of the GDPR.[936] The relationship may as well be of a public-law nature with the measures taken having their legal basis in Article 58 GDPR. For the purposes of conflict of laws, whether the applicable data protection law is determined by its rules depends crucially on the underlying relationship. Conflict of laws only determines the applicable law for data protection claims that originate from a private-law relationship. The applicable law in public-law relationships is essentially determined by the jurisdiction of the authorities.[937]

In contrast, for the applicability of conflict of laws it is irrelevant whether the proceedings have their starting point in a request of the data subject.[938] In this respect, too, the relevant legal relationship might be between the authority and the data processor and therefore a means of *public enforcement*. Even if these proceedings are initiated by the data subject, the supervisory authority is limited to the measures provided for in Article 58 GDPR.[939] Thus, the manner in which the proceedings before the authority were initiated may not have any impact on the proceedings as such and is therefore irrelevant for the purpose of determining the applicable law.[940]

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935 See, on the one hand, the claims of the data subject in Article 12-23 GDPR and the powers of the supervisory authority in Article 58 GDPR.

936 Article 12-23 GDPR.

937 See on the concept of jurisdiction James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford University Press 2019) 431 et seq.; for an overview of the different approaches to conflict of laws in public-law relationships from a German perspective, see Christoph Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts* (Mohr Siebeck 2005) 33 et seq.

938 Article 77(1) GDPR; similar Jan Oster, 'Internationale Zuständigkeit und anwendbares Recht im Datenschutz' (2021) 29 Zeitschrift für Europäisches Privatrecht 275, 278 et seq.; probably differently Martina Melcher, 'Es lebe das Territorialitätsprinzip?', in Susanne Gössl (ed), *Politik und Internationales Privatrecht* (Mohr Siebeck 2019) 129, 132.

939 Waltraut Kotschy, 'Article 77', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 1123.

940 In conclusion, also the Austrian data protection authority, which, in proceedings initiated on the basis of a complaint, linked the question of the applicability of the GDPR to its jurisdiction (see the heading "Anwendbarkeit der DSGVO und zur Zuständigkeit der Datenschutzbehörde" which translates to applicability of the GDPR and jurisdiction of the data protection authority) and thus determined the applicability of the GDPR in accordance with the rules of public international law, Austrian Data Protection Authority, 9. January 2023, 2022-0.479.809, <https://ris.bka.gv.at/Dokumente/Dsk/DSBT_20230109_2022_0_479_809_00/DSBT_20230109_2022_0_479_809_00.html> accessed 4 May 2024.

Admittedly, a different assessment of the applicable data protection law could potentially lead to the applicability of the GDPR being assessed differently, depending on the type of enforcement in a given situation. The data processor in question may then be subject to supervision by the authorities under the GDPR and, at the same time, to a different data protection law before the courts of that member state in civil proceedings. However, this potential plurality of applicable data protection laws to a single situation cannot be avoided by a compelling uniform assessment of the international applicability of the GDPR in the context of *public* and *private enforcement* by a single jurisdiction.[941] Even in case of such an uniform assessment, the respective data controller or data processor will still regularly be subject to several data protection laws of different jurisdictions due to the overlapping territorial scope of application of the different data protection laws.[942] A uniform assessment of the applicability of the GDPR by one jurisdiction does not prevent the data processor from being subject to different legal regimes in different countries.

The different assessment of the applicability of the GDPR depending on the respective type of its enforcement ultimately also follows from the different objectives served by conflict of laws and public international law.[943] Conflict of laws is primarily intended to determine for the parties to the legal relationship an appropriate law by a choice between several legal systems.[944] In contrast, public international law is an expression of the state's regulatory power and is

941 On the advantages and disadvantages of the simultaneous applicability of several data protection laws see also Jiahong Chen, 'How the best-laid plans go awry: the (unsolved) issues of applicable law in the General Data Protection Regulation' (2016) 6 International Data Privacy Law 310, 316 et seq.; Paul de Hert and Michal Czerniawski, 'Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context' (2016) 6 International Data Privacy Law 230, 240; critical regarding the lack of coordination of the *private* and *public enforcement* of the GDPR Wolfgang Wurmnest and Merlin Gömann, 'Comparing Private Enforcement of EU Competition and Data Protection Law' (2022) 13 Journal of European Tort Law 154, 167 et seq.

942 For example, it is sufficient for the applicability of the Chinese Personal Information Protection Law that the data is processed in China, Article 3(1) Chinese Personal Information Protection Law. However, if the data subject is resident in the European Union and this data processing is related to the provision of services in the European Union, the GDPR also applies to this data processing, Article 3(2) lit. a) GDPR; see also below for the various criteria used to determine the territorial scope of application in the data protection laws of different jurisdictions C.III.2.a).

943 Martina Melcher, 'Es lebe das Territorialitätsprinzip?', in Susanne Gössl (ed), *Politik und Internationales Privatrecht* (Mohr Siebeck 2019) 129, 130 et seq.

944 Gisela Rühl, 'Private international law, foundations', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 1388 et seq.; Marian Thon, 'Transnationaler Datenschutz: Das Internationale Datenprivatrecht der DS-GVO' (2020) 84 Rabels Zeitschrift für ausländisches und internationales Privatrecht 25, 30 et seq.; different, however, Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009) 309, who argues that conflict of laws is "a system for the international ordering of regulatory authority, in pursuit of public values of 'justice pluralism' and subsidiarity". However, it cannot be ruled out that this system for the international ordering of regulatory authority is based on the determination of the most appropriate law to the parties within the limits set by public international law.

supposed to determine the scope of the law for the purpose of enforcing public interest.[945,946] Conflict of laws thus pursues its own interests within the framework set by public international law.[947] This goes hand in hand with the possibility of conflict of laws and public international law obtaining different results with regard to the applicable law, even if a matter is to be assessed by different bodies of a single jurisdiction.

Also, the principle of the unity of a legal system does not militate against such unequal treatment by the various bodies of a state.[948] This principle does not require that the various bodies of a state always assess a situation in the same way. For example, some legal systems allow private-law claims to varying degrees even where a public-law authorisation has been granted for an installation.[949] A single legal system may therefore attach different legal consequences to the same conduct in different areas of law. However, this also means that the law applicable to a situation – depending on the procedure in which the applicable law is to be determined – may be subject to different laws. Rather, the unity of a legal system is only affected when a legal system prescribes a specific conduct and at the same time the omission of this conduct by means of two provisions.[950] However, this does not exclude the possibility that a certain conduct may be considered both lawful and unlawful at the same time. The data processor, who is usually subject to different data protection laws under different jurisdictions anyway, is not additionally burdened by such a different treatment.

Thus, the dual nature of the enforcement of the GDPR does not affect the relevance of conflict of laws in determining the applicable law in case of *private enforcement*. To the extent that the provisions of the GDPR are thus enforced by recourse to Chapter III of the GDPR, the international applicability of the GDPR is determined by conflict-of-laws rules.

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945 Marian Thon, 'Transnationaler Datenschutz: Das Internationale Datenprivatrecht der DS-GVO' (2020) 84 Rabels Zeitschrift für ausländisches und internationales Privatrecht 25, 30.

946 Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 185 therefore accurately justify this difference in results on the basis that "the best regulator does not necessarily have the greatest proximity to the contract"; however, this does not negate the possibility of public international law also being relevant to private international law; see above A.II.1.b)(1).

947 Alex Mills, 'Public international law and private international law', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 1449, 1452; see in detail above A.II.1.b)(1).

948 Christoph Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts* (Mohr Siebeck 2005) 113, 120; different, however, Angelika Fuchs, 'Art. 7', in Peter Huber (ed), *Rome II Regulation Pocket Commentary* (sellier 2011) para 36 with regard to Article 7 Rome II Regulation and rules on safety and conduct under Article 17 Rome II Regulation; different also Klaus Schurig, *Kollisionsnorm und Sachrecht* (Duncker & Humblot 1981) 154.

949 Thomas Kadner Graziano, 'The Law Applicable to Cross-Border Damage of the Environment' (2007) 9 Yearbook of Private International Law 71, 78; Jan von Hein, 'Article 7 Rome II', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 23.

950 Hans Kelsen and Stanley Paulson, 'The Concept of the Legal Order' (1982) 27 The American Journal of Jurisprudence 64, 70.

(3) The Limitation of the Substantive Scope of Application of the GDPR

A further peculiarity in determining the international applicability of the GDPR by means of conflict of laws arises from the limited scope of application of the GDPR. The GDPR's provision on the territorial scope of application – insofar as a conflict-of-laws element should be ascribed to them – may only determine the international scope of application of the GDPR if the scope of application of the GDPR is also opened up in other respects.

Therefore, in relation to the GDPR, the determination of the law applicable to data protection claims is only necessary if the substantive scope of the GDPR is given. This requires a processing of personal data within the meaning of Article 2 GDPR. In contrast, it is irrelevant for the opening of the scope of application of the GDPR whether a contractual relationship exists between the data subject and the data processor or whether such a relationship is established or intended. Although the GDPR contains special provisions for cases in which a contractual relationship exists[951], the GDPR does not require the existence of such a relationship for its applicability. Therefore, the question of the international applicability of the GDPR is always relevant whenever there is – in a cross-border situation – a data processing within the meaning of Article 2 GDPR.

b) The Applicable Data Protection Law as a Preliminary Question

The applicability of the GDPR may be relevant in various cross-border situations. Firstly, it is always necessary to assess the international applicability of the GDPR where the basis for the claim in the specific case is taken from Chapter III of the GDPR. Secondly, if the provisions of the GDPR only become relevant incidentally in the context of a private-law relationship, the international scope of application of the GDPR might also have significance.

(1) The Separate Determination of the Applicable Data Protection Law

While in the first mentioned scenario a determination of the applicability of the GDPR is in any way necessary from a conflict-of-laws perspective, this is doubtful regarding the last-mentioned situation. A separate assessment of the applicable data protection law would only be carried out in the latter cases if the applicable data protection law were to constitute a preliminary question[952] for which the applicable law is determined independently.

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951 Cf. e.g. Article 6(1) lit. b) GDPR.

952 On the preliminary question, see Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 51 et seq.; Andrea Bonomi, 'Incidental (preliminary) question', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 913 et seq.

In this respect, it could be argued that such a separate determination of the applicable law in relation to data protection rules would not be necessary, as they are only obligations of conduct. This might follow *e contrario* from Article 12(2) Rome I Regulation and Article 17 Rome II Regulation. According to those provisions, the relevant duties of conduct are – in the absence of indication to the contrary – generally determined by the law applicable to the contractual or non-contractual obligation. They may therefore not be categorised as a preliminary question requiring a dedicated determination of their applicability in a cross-border situation.

However, for claims under the GDPR, this approach might cause difficulties since the GDPR is neither exhaustive nor conclusive, at least regarding claims for damages by the data subject.[953] This may result in the GDPR being independently referred to on the basis of a conflict-of-laws element contained in its provision on the territorial scope of application. However, also the legal system of a third state being referred to under the general conflict-of-laws acts may provide for rules of conduct under its data protection law. If the applicable data protection law were not classified as a preliminary question to be addressed independently, a situation could arise in which European courts award a claim for damages on the basis of a breach of the GDPR. Simultaneously, however, – subject to the classification of the corresponding provisions of the GDPR as overriding mandatory provisions – a claim is denied by European courts on the basis of the third-country data protection law for damages.[954] As a result, this could even lead to a situation where conduct which is required under the GDPR is prohibited under the data protection law of the legal system referred to by the general conflict-of-laws acts and results in claims for damages.

Admittedly, the issue addressed here concerns any data protection claim, and thus also such claims based on national data protection laws. It therefore also affects the generally applicable law on data protection claims already discussed.[955] However, this question is particularly relevant to the GDPR because of the specificity that the GDPR itself potentially contains a conflict-of-laws provision, while at the same time allowing – at least in part – parallel claims based on national data protection laws.

(2) Situations of Simultaneous Application of Two Data Protection Laws

It is true that, especially in the area of data protection law, the applicable data protection law may be assessed differently depending on the way in which the data protection law is enforced,

953 See on this already above C.

954 Jiahong Chen, 'How the best-laid plans go awry: the (unsolved) issues of applicable law in the General Data Protection Regulation' (2016) 6 International Data Privacy Law 310, 319 also highlighting the issue of the reference to third-state law by the general conflict-of-laws instruments.

955 See above C.I.3.

even before the authorities of a single jurisdiction.[956] Yet, this difference reflects the diverging objectives and purposes pursued by conflict of laws and public international law.[957] This situation, however, is to be distinguished from the present one, in which two different data protection laws are potentially cumulatively referred to by the same conflict-of-laws system. Such a contradiction within the conflict of laws cannot be justified by such different objectives and purposes.

The present situation must also be distinguished from those cases that are to be dealt with by means of Article 12(2) Rome I Regulation, Article 17 Rome II Regulation. In these constellations, only the rules of one legal system are referred to by the respective conflict-of-laws act and a potentially necessary adjustment is made possible by means of Article 12(2) Rome I Regulation, Article 17 Rome II Regulation. The present situation differs from this precisely because the data protection rules of two legal systems are referred to in parallel due to the possible independence of the GDPR under conflict of laws and the non-exhaustive regulation of data protection law by the GDPR at the substantive level.

(3) The Applicability of Two Data Protection Laws as a Feature of the GDPR

Such an inconsistency could, firstly, be avoided by considering the determination of the applicable data protection law as a preliminary question of conflict of laws, which is subject to an independent conflict-of-laws assessment. If the provision on the territorial scope of application of the GDPR were to have a conflict-of-laws element, the applicable data protection law would then first be determined on the basis of the GDPR and only subsidiarily – insofar as it is not pertinent – by means of other conflict-of-laws rules.[958] Another approach might rely on those provisions of the conflict-of-laws acts which allow for the consideration of obligations of conduct in addition to the law designated by the conflict-of-laws rules, also with a view to the data protection law applicable in the context of the GDPR.[959] This is supported by the system of European conflict of laws in which special conflict-of-laws rules do not completely supersede the general conflict-of-laws legal acts, which in principle remain applicable.[960] Under this approach, a different data protection law might then also have to be taken into account in the context of a claim under the GDPR even if the GDPR itself would determine its applicability under conflict of laws.

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956 See above C.II.1.a)(2).

957 See above A.II.1.b)(1).

958 In this direction probably Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 3.105.

959 In European conflict of laws, such provisions can be found, for example, in Article 12(2) Rome I Regulation, Article 17 Rome II Regulation.

960 See above B.V.

However, the latter solution is already contradicted by the claim for damages granted in the GDPR being, according to its wording, only applicable to an "infringement of this Regulation".[961] Thus, a claim for damages under the GDPR is not given in the event of a violation of national or third-country data protection law. Also, the assumption of a preliminary question – at least from the perspective of European conflict of laws – is contradicted by the fact that a breach of conduct is precisely subject to the law applicable to a contract and a tort.[962] Since the European legislator refers to obligations of conduct as part of the applicable law, there is a strong argument against treating them separately as a preliminary question. Moreover, European conflict of laws does not explicitly provide for a dedicated conflict-of-laws rule for the applicable data protection law. This would then raise the question of how the law applicable to data protection obligations could be determined if they were categorised as a preliminary question.

The possible applicability of the data protection law of two legal systems is ultimately the result of the potential two-track nature of the GDPR in terms of conflict of laws and substantive law. At the level of conflict of laws, the applicability of the GDPR is potentially to be determined by its own conflict-of-laws rules. At the level of substantive law, claims under national data protection law are, at least in part, permitted by the GDPR in addition to those of the GDPR. It is precisely the intention of the European legislator for the GDPR not to establish a conclusive system, at least with regard to claims for damages.[963] *De lege ferenda* this two-track approach may be eliminated by considering the GDPR as a conclusive regulation within its scope of application on the level of substantive law. On the level of conflict of laws, a solution may be achieved in this respect by creating a multilateral conflict-of-laws rule for determining the applicable data protection law. Until the law is revised accordingly, however, this two-track nature of European data protection law must be accepted.

Thus, data protection rules cannot be considered a preliminary question, at least under European conflict of laws. They are therefore applied if they are part of the legal system referred to by the conflict-of-laws rules. Whether the provision on the territorial scope of application of the GDPR provides a conflict-of-laws element is thus only pertinent if the basis of the claim itself

961 Article 82(1) GDPR.

962 Article 12(1) lit. b) Rome I Regulation, Franco Ferrari, 'Art. 12', in Magnus and Mankowski (eds) *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 17; Article 15 lit. a) Rome II Regulation, Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"), COM(2003) 427, 23.

963 Cf. Recital 146 sentence 3 GDPR, see also above C.

is derived from the GDPR. In all other respects, the determination of the applicable data protection law is based on the general conflict-of-laws acts.

c) Article 3 GDPR as a Unilateral Conflict-of-Laws Provision

Notwithstanding the classification of data protection rules as a preliminary question, however, the conflict-of-laws element of the provision on the territorial scope of the GDPR is relevant in any event where the relevant claim derives directly from the GDPR. It must therefore first be analysed which regulatory content Article 3 GDPR is currently drawn from (1). Subsequently, the approach developed above for determining the conflict-of-laws quality of a provision on the territorial scope of application will be applied to Article 3 GDPR (2). Finally, the extent to which the GDPR may additionally be given effect in cross-border situations will be analysed (3).

(1) The Present Categorisation of Article 3 GDPR

Occasionally, it is assumed of Article 3 GDPR not to be a conflict-of-laws provision.[964] In contrast, the vast majority considers such a conflict-of-laws element to be inherent in Article 3 GDPR and thus regards this provision as a conflict-of-laws provision within the meaning of conflict of laws.[965] The latter classification is justified on the grounds that recourse to general

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964 Christian Kohler, 'Conflict of Laws Issues in the 2016 Data Protection Regulation of the European Union' (2016) Rivista di diritto internazionale privato e processuale 653; Ivo Bach, 'Vorbemerkung zur Rom I-VO', in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (4th edn, C.H. Beck 2019) para 22; Ivo Bach, 'Art. 40 EGBGB', in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (4th edn, C.H. Beck 2019) para 2; Carlo Piltz, 'Art. 3', in Peter Gola and Dirk Heckmann (eds), *Datenschutzgrundverordnung, Bundesdatenschutzgesetz* (3rd edn, C.H. Beck 2022) para 56.

965 Axel Halfmeier, 'Article 1 Rome II', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 58; Axel Halfmeier, 'Article 27 Rome II', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 21a; Peter Mankowski, 'Art. 27', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 8; Jan von Hein, 'Künstliche Intelligenz im Internationalen Deliktsrecht der EU', in Sebastian Kubis, Karl-Nikolaus Pfeifer, Benjamin Raue and Malte Stieper (eds), *Ius Vivum: Kunst – Internationales – Persönlichkeit* (Mohr Siebeck 2022) 428, 433; Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 3.40; Luís De Lima Pinheiro, 'Law Applicable to Personal Data Protection on the Internet: Some Private International Law Issues' (2008) 18 Anuario español de Derecho internacional privado 163, 181; Jan Oster, 'Internationale Zuständigkeit und anwendbares Recht im Datenschutz' (2021) 29 Zeitschrift für Europäisches Privatrecht 275, 281; Jan Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' (2018) 117 Zeitschrift für vergleichende Rechtswissenschaft 50, 72; Marian Thon, 'Transnationaler Datenschutz: Das Internationale Datenprivatrecht der DS-GVO' (2020) 84 Rabels Zeitschrift für ausländisches und internationales Privatrecht 25, 40; Dulce Lopes, 'GDPR – Main International Implications' (2020) European Journal of Privacy Law & Technology 9, 17; Martina Melcher, 'Substantive EU Regulations as Overriding Mandatory Rules?' (2020) ELTE Law Journal 37, 48; Stefan Hanloser, 'Art. 3 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg (eds), *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 7; Bettina Heiderhoff, 'Artikel 6', in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht*, Band III (5th edn, ottoschmidt 2023) para 24; Kasten Thorn, 'Artikel 9', in Thomas Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht*, Band III (5th edn,

conflict-of-laws rules would ignore the requirements of data protection law.[966] Furthermore, the assumption of such a conflict-of-laws element would be necessary to safeguard the internal market.[967] Finally, the presumption of a conflict-of-laws element in Article 3 GDPR is based on its predecessor provision in the DPD – Article 4 DPD.[968] The conflict-of-laws relevance of Article 4 DPD is acknowledged in the literature as well as in the case law of the ECJ.[969]

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ottoschmidt 2023) para 55; Stephan Gräf, 'Der Richtlinienentwurf zur Plattformarbeit – Analyse, Umsetzungsperspektiven und Alternativen' (2023) 54 Zeitschrift für Arbeitsrecht 209, 227; Martin Zwickel, Reinhold Thode and Peter Stelmasczcyk, '§ 5 Eingriffsnormen (international zwingende Bestimmungen), Berücksichtigung ausländischer Devisenvorschriften, Formvorschriften', in Christoph Reithmann and Dieter Martiny (eds), *Internationales Vertragsrecht* (9th edn, ottoschmidt 2022) para 5.77; Felix Zopf, 'Two Worlds Colliding – The GDPR In Between Public and Private Law' (2022) 8 European Data Protection Law Review 210, 216 et seq.; Jan Oster, 'Gefällt Facebook nicht: Die Zähmung eines Datenriesen durch Internationales Datenschutz-Privatrecht' (2023) Praxis des Internationalen Privat- und Verfahrensrechts 2023, 198, 204; Matteo Fornasier, 'Art. 40 EGBGB', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR EGBGB* (C.H. Beck 2024) para 99; Andreas Spickhoff, 'Art. 40 EGBGB', in Wolfgang Hau and Roman Poseck (69th edn, C.H. Beck 2024) para 40; Martina Melcher, 'Es lebe das Territorialitätsprinzip?', in Susanne Gössl (ed), *Politik und Internationales Privatrecht* (Mohr Siebeck 2019) 129, 134; Christina Breunig and Martin Schmidt-Kessel, 'Data Protection in the Internet: National Report Germany', Dário Moura Vicente and Sofia de Vasconcelos Casimiro (eds), *Data Protection in the Internet* (Springer 2020) 207; broader Daniel Cooper and Christopher Kuner, 'Data Protection Law and International Dispute Resolution' (2015) 382 Recueil des Cours 9, 80, 116, according to whom conflict-of-laws rules are to be taken from data protection law itself; Susanne Gössl, 'Altersgrenzen bei der datenschutzrechtlichen Einwilligung aus internationaler Perspektive', in Sebastian Kubis, Karl-Nikolaus Pfeifer, Benjamin Raue and Malte Stieper (eds), *Ius Vivum: Kunst – Internationales – Persönlichkeit* (Mohr Siebeck 2022) 417, 418 et seq. also considering such a classification.

966 Martina Melcher, 'Substantive EU Regulations as Overriding Mandatory Rules?' (2020) ELTE Law Journal 37, 48; Florian Jotzo, *Der Schutz personenbezogener Daten in der Cloud* (2nd edn, Nomos 2020) para 245.

967 Marian Thon, 'Transnationaler Datenschutz: Das Internationale Datenprivatrecht der DS-GVO' (2020) 84 Rabels Zeitschrift für ausländisches und internationales Privatrecht 25, 50.

968 Helmut Heiss, 'Art. 7', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 71 et seq.; Florian Jotzo, *Der Schutz personenbezogener Daten in der Cloud* (2nd edn, Nomos 2020) para 242, 245; Felix Maultzsch, 'Art. 9 Rom I-VO', in Christine Budzikiewicz, Marc-Philippe Weller and Wolfgang Wurmnest (eds), *beck-online.GROSSKOMMENTAR EGBGB* (C.H. Beck 2024) para 273; Stefan Hanloser, 'Art. 3 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg (eds), *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 7.

969 Aleksandra Kuczerawy, 'Facebook and Its EU Users – Applicability of the EU Data Protection Law to US Based SNS', in Michele Bezzi, Penny Duquenoy, Simone Fischer-Hübner, Marit Hansen and Ge Zhang (eds), *Privacy and Identity* (Springer 2010) 75, 79; European Commission, 'Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality' (JLS/2007/C4/028, Final Report) 64 < http://ejtn6r2.episerverhosting.com/PageFiles/6333/Mainstrat%20Study.pdf> accessed 4 May 2024; Lee Bygrave, 'European Data Protection' (2000) 16 Computer Law & Security Report 252, 253; Article 29 Working Party, 'Working Document on determining the international application of EU data protection law to personal data processing on the Internet by non-EU based web sites' (WP 56, 30 May 2002), 6; Stefan Hanloser, 'Art. 3 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg (eds), *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 7; Bernard Haftel, 'Protection des données personnelles : autorité de contrôle compétente et loi applicable' (2016) Revue Critique de Droit International Privé 377, 380; Christopher Kuner, 'Data Protection Law and International Jurisdiction on the Internet (Part 1)' (2010) 18 International Journal of Law and Information Technology 176, 191; Michael Müller, 'Amazon and Data Protection Law – The end of the Private/Public Divide in EU conflict of laws' (2016) 2 Journal of European Consumer and Market Law 215, 218; Maja Brkan, 'Data Protection and Conflict-of-Laws: A Challenging Relationship' (2016) 2 European Data Protection Law Review 324, 326, 332; ECJ, C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* [2016]

(a) The GDPR as an Instrument to Protect the Internal Market

It is doubtful, however, to what extent these considerations, on which the assumption of a conflict-of-laws dimension of Article 4 DPD is based, actually also support the affirmation of a conflict-of-laws element in Article 3 GDPR.[970] The argument referring to the protection of the internal market is also only partially convincing at best.

Firstly, if a situation only concerns the internal market, the law of a member state of the European Union, and therefore the GDPR for data protection law, will usually already apply on the basis of general conflict-of-laws rules. In particular, the place where the damage occurred is in a case with a connection to the internal market typically located in the European Union. Furthermore, due to the parallel *public enforcement* especially of the rules on transfers of personal data to third countries or international organisations[971], data processors anyways have an interest in processing data exclusively within the European Union in cases affecting the internal market. This factor also favours the application of the law of a member state of the European Union under the general conflict-of-laws rules.

Secondly, if data processing nevertheless takes place outside the European Union, the uniform general conflict-of-laws rules of the European Union may refer to the same third-state law. Thirdly, the GDPR already allows for the parallel application of other data protection law, at least for claims for damages.[972] Thus, the GDPR does not intend to provide a uniform data protection law for the internal market, but at best to ensure a certain minimum standard for data protection. However, if the objective is not to ensure a uniform application of the law, but to enforce a substantive minimum standard, this may also be achieved by classifying provisions of the GDPR as overriding mandatory provisions. Hence, the classification of Article 3 GDPR as a unilateral conflict-of-laws rule based on this argument is not compelling.

(b) The Protection of Fundamental Rights and Freedoms by the GDPR

As far as it is argued that a recourse to general conflict of laws would ignore the requirements of data protection law, it remains unclear how the requirements of data protection law from a private-law perspective differ from other regulations which are subject to general conflict of

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ECLI:EU:C:2016:612 para 72-81; differently – as far as can be seen – only Jan-Jaap Kuipers, 'Bridging the Gap' (2012) 76 Rabels Zeitschrift für ausländisches und internationales Privatrecht 562, 574; Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 191 and probably also Björn Steinrötter, 'Kollisionsrechtliche Bewertung der Datenschutzrichtlinien von IT-Dienstleistern' (2013) 16 Zeitschrift für IT-Recht und Recht der Digitalisierung 691, 693.

970 See on this in detail below C.II.1.c)(2)(b)(iii); critically in this respect Carlo Piltz, 'Art. 3', in Peter Gola and Dirk Heckmann (eds), *Datenschutzgrundverordnung, Bundesdatenschutzgesetz* (3rd edn, C.H. Beck 2022) para 56; Ivo Bach, 'Art. 40 EGBGB', in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (4th edn, C.H. Beck 2019) para 2.

971 Article 44 et seq. GDPR.

972 See above C.

laws. To the extent that this argument is based on the fundamental rights dimension of data protection law, it ignores the fact that other substantive law of the European Union also contains a provision on the territorial scope of application and serves to protect fundamental rights or freedoms. At least some of these acts do not contain any conflict-of-laws rules either.[973] Furthermore, there are legal acts of the European Union which serve to protect fundamental rights and which do not contain any regulation on their territorial scope of application at all.[974] For these legal acts, an autonomous assessment of their applicability in cross-border situations is not possible at all. This underlines that, in the view of the European legislator, the implementation of an effective protection of fundamental rights does not necessarily require the enforcement of the respective legal act under conflict of laws. Thus, the mere relevance of a legal act of the European legislator to fundamental rights does not inevitably imply its relevance to conflict of laws. Hence, this argument is not compelling either.

Overall, it becomes apparent that although Article 3 GDPR is predominantly recognised as providing for a conflict-of-laws element, a viable justification for such an assumption is missing. However, we have seen that provisions on the territorial scope of application in substantive regulations in national law can also be attributed a conflict-of-laws element.[975] This also applies to substantive legal acts of the European Union.[976] Such an element of conflict of laws may possibly also be inferred from Article 3 GDPR. In the following, it will therefore be examined whether the approach proposed above[977] is suitable to substantiate the conflict-of-laws dimension of Article 3 GDPR or whether it provides arguments opposing such a conflict-of-laws element.

(2) Applying the Multi-stage Test to Article 3 GDPR

Based on the multi-stage test proposed above, two stages in particular seem to be problematic with regard to the various steps of the conflict-of-laws classification of Article 3 GDPR. Firstly, it is doubtful whether the conflict-of-laws rules of the general conflict-of-laws acts, under which the facts covered by the GDPR can be subsumed, limit the territorial scope of application of the GDPR. This would be the case if the general conflict-of-laws rules do not always result in the application of the law of a member state of the European Union and thus in the application of

973 See above B.III.; for example, Recital 1 Services Directive refers to the freedom to provide services. See also the reference in Recital 5 Transfers of Undertakings Directive to the Community Charter of the Fundamental Social Rights of Workers adopted on 9 December 1989 and Recital 3 Digital Services Act, which refers to the Charter of Fundamental Rights of the European Union.

974 See, for example, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

975 A.II.3.c).

976 B.I.

977 See above A.II.3.c)(3)(a)(iii) and B.IV.1.b)(2).

the GDPR in those cases in which the scope of application of the GDPR is given (step 3, (a)). Secondly, if the rules of general conflict of laws should limit the territorial scope of application of the GDPR, it must finally be determined by way of interpretation whether a conflict-of-laws element can be attributed to Article 3 GDPR (step 5, (b)).

In contrast, the determination of the potential conflict-of-laws content of Article 3 GDPR (step 1) is straightforward due to its function as a provision on the territorial scope, the only substantive function of which is to declare the GDPR territorially applicable. This also applies to the finding that there are no uniform explicit rules for determining the law applicable to data protection claims, at least at the European level (step 2), and that there are no primary relevant conflict-of-laws rules (step 4).

(a) Limitation of the Territorial Scope of the GDPR by General Conflict-of-Laws Rules

The general conflict-of-laws acts of the European Union and the GDPR are based on different territorial criteria. These different criteria lead to a restriction of the territorial scope of application of the GDPR by the general conflict-of-laws rules.

(i) Territorial Connecting Factors in the General Conflict-of-Laws Acts and the GDPR

The general conflict-of-laws rules of the European Union refer to the *loci damni* and therefore to the place where the control of the data subject over the personal data is affected for matters relating to an infringement of data protection.[978] Depending on the particular data processing, this is the place where the data subject is located at the time of the data processing or the place where third parties gain knowledge of the personal data. Alternatively, the data subject may invoke the law of the data subject's habitual residence in each case.

In contrast, according to the provisions of the GDPR[979], it is irrelevant for its applicability where the data processing takes place or where the data subject exercises control over his or her personal data.[980] Decisive in this respect is, in principle, whether the data controller or data processor is operating in the European Union by means of an establishment and personal data are processed in this context.[981] In the absence of such an establishment, the GDPR applies if the data subject is located in the European Union and the data processing is carried out in connection with conduct taking place or the offering of goods and services in the Union.[982] The

978 See above C.I.3.b)(4).
979 See in detail above A.I.2.
980 Cf. Article 3(1) GDPR.
981 Article 3(1) GDPR.
982 Article 3(2) GDPR; in the following, it will be assumed for the sake of clarity that it is sufficient for the application of Article 3(2) GDPR that the data subject is located in the European Union. Since the only issue at stake here is the potential limitation of the scope of application of the GDPR by Article 4 Rome II Regulation, the additional conditions of Article 3(2) GDPR are disregarded. While Article 3(2) GDPR

GDPR thus links its application to the location of the data subject or, alternatively, to the registered office or habitual residence of the data processor, irrespective of the specific type of data processing in question.

(ii) Effects of the Differing Connecting Factors

The diverging criteria for determining the applicable law and for defining the territorial scope of application limit the territorial scope of application of the GDPR in various situations. All these situations presuppose at the outset that the data subject's habitual residence is not within the European Union. Otherwise, under Article 4(1) Rome II Regulation, the data subject would be able to choose the law of the respective member state of the European Union as this is the place of its habitual residence.[983] In this case, the GDPR would then also be applicable under the conflict of laws.

In addition to the habitual residence of the data subject outside the European Union, further requirements must be met for the conflict of laws to refer to the law of a third country, but the territorial scope of application of the GDPR is established at the same time. These requirements depend on the respective type of data processing.

First, this concerns data processing by transferring personal data to third parties outside the European Union. If the data subject is located but not habitually resident in the European Union or if the data processor has its registered office or habitual residence in a member state, the scope of application of the GDPR would potentially be triggered pursuant to Article 3(1),(2) GDPR. However, Article 4(1) Rome II Regulation does not refer to the law of a member state of the European Union in these cases.

Secondly, also if the data processing takes place exclusively within the sphere of the data processor, there may be a limitation of the scope of the GDPR by Article 4(1) Rome II Regulation. According to Article 3(1) GDPR, the GDPR basically applies if the data processor has its registered office or habitual residence in the European Union. This is also true if the data subject is not located in the European Union at the time of the data processing. However, while according to Article 3(1) GDPR, the GDPR would govern these cases, Article 4(1) Rome II Regulation would not refer to the law of a member state of the European Union in these situations.

In the aforementioned constellations, Article 4(2),(3) Rome II Regulation will also generally not lead to the application of the law of a member state of the European Union. Something else may apply only if the data processor has its registered office or habitual residence in the

sets further conditions for the applicability of the GDPR, its limitation as described below is merely the maximum possible limitation of the GDPR by Article 4 Rome II Regulation.

983 See above C.I.3.b)(4)(b) for details on this possibility of a choice by the data subject.

European Union and a contractual relationship exists with the data subject in the context of which the data processing takes place, in accordance with Article 4(3) Rome II Regulation.
Thus, it becomes apparent that especially if the data subject has only a loose or no connection to the European Union, the scope of application of the GDPR is limited by the Rome II Regulation. It is therefore at issue whether this is such a significant limitation of the scope of application of the GDPR for Article 3 GDPR itself to be interpreted as providing a conflict-of-laws element. For this purpose, it is necessary to analyse the significance that the GDPR attaches to this limitation of its scope by way of interpretation.

(b) Determining the Conflict-of-Laws Element by Means of Interpretation

In assessing the existence of a conflict-of-laws element in Article 3 GDPR, recourse may be drawn to the criteria used by Article 3 GDPR *(i)*, the relationship between Article 3 GDPR and Articles 44 et seq. GDPR *(ii)* and the predecessor regulation of Article 3 GDPR in Article 4 DPD *(iii)*. Further, the fundamental rights implications *(iv)*, the function of the GDPR in the system of European data protection law *(v)*, the regulatory purpose of the GDPR *(vi)* and the explicit provision of international jurisdiction in Article 79(2) GDPR *(vi)* are to be taken into account.

(i) Criteria Employed in Article 3 GDPR

If the conflict-of-laws content of Article 3 GDPR is thus to be determined by way of interpretation, it first is to be observed that the wording of Article 3(1) GDPR refers in any case to the place of the activity itself. It is thus based on a conflict-of-laws criterion that is fundamentally alien to European conflict of laws and that has been actively avoided to a large extent in European conflict of laws on non-contractual obligations.[984] The same applies to the reference to the mere location of the data subject in Article 3(2) GDPR. The location is explicitly only significant in the conflict of laws of the European Union if it is consolidated into a place of habitual residence. In this respect, too, the criteria used in Article 3 GDPR differ from the connecting factors expressly relied on in European conflict of laws.
Furthermore, the criteria used in Article 3 GDPR are explicitly based on the location of the facts in the European Union, as well as referring to constellations in which the facts have a connection with a third country.[985] Thus, the European legislator explicitly relies on criteria located within the European Union on the one hand, and outside the European Union on the

984 Cf. in this respect only the exception in Article 7 Rome II Regulation; in this respect, see also the wording of Article 4(1) Rome II Regulation, according to which the country in which the event giving rise to the damage occurred is irrelevant.
985 Cf. Article 3(2) GDPR, "not established in the Union".

other hand, to limit the territorial scope of application of the GDPR. This suggests that the European legislator has recognised the possibility of the applicability of the GDPR to a situation involving a third country, and thus the need to distinguish the GDPR from other potentially applicable data protection laws.

Hence, the considerable deviation of the criteria used in Article 3 GDPR from the connecting factors typically found in the conflict of laws of the European Union tends to argue against the assumption of a conflict-of-laws element. In contrast, the explicit reference to criteria located inside and outside the European Union indicates the European legislator's awareness of the potential conflict-of-laws significance of the GDPR. The fact that the legislator has nevertheless refrained from introducing an explicit conflict-of-laws provision indicates the absence of a conflict-of-laws element in Article 3 GDPR.

(ii) The Relation of Article 3 GDPR and Articles 44 et seq. GDPR

In any case, the European legislator seems to have recognised, in principle, the need for the GDPR to also address the issue of the GDPR's relationship with third-country data protection law. This follows not only from the GDPR's provision on the international jurisdiction for claims arising from the GDPR[986], but also from the rules on the transfer of data to third countries.

Articles 44 et seq. GDPR establish requirements for the transfer of personal data to a state other than a member state of the European Union.[987] They extend the territorial scope of application established by Article 3 GDPR in case of an onward transfer.[988] Therefore, the existence of the prerequisites of Article 3 GDPR is not always a requirement for the application of Articles 44 et seq. GDPR.[989] In this context, it needs to be recalled that the applicability of Articles 44 et seq. GDPR is not linked to the territorial inapplicability of the GDPR once the personal data have been transferred, but exclusively to the classification as a third country.[990] This may in principle result in situations where the recipient of the data transfer in a third country according to Articles 44 et seq. GDPR is itself also subject to the provisions of the GDPR according to Article 3 GDPR.[991]

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986 Article 79(2) GDPR.

987 See on Article 44 et seq. GDPR in detail above A.I.3.

988 See above A.I.3.c).

989 Different Sylvia Juarez, 'Art. 44 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg (eds), *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 33.

990 Cf. Article 44 GDPR; see also European Data Protection Board, 'Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR' (Version 2.0, Adopted on 14 February 2023) para 4, 22 et seq.

991 See the cumulative criteria for an application of Article 44 et seq. GDPR in European Data Protection Board, 'Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR' (Version 2.0, Adopted on 14 February 2023) para

Thus, despite such extensive regulation of data transfers to third countries – and thus potential conflicts with a foreign data protection law – there is no explicit conflict-of-laws provision. By creating Articles 44 et seq. GDPR, the European legislator has shown clearly that it had third-country issues in mind when drafting the GDPR. Moreover, Articles 44 et seq. GDPR resolve such a conflict by ensuring the level of protection prescribed by the GDPR still being met even if the territorial scope of application of the GDPR itself is no longer given.[992] In view of these aspects, the absence of an explicit conflict-of-laws provision argues against the assumption of a conflict-of-laws element contained in Article 3 GDPR. Rather, the European legislator seems to be pursuing a concept according to which the objectives and the level of protection of the GDPR in a situation involving a third country are to be unilaterally enforced via Articles 44 et seq. GDPR.

(iii) Article 3 GDPR as Successor Provision to Article 4 DPD

Further, indications for the interpretation of Article 3 GDPR could also be derived from the predecessor provision of Article 3 GDPR in the DPD. Article 4 DPD was almost unanimously classified as a unilateral conflict-of-laws provision.[993] In particular, the heading of Article 4 DPD, which reads "National law applicable", may be relied upon for this argument.

9, 12; Christopher Kuner, 'Article 44', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 759.

992 Cf. Article 45(1), 46(1) GDPR.

993 See only Aleksandra Kuczerawy, 'Facebook and Its EU Users – Applicability of the EU Data Protection Law to US Based SNS', in Michele Bezzi, Penny Duquenoy, Simone Fischer-Hübner, Marit Hansen and Ge Zhang (eds), *Privacy and Identitiy* (Springer 2010); European Commission, 'Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality' (JLS/2007/C4/028, Final Report) 64 < http://ejtn6r2.episerverhosting.com/PageFiles/6333/Mainstrat%20Study.pdf> accessed 4 May 2024; Lee Bygrave, 'European Data Protection' (2000) 16 Computer Law & Security Report 252, 253; Lee Bygrave, *Data Privacy Law* (Oxford University Press 2014) 199; Michael Müller, 'Amazon and Data Protection Law – The end of the Private/Public Divide in EU conflict of laws' (2016) 2 Journal of European Consumer and Market Law 215, 218; Maja Brkan, 'Data Protection and Conflict-of-Laws: A Challenging Relationship' (2016) 2 European Data Protection Law Review 324, 326, 332; Article 29 Working Party, 'Working Document on determining the international application of EU data protection law to personal data processing on the Internet by non-EU based web sites' (WP 56, 30 May 2002), 6; Bernard Haftel, 'Protection des données personnelles : autorité de contrôle compétente et loi applicable' (2016) Revue Critique de Droit International Privé 377, 380; Christopher Kuner, 'Data Protection Law and International Jurisdiction on the Internet (Part 1)' (2010) 18 International Journal of Law and Information Technology 176, 191; Peter Swire, 'Of Elephants, Mice, And Privacy: International Choice of Law and the Internet' (1998) 32 The International Lawyer 991, 994; Helmut Heiss, 'Art. 7', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 72; so arguably implicitly ECJ, C-191/15 *Verein für Konsumenteninformation v Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612 para 72 et seq.; different Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 191 and Jan-Jaap Kuipers, 'Bridging the Gap' (2012) 76 Rabels Zeitschrift für ausländisches und internationales Privatrecht 562, 574; different also Peter Mankowski, 'Art. 27', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 9.

It is nonetheless unclear to what extent the legal classification of Article 4 DPD can be seamlessly transferred to Article 3 GDPR.[994] Already the different legal nature of the GDPR as a regulation and the DPD as a directive could argue against such a transfer. For the DPD, a conflict-of-laws rule was already necessary because, given its legal nature as a directive, the DPD had to ensure at least the coordination of the different member state implementations of the DPD in terms of conflict of laws. However, such coordination of the various member states' laws is no longer necessary, at least for the provisions of the GDPR itself.[995]

Another argument against transferring the legal classification is the significant difference between the wording of the DPD and the GDPR for the point at issue here. While the DPD in the German version of the Directive is to apply "[…] auf *alle* Verarbeitungen personenbezogener Daten […]", the GDPR applies "[…] auf die Verarbeitungen personenbezogener Daten […]".[996] Whereas Article 4 DPD in the German language version thus explicitly expresses its intention to apply to any data processing within its scope of application, this cannot be directly deduced from the wording of Article 3 GDPR.

Another argument against transferring the categorisation of Article 4 DPD is that the GDPR, like the DPD, regulates the substantive scope of application in a separate article. However, while Article 4 DPD is headed "National law applicable", the heading of Article 3 GDPR is "Territorial scope". Given the separate regulation of the substantive scope of application, the European legislator would have been free to choose e.g. "Applicable law" as the heading when creating the GDPR. This is all the more true as the DPD contains another provision entitled "Scope" (Article 3 DPD), which shows that the European legislator was aware of the possibility of a different wording. Thus, the fact that the European legislator has opted against a similar title suggests that Article 3 GDPR has a different function from that envisaged in Article 4 DPD.

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994 Affirmatively Helmut Heiss, 'Art. 7', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 71 et seq.; Stefan Hanloser, 'Art. 3 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg (eds), *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 7, however rejecting such a transfer Carlo Piltz, 'Art. 3', in Peter Gola and Dirk Heckmann (eds), *Datenschutzgrundverordnung, Bundesdatenschutzgesetz* (3rd edn, C.H. Beck 2022) para 56; also adopting a different assessment, Peter Mankowski, 'Art. 27', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 9; critically on a transfer also Ioannis Revolidis, 'Judicial Jurisdiction over Internet Privacy Violations and the GDPR: A Case of "Privacy Tourism"?' (2017) 11 Masaryk University Journal of Law and Technology 7, 11 et seq. who claims to have identified an approximation of European conflict of laws to the DPD.

995 See, however, below at C.II.2. on the references of the GDPR to national law and the gaps left by the provisions of the GDPR, which are to be filled by means of national law and for which a determination of the applicable law is still necessary.

996 Emphasis mine. Admittedly, this difference is not found in all language versions of the DPD and the GDPR. For example, in the French, English and Italian language versions, the formulations in both legal acts are identical in this respect, while the Spanish language version corresponds to the German wording.

Thus, even if one assumes that an element of conflict of laws can be inferred from Article 4 DPD, it is nevertheless doubtful whether this assessment can be applied to Article 3 GDPR without further ado, given the differences between Article 4 DPD and Article 3 GDPR. The predecessor provision of Article 3 GDPR is therefore inconclusive for determining the existence of an element of conflict of laws in Article 3 GDPR.

(iv) The Fundamental Rights Dimension of the GDPR

For the determination of the conflict-of-laws element in Article 3 GDPR, the fundamental rights dimension of data protection law is also to be taken into account. Although the relevance of data protection law to fundamental rights is not a compelling argument for the existence of a conflict-of-laws element[997], it must nevertheless be considered as a factor in the interpretation of Article 3 GDPR. This follows not least from the fact that conflict of laws is also influenced by substantive legal assessments.[998] In particular, the requirements set out in the fundamental freedoms and the CFR demand that secondary law of the European Union is interpreted in conformity with primary law.[999] To the extent that these rules require an enforcement of the GDPR that goes beyond relying on the general conflict-of-laws rules, Article 3 GDPR may have to be attributed a conflict-of-laws content.

The object of protection of the GDPR is described in Article 1 GDPR. According to Article 1(1),(2) GDPR, the GDPR protects natural persons with regard to the processing of personal data and the free movement of such data.[1000] Recital 1 GDPR emphasises the relevance of Article 8 CFR and Article 16 TFEU. The GDPR thus serves first and foremost the right to data protection and the free movement of such data. Moreover, Article 1(2) GDPR stresses the protection of fundamental rights and freedoms of natural persons, and in particular their right to the protection of personal data. However, Article 1(2) GDPR merely states that the GDPR does not interfere with these rights and freedoms, but not that the GDPR is intended to promote

997 See above C.II.1.c)(1).

998 See above A.II.3.a).

999 ECJ, C-360/10 *SABAM* [2012] ECLI:EU:C:2012:85 para 52; ECJ, C-426/11 *Alemo-Herron and Others* [2013] ECLI:EU:C:2013:521 para 30; ECJ, C-131/12 *Google Spain and Google* [2014] ECLI:EU:C:2014:317 para 68, 74; ECJ, C-580/13 *Coty Germany* [2015] ECLI:EU:C:2015:485 para 34; see also comprehensively Stefan Leible and Ronny Domröse, 'Interpretation in Conformity with Primary Law', in Karl Riesenhuber (ed), *European Legal Methodology* (2nd edn, Intersentia 2021) 181 et seq., 187 on interpretation in conformity with primary law, which also requires consideration of fundamental rights.

1000 Gerrit Hornung and Indra Spieker gen. Döhmann, 'Art. 1', in Indra Spieker gen. Döhmann, Vagelis Papakonstantinou, Gerrit Hornung and Paul De Hert (eds), *General Data Protection Regulation* (Nomos 2023) para 34; Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2016) 86 et seq.; for ECJ case law on the importance of these two data protection objectives, see also Hielke Hijmans, 'Article 1', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 52 et seq.

them.[1001] This follows from Recital 4 sentence 3 GDPR according to which the GDPR "[…] respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties […]". Article 1(2) GDPR is therefore to be understood as meaning that the right to data protection is to be balanced with other fundamental rights and freedoms by the GDPR.[1002] However, Article 1(2) GDPR does not contain a specific mandate for promotion of other fundamental rights and freedoms. Thus, it follows at least from the GDPR itself that it is not intended to promote fundamental rights or freedoms other than the right to data protection and the free movement of data. Even if a restriction of the territorial scope of the GDPR by Article 4 Rome II Regulation would also limit the territorial scope of other fundamental rights or freedoms, it is questionable to what extent these are intended to be protected by the GDPR.

Furthermore, the territorial scope of the fundamental rights[1003] and freedoms of the European Union is in principle limited to the territorial scope of the law of the European Union.[1004] The fundamental rights of the European Union are thus only given effect to the extent that the legal situation has a connection with the territory of the European Union.[1005] With regard to the localisation of data processing for the purposes of European fundamental rights, the ECJ establishes this territorial connection with the European Union for data subjects located in the European Union not by means of data processing in the third country itself. Rather, it focuses on the transfer of data from the European Union to a third country.[1006] Conversely, it follows that the scope of application of Article 8 CFR is in any case only given if both the fundamental rights subject and the data processor or data controller have a territorial connection to the European Union. The scope of application of the GDPR therefore transcends the fundamental rights guarantees by the European Union.[1007]

1001 Hielke Hijmans, 'Article 1', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 57.

1002 Hielke Hijmans, 'Article 1', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 57.

1003 Angela Schwerdtfeger, 'Art. 51 GRCh', in Jürgen Meyer and Sven Hölscheidt (eds), *Charta der Grundrechte der Europäischen Union* (5th edn, Nomos 2019) para 62; Hans Jarass, *Charta der Grundrechte der Europäischen Union* (4th edn, C.H. Beck 2021) Art. 51 para 44.

1004 Cf. Dirk Ehlers, 'Allgemeine Lehren der Unionsgrundrechte', in Dirk Ehlers (ed), *Europäische Grundrechte und Grundfreiheiten* (4th edn, De Gruyter 2014) § 14 para 82.

1005 ECJ, C-36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* [1974] ECLI:EU:C:1974:140 para 28 f.; cf. Article 52 TEU, Article 355 TFEU.

1006 Cf. ECJ, C-362/14 *Schrems* [2015] ECLI:EU:C:2015:650 para 79; ECJ, C-311/18 *Facebook Ireland and Schrems* [2020] ECLI:EU:C:2020:559 para 171.

1007 So expressly for Article 16 TFEU also Christoph Sobotta, 'Art. 16 AEUV', in Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (81th edn, January 2024) para 19.

Consequently, the question arises as to whether and in which situations the limitation of the territorial scope of the GDPR by the Rome II Regulation would limit fundamental rights or freedoms, namely the right to data protection enshrined in Article 8 CFR. The limitation of the scope of application of the GDPR by Article 4 Rome II Regulation concerns a data subject with a location and a habitual residence outside the European Union. It also requires that the data processor has its registered office or habitual residence in the European Union, that the data processing does not consist of a disclosure to third parties within the European Union and that there is no contractual relationship between the parties.[1008] If the data subject is located in the European Union, the scope of application of the GDPR is only limited by Article 4 Rome II Regulation if the data processing is carried out by means of a data transfer to a third country and the data subject is not habitually resident in a member state of the European Union.

In particular, in those cases in which the data subject is neither located nor habitually resident in a member state of the European Union, the application of Article 8 CFR is also not triggered. In these cases, the fundamental right to data protection is therefore not affected. This leaves those cases in which the data subject is located in the European Union but does not have its habitual residence there and the data processing is carried out by means of disclosure of the personal data to third parties established outside the European Union. Furthermore, in these cases – insofar as the data processor has its registered office or habitual residence in the European Union – there must be no contractual relationship between the parties. In these cases, the scope of application of the GDPR is limited by Article 4 Rome II Regulation. However, for those situations, the scope of application of Article 8 CFR is opened.

The limitation of the territorial scope of the GDPR by Article 4 Rome II Regulation thus only causes an additional restriction of the fundamental right to data protection if three requirements are met cumulatively. Firstly, the data subject must be located in the European Union but does not have its habitual residence there. Secondly, the data processing is carried out by means of disclosure of the personal data to third parties outside the European Union. Thirdly, there is no contractual relationship between the parties. In those cases, Article 4 Rome II Regulation results in an additional restriction of Article 8 CFR at the level of conflict of laws.

The "[…] free movement of data […]" addressed in Article 1(1),(2) GDPR, by contrast, has no relevance to the question at hand. The internal market and therefore the fundamental freedoms are not affected by a transfer of personal data to third countries.[1009] Thus, there are no situations

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1008 See above C.II.1.c)(2)(ii).

1009 Gerrit Hornung and Indra Spieker gen. Döhmann, 'Art. 1', in Indra Spieker gen. Döhmann, Vagelis Papakonstantinou, Gerrit Hornung and Paul De Hert (eds), *General Data Protection Regulation* (Nomos 2023) para 43.

in which the GDPR is limited by Article 4 Rome II Regulation and this limitation at the same time constitutes an interference with the freedoms of the internal market. Moreover, the GDPR itself only serves the free movement of personal data within the European Union.[1010] Under the GDPR, the free movement of personal data is only affected if the data processing is carried out by means of disclosure to a third party located in another member state.[1011] However, when data is transferred within the European Union the law of a member state is always applicable under Article 4 Rome II Regulation. Therefore, the limitation of the scope of application of the GDPR by the conflict of laws does not lead to an additional restriction of fundamental freedoms. Thus, the limitation of the territorial scope of application of the GDPR by Article 4 Rome II Regulation results in an additional restriction of the fundamental right to data protection only in very few situations. Moreover, the limitation of the territorial scope of the GDPR does not result in any restriction of fundamental freedoms. In view of this marginal additional restriction of fundamental rights, it is doubtful whether it is necessary to attribute a conflict-of-laws element to Article 3 GDPR.

In this respect, it is precisely the assessment of Article 1(2) GDPR that must be taken into account. According to this provision the right to data protection is not granted without any restriction, but is subject to a balancing with other fundamental rights.[1012] Therefore, while a conflict-of-laws limitation of the territorial scope of application may constitute an interference with fundamental rights, not every interference with a fundamental right requires the attribution of a conflict-of-laws element to Article 3 GDPR. Thus, the additional interference with Article 8 CFR caused by Article 4 Rome II Regulation is an indication that Article 3 GDPR also contains a conflict-of-laws dimension. Nevertheless, the specificity of the situation in which Article 4 Rome II Regulation restricts the right to data protection also indicates only a minor interference with Article 8 CFR. However, such a minor interference cannot, at least in itself, require the presumption of an element of conflict of laws.

(v) The GDPR as a Building Block of Comprehensive Data Protection Law

A further indication of the conflict-of-laws dimension of Article 3 GDPR may be derived from the relationship between the claims arising from the GDPR and more extensive claims under

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1010 Cf. Article 1(3) GDPR

1011 Cf. the wording of Recital 13 sentence 1 GDPR, which explicitly refers to "the Union" and "the internal market"; Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 3.29; Gerrit Hornung and Indra Spieker gen. Döhmann, 'Art. 1', in Indra Spieker gen. Döhmann, Vagelis Papakonstantinou, Gerrit Hornung and Paul De Hert (eds), *General Data Protection Regulation* (Nomos 2023) para 43 et seq.; Peter Schantz, 'Art. 1 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg (eds), *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 2.

1012 Hielke Hijmans, 'Article 1', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 57.

national law. In principle, claims under the applicable national law exist within the limits of Article 1(3) GDPR in addition to the claims established by the GDPR.[1013] Thus, according to the European legislator's conception, the GDPR is not a comprehensive and conclusive regulatory regime.

To the extent that this may also give rise to claims under national law in addition to those under the GDPR, it remains ambiguous why the applicability of the GDPR and the claims under national law should be assessed differently under conflict of laws. It is not evident why the European legislator should subject legally identical questions of a factual situation to different conflict-of-laws rules. There are no compelling indications for such a different assessment under conflict of laws.[1014] Such a diversity of conflict-of-laws rules would also run counter to the European legislator's objective of unifying the conflict-of-laws rules as far as possible.[1015] Furthermore, it must be taken into account that the GDPR not only allows for a parallel application of national claims, but also does not itself contain a comprehensive regulation of the claims established by it or, in this respect, partly refers to national law itself.[1016] Where the law applicable to data protection claims is determined according to the general conflict-of-laws rules, the law designated as applicable under the Rome II Regulation comprehensively governs the respective facts.[1017] Irrespective of whether the conflict-of-laws applicability of the GDPR is determined according to Article 3 GDPR or Article 4 Rome II Regulation, the law applicable to the gaps left by the GDPR is therefore regularly established on the basis of Article 4 Rome II Regulation. However, where recourse to the Rome II Regulation is necessary anyway, it is not apparent why Article 4 Rome II Regulation does not also determine the applicability of the GDPR itself under conflict of laws. This would also establish the applicability of the GDPR only in cases where a member state's legal system is used to fill the gaps. At the same time, this would ensure that the GDPR's explicit references to the law of a member state[1018] are not rendered ineffective in cases, where Article 4 Rome II Regulation refers to the law of a third country.

1013 See above C. and Paul Voigt and Axel von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 206.

1014 See above C.I.

1015 Cf. in this respect Article 12 Rome I Regulation, Article 15 Rome II Regulation as well as above C.I.4.; on Article 12 Rome I Regulation see also Susanne Augenhofer, 'Article 12 Rome I', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 1; Franco Ferrari, 'Art. 12', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 5.

1016 See already above C. as well as in detail on the determination of the applicable law in this respect below C.II.2.

1017 See above C.I.4.

1018 See in detail below C.II.2.a)-b).

(vi) Regulatory Purpose of Article 3 GDPR

The regulatory purpose of the GDPR may also provide guidance as to whether an element of conflict of laws can be derived from Article 3 GDPR. In this respect, the crucial question is whether the reasons that led to the creation of Article 3 GDPR at the level of substantive law are also relevant for conflict of laws.[1019] Article 3 GDPR is, *inter alia*, intended to ensure the export of regulatory standards to third countries.[1020] The purpose of this provision is to extend the applicability of the GDPR to all situations with a connection to the European Union and to create uniform rules in the internal market for data controller and data processor inside and outside the European Union.[1021] In this context, Article 3 GDPR takes a key role in the integration of the GDPR into international law.[1022] Accordingly, the compatibility of Article 3 GDPR with international law is regularly the subject of debate.[1023]

The enforcement of regulatory standards in situations involving a third country is in principle also a matter of importance at the level of conflict of laws. This might argue in favour of attributing a conflict-of-laws content to Article 3 GDPR. However, it must be taken into account that Article 3 GDPR focuses primarily on the question of the applicability of the GDPR in a cross-border public-law situation.[1024] This is also highlighted by the discussion on the admissibility of Article 3 GDPR under international law. Only in these situations the applicability of the GDPR depends solely on the definition of its own scope of application.

1019 See on this criterion already above A.II.3.c)(3)(a)(iii)(b)(iii).

1020 Gerrit Hornung and Indra Spieker gen. Döhmann, 'Introduction', in Indra Spieker gen. Döhmann, Vagelis Papakonstantinou, Gerrit Hornung and Paul De Hert (eds), *General Data Protection Regulation* (Nomos 2023) para 210.

1021 Gerrit Hornung, 'Art. 3', in Indra Spieker gen. Döhmann, Vagelis Papakonstantinou, Gerrit Hornung and Paul De Hert (eds), *General Data Protection Regulation* (Nomos 2023) para 1.

1022 Dan Svantesson, 'Article 3', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 76 et seq.

1023 Adèle Azzi, 'The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation' (2018) 9 Journal of Intellectual Property Information Technology and Electronic Commerce Law 126; Cedric Ryngaert and Mistale Taylor, 'The GDPR as Global Data Protection Regulation?' (2020) 114 American Journal of International Law Unbound 5; Brendan van Alsenoy, 'Reconciling the (extra)territorial reach of the GDPR with public international law', in Gert Vermeulen and Eva Lievens (eds), *Data Protection and Privacy Under Pressure* (Maklu 2017) 77; Merlin Gömann, 'The New Territorial Scope of EU Data Protection Law: Deconstructing a Revolutionary Achievement' (2017) 54 Common Market Law Review 567; Paul de Hert and Michal Czerniawski, 'Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context' (2016) 6 International Data Privacy Law 230; still on Article 4 DPD, Niilo Jääskinen and Angela Ward, 'The External Reach of EU Private Law in the Light of L'Oréal versus eBay and Google and Google Spain', in Marise Cremona and Hans-W Micklitz (eds), *Private Law in the External Relations of the EU* (Oxford Unversity Press 2016) 125.

1024 Felix Zopf, 'Two Worlds Colliding – The GDPR In Between Public and Private Law' (2022) 8 European Data Protection Law Review 210, 215, 216 et seq. emphasises the GDPR's general focus on *public enforcement* and Article 3 GDPR as being a typical public law approach.

To the extent that a private-law relationship is concerned and this situation is subject to the rules of conflict of laws[1025], it is much more relevant to consider how the GDPR is to be coordinated with other data protection laws in case of a cross-border situation. Situations may arise where the GDPR and a foreign data protection regime are supposed to apply at the same time, according to their territorial scope of application. As the court must determine the law applicable to the respective facts, it has to coordinate the territorial scope of application of the respective data protection laws. To this extent, however, conflict of laws provides a wide variety of mechanisms to establish a balance or hierarchy between these two legal systems. Thus, the regulatory objective of Article 3 GDPR of exporting data protection standards to third countries does not depend on Article 3 GDPR being assigned a conflict-of-laws element. Also, the question of extraterritoriality is thus not one of European private international law, since European private international law does not assess the territorial scope of substantive law, but coordinates situations in which several substantive rules claim to be applicable.[1026] Hence, enforcing regulatory standards may indeed also be of importance for conflict of laws. However, such enforcement is not achieved by the creation of a unilateral conflict-of-laws rule, but by means of other mechanisms of conflict of laws.

The substantive regulatory purpose of the export of regulatory standards pursued by the European legislator with Article 3 GDPR is therefore inconclusive for the assessment of the existence of a conflict-of-laws element in Article 3 GDPR. This function may be fulfilled by other conflict-of-laws mechanisms as well.

(vii) The Explicit Provision of International Jurisdiction in Article 79(2) GDPR

Another argument for the conflict-of-laws classification of Article 3 GDPR could also be deduced from Article 79(2) GDPR. This provision establishes an international jurisdiction at least for data protection claims based on the GDPR.[1027]

1025 These rules apply irrespective of whether Article 3 GDPR is classified as a unilateral conflict-of-laws rule, see above B.I.1.

1026 See also Toshiyuki Kono, 'Territoriality', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 1703 et seq. on the importance of extraterritoriality for the conflict of laws of the US; see on the relevance of public international law for the determination of the applicable law in private-law situations in detail above A.II.1.b)(1).

1027 With regard to Article 79(2) GDPR, many issues remain controversial; for example, it is unclear whether Article 79(2) GDPR merely establishes a further head of international jurisdiction in addition to the general rules of international jurisdiction, namely the Brussels I*bis* Regulation, see Waltraut Kotschy, 'Article 79', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 1140; Olivia Tambou, 'Art. 79', in Indra Spieker gen. Döhmann, Vagelis Papakonstantinou, Gerrit Hornung and Paul De Hert (eds), *General Data Protection Regulation* (Nomos 2023) para 29 et seq.

A particular feature of the international jurisdiction established by Article 79(2) GDPR is that Article 79(2) GDPR does not confer jurisdiction in all cases in which the territorial scope of the GDPR is opened. In cases where the territorial scope of the GDPR is given according to Article 3(2) GDPR and the data subject is not habitually resident in the European Union, there is no international jurisdiction in the European Union under Article 79(2) GDPR.[1028] Thus the GDPR's provisions might be applicable according to Article 3 GDPR even if Article 79(2) GDPR does not establish a place of international jurisdiction in the European Union. This could be an indication of the European legislator's intention to integrate the GDPR into the existing private international law of the European Union and thus at least into the existing rules on international jurisdiction. Article 79(2) GDPR would then no longer be considered a conclusive rule, but would only establish a further head of international jurisdiction in addition to the rules of the Brussels I*bis* Regulation. The provisions of the Brussels I*bis* Regulations would thus continue to apply to the extent that they are compatible with Article 79(2) GDPR.[1029] Such an understanding is also supported by Recital 147 GDPR. According to this Recital the Brussels I*bis* Regulation shall not prevent the applicability of Article 79(2) GDPR. Conversely, this suggests that the international jurisdiction established by the Brussels I*bis* Regulation should in principle coexist with that of Article 79(2) GDPR.

The very fact that there is no corresponding regulation on the relationship between Article 3 GDPR and the Rome II Regulation suggests that the European legislator did not anticipate a potential conflict in this respect. However, such a conflict would only be absent if Article 3 GDPR had no inherent conflict-of-laws element. Furthermore, it follows from Article 79(2) GDPR that the European legislator has envisaged the integration of the GDPR into European private international law, at least with regard to international jurisdiction. The existence of an explicit rule on international jurisdiction and the classification of the relationship of this provision to other provisions of European private international law therefore tend to argue against the assumption of a conflict-of-laws element present in Article 3 GDPR.

(viii) Conclusion

Taking into account the various factors, the assumption of a conflict-of-laws element in Article 3 GDPR is supported, firstly, by the explicit reference in Article 3 GDPR to the European Union for the purpose of determining its territorial scope of application. By employing this criterion,

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1028 See already Marta Requejo Isidro, 'Procedural Harmonisation and Private Enforcement in the GDPR', in Fernando Gascón Inchausti and Burkhard Hess (eds), *The Future of the European Law of Civil Procedure* (Intersentia 2020) 173, 185.

1029 In this direction already Kohler, 'Conflict of Laws Issues in the 2016 Data Protection Regulation of the European Union' (2016) Rivista di diritto internazionale privato e processuale 653, 669.

the GDPR reflects the European legislator's intention to address precisely also situations with a connection to third countries. In addition, the absence of a conflict-of-laws element would not only limit the scope of application of the GDPR, but also lead to an additional interference with the fundamental right to data protection.

However, it should be borne in mind that this limitation and interference are subject to a multitude of preconditions and are therefore likely to be of little practical relevance. With regard to the explicit reference to the European Union, it could also be argued that the European legislator omitted an explicit conflict-of-laws provision, even though it recognised the possibility of situations involving a third country. It could therefore be argued that the legislator has deliberately omitted such a provision and has left the conflict of laws to the general rules. Such an awareness on the part of the legislator in drafting the GDPR is also supported by Articles 44 et seq. GDPR, which provide for a substantive regulation at least for a certain form of data processing with a connection to a third country. The parallel application of the GDPR alongside national data protection law on a substantive level also argues against the assumption of a conflict-of-laws element. A different determination of the conflict-of-laws applicability of the GDPR and national data protection law could lead to inconsistencies. A further factor weighing against a conflict-of-laws classification of Article 3 GDPR is the regulatory purpose pursued with Article 3 GDPR on a substantive level. This purpose does not require the attribution of an independent conflict-of-laws element to Article 3 GDPR at the level of conflict of laws. Moreover, there is no reason for a different connecting factor at the level of conflict of laws, especially as the European legislator generally strives for uniform connecting factors in conflict of laws. Furthermore, Article 79(2) GDPR, which contains an explicit provision on international jurisdiction, and the European legislator's statement on its relationship with European private international law in Recital 147 GDPR also militate against the assumption of a conflict-of-laws element.

In contrast, the conflict-of-laws characterisation of Article 4 DPD is inconclusive with regard to the conflict-of-laws classification of Article 3 GDPR. Even if an element of conflict of laws could possibly be attributed to Article 4 DPD, a transfer of this categorisation to Article 3 GDPR is doubtful.

A balancing of the aforementioned factors derived from the interpretation of Article 3 GDPR indicates the absence of a conflict-of-laws element in Article 3 GDPR. Article 3 GDPR thus has an effect in private-law relationships solely at the level of substantive law, as a provision restricting the territorial scope of application. The international applicability of the GDPR to

private-law relationships is therefore governed by the general rules of conflict of laws. In this respect, Article 4 Rome II Regulation is authoritative.[1030]

d) Applicability of the GDPR Besides the Law Referred to by Conflict of Laws

If conflict of laws refers to the legal system of a third country, the GDPR is not part of the invoked legal system. However, the provisions of the GDPR may apply as overriding mandatory provisions (1). Besides, provisions of the GDPR may also be classified as rules on safety and conduct (2).

(1) Provisions of the GDPR as Overriding Mandatory Rules

The applicability of the rules of the GDPR in cross-border situations is consistently based on the legal instrument of the overriding mandatory provision (a). However, a blanket classification of data protection law rules as overriding mandatory provisions is inadmissible (b). It is therefore necessary to examine whether, and if so which, provisions of the GDPR have the quality of an overriding mandatory provision (c). Finally, the legal consequences of such a classification of provisions of the GDPR as overriding mandatory provisions need to be considered in more detail (d).

(a) The Classification of the Provisions of the GDPR as Overriding Mandatory Provisions

The classification of provisions of the GDPR as overriding mandatory provisions is assessed differently. In part, it is assumed sweepingly of all provisions of data protection law[1031] or the GDPR[1032] to be classified as overriding mandatory provisions. Others, however, acknowledge

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1030 See on Article 4 Rome II Regulation and data protection claims above C.I.3.

1031 Maja Brkan, 'Data Protection and Conflict-of-Laws: A Challenging Relationship' (2016) 2 European Data Protection Law Review 324, 333; Christian Kohler, 'Conflict of Laws Issues in the 2016 Data Protection Regulation of the European Union' (2016) Rivista di diritto internazionale privato e processuale 653, 674; Martin Zwickel, Reinhold Thode and Peter Stelmasczcyk, '§ 5 Eingriffsnormen (international zwingende Bestimmungen), Berücksichtigung ausländischer Devisenvorschriften, Formvorschriften', in Christoph Reithmann and Dieter Martiny (eds), *Internationales Vertragsrecht* (9th edn, ottoschmidt 2022) para 5.77.

1032 Christian Kohler, 'Conflict of Laws Issues in the 2016 Data Protection Regulation of the European Union' (2016) Rivista di diritto internazionale privato e processuale 653, 661, 674; Ivo Bach, 'Vorbemerkungen zur Rom I-VO', in Gerald Spindler and Fabian Schuster (eds), *Recht der elektronischen Medien* (4th edn, C.H. Beck 2019) para 22; Stefan Hanloser, 'Art. 3 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg (eds), *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 7; different, however, Luís De Lima Pinheiro, 'Law Applicable to Personal Data Protection on the Internet: Some Private International Law Issues' (2008) 18 Anuario español de Derecho internacional privado 163, 183.

an overriding mandatory nature only for certain provisions of the GDPR, in particular Article 3 GDPR.[1033]

These different classifications have already been discussed for the DPD. It has also been argued for the DPD as a whole[1034] or at least for parts of it and in particular Article 4 DPD to be classified as overriding mandatory provision.[1035] Some, however, reject a classification as overriding mandatory provisions of the provisions of the DPD[1036] and GDPR[1037].

(b) The Blanket Classification of Data Protection Rules as Overriding Mandatory Provisions

To the extent to which data protection law rules or the provisions of the DPD or the GDPR are universally considered to have the quality of an overriding mandatory provision, this classification must be rejected in its generality.[1038] This already follows from the wording of Article 9(1) Rome I Regulation, which also defines the concept of an overriding mandatory provision for Art 16 Rome II Regulation.[1039] According to Article 9(1) Rome I Regulation, the

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1033 Dulce Lopes, 'GDPR – Main International Implications' (2020) European Journal of Privacy Law & Technology 9, 17 et seq.; Jan Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' (2018) 117 Zeitschrift für vergleichende Rechtswissenschaft 50, 74; Bernd Schmidt, 'Art. 3 DSGVO', in Jürgen Taeger and Detlev Gabel (eds), *DSGVO - BDSG – TTDSG* (4th edn, Recht und Wirtschaft 2022) para 37; Basak Erdogan, 'Data Protection Around the World: Turkey', in Elif Kiesow Cortez (ed), *Data Protection Around the World* (T.M.C. Asser Press 2021) 203, 224; Carlo Piltz, 'Art. 3', in Peter Gola and Dirk Heckmann (eds), *Datenschutzgrundverordnung, Bundesdatenschutzgesetz* (3rd edn, C.H. Beck 2022) para 56, 57; Martina Melcher, 'Substantive EU Regulations as Overriding Mandatory Rules?' (2020) ELTE Law Journal 37, 42; Wolfgang Däubler, 'Das Kollisionsrecht des neuen Datenschutzes' (2018) Recht der Internationalen Wirtschaft 405, 406; Jan Oster, 'Internationale Zuständigkeit und anwendbares Recht im Datenschutz' (2021) 29 Zeitschrift für Europäisches Privatrecht 275, 281; Manuel Klar, 'Art. 3 DSGVO', in Jürgen Kühling and Benedikt Buchner (eds), *Datenschutz-Grundverordnung, Bundesdatenschutzgesetz* (2nd edn, C.H. Beck 2018) para 105.

1034 Stefan Hanloser, 'Art. 3 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg (eds), *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 7.

1035 Jan-Jaap Kuipers, *EU Law and Private International Law* (Martinus Nijhoff 2012) 185 et seq.; Carlo Piltz, '*Facebook Ireland Ltd. / Facebook Inc. v Independent Data Protection Authority of Schleswig-Holstein* – Facebook is not subject to German data protection law' (2013) 3 *International Data Privacy Law* 210; Carlo Piltz, 'Der räumliche Anwendungsbereich europäischen Datenschutzrechts' (2013) Kommunikation und Recht 292, 296; Michael Müller, 'Amazon and Data Protection Law – The end of the Private/Public Divide in EU conflict of laws' (2016) 2 Journal of European Consumer and Market Law 215, 218.

1036 Critical on the characterisation of the provisions of the DPD as overriding mandatory provisions, Maja Brkan, 'Data Protection and European Private International Law', EUI Working Papers RSCAS 2015/40, 30 et seq.

1037 Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 23; Ulrich Magnus, 'Art. 9 Rom I-VO', in *Staudinger Internationales Vertragsrecht I - Internationales Devisenrecht* (De Gruyter 2021) para 186.

1038 Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-026; Martina Melcher, 'Substantive EU Regulations as Overriding Mandatory Rules?' (2020) ELTE Law Journal 37, 40; Björn Steinrötter, 'Kollisionsrechtliche Bewertung der Datenschutzrichtlinien von IT-Dienstleistern' (2013) 16 Zeitschrift für IT-Recht und Recht der Digitalisierung 691, 693.

1039 See above B.II.2.a)(1) as well as ECJ, C-359/14 and C-475/14 *ERGO Insurance* [2016] ECLI:EU:C:2016:40 para 43; ECJ, C-149/18 *Da Silva Martins* [2019] ECLI:EU:C:2019:84 para 28.

object of classification as an overriding mandatory provision is "[…] provisions […]" but not a "law" or "act".[1040] Consequently, already under the wording of Article 9(1) Rome I Regulation, it is always the individual rule that is the yardstick for the classification as an overriding mandatory provision. Moreover, overriding mandatory provisions disrupt the principle of uniform application of the applicable law and may restrict the parties in their contractual autonomy as expressed in the choice of law.[1041] They hence take on an exceptional character in the system of European conflict of laws, which therefore requires a narrow interpretation.[1042] Moreover, specifically for legal acts of substantive Union law, it must be recalled that they often serve both the protection of individuals and the protection of public interests.[1043] However, to the extent that a provision of these acts is aimed exclusively at the protection of individuals, a classification as an overriding mandatory provision is precluded.[1044] It must therefore be examined separately for each individual provision whether it is to be classified as an overriding mandatory provision within the meaning of Article 9(1) Rome I Regulation. This does not exclude the possibility for large parts of legal acts to be ascribed the quality of an overriding mandatory provision. However, it does not relieve from the separate examination for each individual provision of a legal act. To the extent that considerations apply not only to a single provision, but to several provisions, a joint assessment is generally permissible.

(c) The Overriding Mandatory Nature of Provisions of the GDPR

For a provision of the GDPR to be classified as an overriding mandatory provision, three conditions must be met cumulatively: it must be a mandatory provision (i), the public interest

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1040 This limitation of Article 9(1) Rome I Regulation to individual provisions is not a peculiarity of the English language version, but is also found in the French ("une disposition") and German ("eine zwingende Vorschrift") language versions.

1041 In this regard already on the Rome Convention ECJ, C-184/12 *Unamar* [2013] ECLI:EU:C:2013:663 para 49; emphasising the importance of this principle also for the Rome I Regulation ECJ, C-152/20 and C-218/20 *SC Gruber Logistics* [2021] ECLI:EU:C:2021:600 para 36.

1042 Cf. Recital 37 Rome I Regulation; in the result also ECJ, C-149/18 *Da Silva Martins* [2019] ECLI:EU:C:2019:84 para 29; ECJ, C-135/15 *Nikiforidis* [2016] ECLI:EU:C:2016:774 para 44.

1043 Jürgen Basedow, *EU Private Law* (Intersentia 2021) I-46; see already above B.IV.1.b)(1).

1044 See above B.II.2.a)(2)(b); Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 11; see also Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (Oxford University Press 2015) para 15.39 et seq.; Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 12-026; similar Moritz Renner, 'Article 9 Rome I', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 13; Andrea Bonomi, 'Art. 9', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. II (ottoschmidt 2017) para 70 et seq.; so already for data protection law Björn Steinrötter, 'Kollisionsrechtliche Bewertung der Datenschutzrichtlinien von IT-Dienstleistern' (2013) 16 Zeitschrift für IT-Recht und Recht der Digitalisierung 691, 693.

protected by it must be of a certain quality (ii) and the provision must provide an overriding reach (iii).[1045]

(i) The Provisions of the GDPR as Mandatory Provisions

In a first step, the respective provision needs to qualify as a mandatory provision. In the absence of an express provision[1046], the mandatory nature of provisions of the GDPR is to be determined by way of interpretation[1047].

The provisions of data protection law in general and the GDPR in particular are often regarded as mandatory.[1048] However, it could be argued against classifying the GDPR's provisions as mandatory that, under the GDPR, data processing is also permitted if the data subject has given consent.[1049] Therefore, it could be assumed that the GDPR itself allows for a waiver of its provisions, making them subject to the will of the parties. However, this would ignore the fact that consent does not lead to a waiver of the GDPR *per se*; rather, the rights granted by the GDPR exist in part even if the data processing is lawful under Article 6(1) lit. a) GDPR. Moreover, the GDPR continues to regulate the requirements and scope of consent in this respect.[1050] Thus, consent to data processing does not allow for a derogation from the GDPR as such, but only results in the processing itself being permissible in accordance with the requirements described in the GDPR.

In contrast, the assumption of a mandatory nature for provisions of the GDPR is supported by the fact that the GDPR is not only aimed at protecting individuals, but also at creating a uniform data protection standard in the European Union.[1051] It would be contrary to this objective if it were possible to deviate from the provisions of the GDPR as a whole by means of a contractual agreement. The ECJ has also stated in this respect for the DPD that it is unacceptable "[…] that

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1045 See in detail above B.II.2.a)(2).

1046 Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2016) 243 on the DPD.

1047 See above B.II.2.a)(2)(a).

1048 General on (European) data protection law Lucas Bergkamp, *European Community Law for the New Economy* (Internsentia 20023) 123; Lokke Moerel, *Binding Corporate Rules* (Oxford University Press 2012) 153; Daniel Cooper and Christopher Kuner, 'Data Protection Law and International Dispute Resolution' (2015) 382 Recueil des Cours 9, 32, 59; Maja Brkan, 'Data Protection and Conflict-of-Laws: A Challenging Relationship' (2016) 2 European Data Protection Law Review 324, 339; Maja Brkan, 'Data Protection and European Private International Law', EUI Working Papers RSCAS 2015/40, 30; Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford University Press 2016) 235; for the GDPR Dan Svantesson, 'Article 3', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 82; Christian Kohler, 'Conflict of Laws Issues in the 2016 Data Protection Regulation of the European Union' (2016) Rivista di diritto internazionale privato e processuale 653, 661; however, this is not uncontroversial, see for example on the DPD Colette Cuijpers, 'A Private Law Approach to Privacy; Mandatory Law Obliged?' (2007) 4 SCRIPTed 304, 306.

1049 Article 6(1) lit. a) GDPR.

1050 Cf Article 7, 8 GDPR.

1051 Cf. Recital 10 GDPR.

the processing of personal data […] should escape the obligations and guarantees laid down by Directive 95/46, which would compromise the directive's effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons which the directive seeks to ensure."[1052] It is therefore evident that the provisions of the GDPR are to be classified as mandatory in their entirety.

(ii) Provisions of the GDPR Protecting Public Interests with a Certain Quality

Furthermore, for a provision of the GDPR to qualify as overriding mandatory, the provision must protect a public interest (a) and that protection must be of a certain quality (b).

(a) The Public Interests Protected by the GDPR

A public interest as required for an overriding mandatory provision is protected if the provision serves to promote the collective interests of the community.[1053] For the GDPR, such promotion of collective interests of the community follows, firstly, from the protection of the fundamental right to data protection that the GDPR seeks to achieve.[1054] Secondly, it is also based on the fact that data protection law serves the implementation of the internal market.[1055]

(b) Relevance of the Provisions of the GDPR to Protect Public Interests

In addition, the provision in question must be essential for the protection of the public interests.

(i) The GDPR as a Legal Act to Protect the Free Movement of Personal Data

In any case, it is not sufficient for the GDPR to serve the free movement of personal data and thus the protection of fundamental freedoms. Otherwise, any provision in a legal act of the European Union serving the fundamental freedoms would potentially be classified as an overriding mandatory provision.[1056] This would lead to a plethora of overriding mandatory provisions, especially in light of the fact that a large number of legal acts are based on the competence for the protection of fundamental freedoms enshrined in Article 114 TFEU in the absence of a more specific legal basis. This would also contradict the restrictive approach to the presumption of an overriding mandatory provision.[1057]

1052 ECJ, C-131/12 *Google Spain and Google* [2014] ECLI:EU:C:2014:317 para 58.

1053 See above B.II.2.a)(2)(b).

1054 Maja Brkan, 'Data Protection and European Private International Law', EUI Working Papers RSCAS 2015/40, 36; see also above on the fundamental rights protected by the GDPR C.I.2.b)(2).

1055 Maja Brkan, 'Data Protection and European Private International Law', EUI Working Papers RSCAS 2015/40, 30; Carlo Piltz, 'Rechtswahlfreiheit im Datenschutzrecht?' (2012) Kommunikation und Recht 640, 643.

1056 Maja Brkan, 'Data Protection and European Private International Law', EUI Working Papers RSCAS 2015/40, 30 et seq.; Martin Schmidt-Kessel, 'Article 9', in Franco Ferrari (ed), *Concise Commentary on the Rome I Regulation* (2nd edn, Cambridge University Press 2020) para 17, in contrast, denies already that the provision is mandatory merely because it is based on Art. 114 TFEU.

1057 Cf. C.II.1.d)(1)(b).

(ii) The Public Enforcement of the GDPR

Applying the relevant criteria[1058] for determining the quality of the protection of public interests, it is apparent from Article 3 GDPR, firstly, that the GDPR as a whole provides for an explicit regulation of its territorial scope of application. In addition, the GDPR contains extensive possibilities for the enforcement of the GDPR by means of *public enforcement*. In Article 58 GDPR, for example, the European legislator grants the administrative authorities of the member states extensive powers to enforce the GDPR. In addition, Article 83(4),(5) GDPR sanctions violations of a large number of provisions of the GDPR with administrative penalties. Moreover, according to Article 84 GDPR, all other violations of the GDPR may be subject to fines by the member states. Both criteria thus support the finding that the provisions of the GDPR have the necessary quality to protect the public interest, in order to be classified as an overriding mandatory provision.

However, the assumption of a corresponding quality of protection of public interests could be contradicted by the fact that the European legislator has not only assigned the enforcement of the GDPR to the authorities of the member states. Rather, it has also granted extensive possibilities to private parties to enforce compliance with the GDPR. In this respect, it could be argued that by creating the possibility of *private enforcement*, the European legislator has at least also, if not primarily, left the enforcement of the GDPR to private parties. From this, it could be concluded that the European legislator did not consider the enforcement of these interests to be essential. It is therefore questionable whether this duality of enforcement precludes the assumption of a corresponding quality of the public interest.

Under the GDPR, *private enforcement* is in particular possible within the framework of the claims listed in Articles 12 to 22 GDPR and the claim for damages provided for in Article 82 GDPR. However, to the extent that the GDPR is intended to be enforced by means of *private enforcement*, this type of enforcement is merely an additional means to the enforcement of the GDPR by means of *public enforcement*.[1059] This already follows from the regulatory density, which is significantly higher for *public enforcement* than for *private enforcement*.[1060] *Private*

1058 See on these criteria exhaustively above B.II.2.a)(2)(b).

1059 Similar Wolfgang Wurmnest and Merlin Gömann, 'Comparing Private Enforcement of EU Competition and Data Protection Law' (2022) 13 Journal of European Tort Law 154, 163 et seq., 166, who, however, also emphasise the independent importance of *private enforcement* for the compensation of injured parties; see also Christian Kohler, 'Conflict of Laws Issues in the 2016 Data Protection Regulation of the European Union' (2016) Rivista di diritto internazionale privato e processuale 653, 674; also emphasising the independent importance of *private enforcement* for the GDPR Olivia Tambou, 'Art. 82', in Indra Spieker gen. Döhmann, Vagelis Papakonstantinou, Gerrit Hornung and Paul De Hert (eds), *General Data Protection Regulation* (Nomos 2023) para 3.

1060 Marta Requejo Isidro, 'Procedural Harmonisation and Private Enforcement in the GDPR', in Fernando Gascón Inchausti and Burkhard Hess (eds), *The Future of the European Law of Civil Procedure*

enforcement in the GDPR thus only serves a supporting function; it is not intended to replace the *public enforcement* of the GDPR. However, since the enforcement of the GDPR is thus in principle primarily vested in the member state authorities, the additional possibility of *private enforcement* of the GDPR is no indication against the existence of a corresponding quality of the protected interest.[1061]

(iii) Decisional Harmony

Furthermore, the fact of a large number of legal systems having already enacted data protection laws[1062], which are also frequently inspired by the rules of the GDPR[1063], might also militate against the categorisation of provisions of the GDPR as overriding mandatory provisions. In many cases, the law referred to by Article 4 Rome II Regulation will also provide for data protection rules. If individual provisions of the GDPR were to be classified as overriding mandatory provisions, this would mean that the provisions of third country data protection law referred to by Article 4 Rome II Regulation would generally be superseded by the provisions of the GDPR classified as overriding mandatory provisions.[1064] This would considerably impair international decisional harmony, one of the objectives of conflict of laws, and would also encourage forum shopping.[1065] This is all the more significant as the classification as an overriding mandatory provision does not contribute to decisional harmony within the European Union: The provisions of the GDPR – like all other provisions of data protection law – are in any case part of the law applicable under Article 4 Rome II Regulation.[1066] Within the European Union[1067], therefore, their applicability is determined uniformly in accordance with Article 4 Rome II Regulation.

(Intersentia 2020) 173, 175, 194; Felix Zopf, 'Two Worlds Colliding – The GDPR In Between Public and Private Law' (2022) 8 European Data Protection Law Review 210, 215.

1061 On the function of *private enforcement*, its relationship to *public enforcement* and a comparison between competition and data protection law, see Wolfgang Wurmnest and Merlin Gömann, 'Comparing Private Enforcement of EU Competition and Data Protection Law' (2022) 13 Journal of European Tort Law 154.

1062 Christoper Kuner, 'Article 44', in Christopher Kuner, Lee Bygrave, Christopher Docksey and Laura Drechsler (eds), *The EU General Data Protection Regulation (GDPR)* (Oxford University Press 2020) 757; see in this regard the overviews regularly published by Graham Greensleaf, for example, Graham Greensleaf, 'Global data privacy laws 2023: 162 national laws and 20 Bills' <https://ssrn.com/abstract=4426146> accessed 6 May 2024.

1063 Graham Greenleaf, 'Now 157 countries: Twelve data privacy laws in 2021/22' 8 <https://ssrn.com/abstract=4137418>.

1064 For the relationship between the different means by which conflict of law might give effect to substantive law, see above B.II.3.

1065 Also emphasising the importance of decisional harmony for conflict of laws, Gisela Rühl, 'Private international law, foundations', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 1388.

1066 See above C.II.1.b).

1067 Except of Denmark, Article 1(4) Rome II Regulation.

(iv) The Regulatory Purpose of the GDPR

However, through Recital 101 and Articles 44 et seq. GDPR, the European legislator has made clear that the level of protection created by the GDPR should also apply in cases with a strong connection to a third country. Thus, from the perspective of the European legislator, it is not sufficient to apply any third-country data protection law. The objective of the GDPR is rather to ensure a level of data protection equivalent to that of the GDPR.[1068] To ensure this level of protection, the rules must be designed as an overriding mandatory provision.

At the same time, it also follows from this objective of the GDPR – to ensure a level of data protection equivalent to that of the GDPR – for which types of provisions of the GDPR a corresponding quality of protection of the public interest is given. In this respect, it is necessary to distinguish between three categories of provisions contained in the GDPR.

First of all, the GDPR consists of a large number of provisions that do not themselves directly concern data protection law, but only have a technical legal function. These include, for example, the general provisions[1069] and the provisions on delegated and implementing acts[1070] as well as the final provisions[1071]. Neither a regulatory content under data protection law nor any other purpose in the public interest can be derived from these provisions. Therefore, they do not qualify as overriding mandatory provisions.[1072] Similarly, the GDPR lays down rules on the establishment and functioning of the European Data Protection Board[1073], which are intended to ensure a uniform application of the GDPR[1074]. These provisions do not constitute data protection rules in the strict sense of the term. Therefore, they cannot be considered to possess the quality of an overriding mandatory provision.

Secondly, the GDPR comprises provisions which do not address data processing, but which lay down rules for ensuring or enforcing lawful data processing. This concerns the rules on the competence and powers of data protection authorities in the enforcement of the GDPR[1075] and the claims of data subjects and their legal remedies as well as the procedural provisions relevant

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1068 See also Peter Schantz, 'Art. 6', in Indra Spieker gen. Döhmann, Vagelis Papakonstantinou, Gerrit Hornung and Paul De Hert (eds), *General Data Protection Regulation* (Nomos 2023) para 6 et seq.

1069 Article 1-4 GDPR.

1070 Article 92-93 GDPR.

1071 Article 94-99 GDPR.

1072 However, different with regard to Article 3 GDPR – albeit mostly without justification – Jan Oster, 'Internationale Zuständigkeit und anwendbares Recht im Datenschutz' (2021) 29 Zeitschrift für Europäisches Privatrecht 275, 281; Carlo Piltz, 'Art. 3', in Peter Gola and Dirk Heckmann (eds), *Datenschutzgrundverordnung, Bundesdatenschutzgesetz* (3rd edn, C.H. Beck 2022) para 56; Jan Lüttringhaus, 'Das internationale Datenprivatrecht: Baustein des Wirtschaftskollisionsrechts des 21. Jahrhunderts' (2018) 117 Zeitschrift für vergleichende Rechtswissenschaft 50, 74; Bernd Schmidt, 'Art. 3 DSGVO', in Jürgen Taeger and Detlev Gabel (eds), *DSGVO - BDSG – TTDSG* (4th edn, Recht und Wirtschaft 2022) para 37.

1073 Articles 68-76 GDPR.

1074 Article 70(1) lit. 1) GDPR.

1075 Articles 51-67, 83-84 GDPR.

in this respect[1076]. With regard to the *private enforcement* of the GDPR, some of these provisions considerably facilitate[1077] or establish claims which are typically not known under general private law[1078]. With regard to the *private enforcement* of the GDPR, claims are also regularly substantiated under general private law in the event of a violation of the GDPR, which in this respect stipulates legal duties of conduct. Even if the enforcement of these claims based on a violation of the GDPR is subject to higher requirements under national law, the *private enforcement* of the GDPR is not excluded in these cases. Thus, the provisions on the enforcement of the GDPR are not of particular interest to protect the public interests.

Furthermore, the enforcement of the level of protection established by the GDPR does not directly concern the level of protection itself. The level of protection under data protection law is only affected by the rules on enforcement if – in the absence of a possibility to enforce the rules – violations of these rules remain without consequences. Thus, the level of protection provided by the GDPR would only be affected if enforcement of the GDPR were completely excluded. However, this is generally not the case. Even to the extent to which the GDPR contains claims which are not provided for by general private law, this does not as a rule affect the level of protection in the processing of personal data. This would only be the case if the respective claim is crucial for achieving the respective level of data protection. However, the fact that the GDPR already provides for extensive exceptions[1079] to those claims militates against such a categorisation of this type of provision as crucial.[1080] These exceptions indicate that the European legislator did not consider the provisions on the enforcement of the GDPR as essential to safeguard a public interest.

Thirdly, the GDPR contains rules for the processing of personal data[1081], rules for special processing situations[1082] and rules for the transfer of personal data to third countries or to international organisations[1083]. It is precisely these provisions which serve to protect the fundamental right to data protection and the free movement of personal data. Moreover, the application of these provisions is necessary to maintain a level of data protection comparable to the GDPR, even if a third-country data protection law is applicable to the data processing.

1076 Articles 12-22, 77-82 GDPR.

1077 Cf. e.g. the reversal of the burden of proof in Article 82(3) GDPR.

1078 E.g. the right not to be subject to an automated decision, cf. Article 22(1) GDPR.

1079 This is at least true for Article 22(1) GDPR, c.f. Article 22(2) GDPR.

1080 See above B.II.2.a)(2)(b) on this criterion for determining the existence of an overriding mandatory provision.

1081 Article 5-11 GDPR.

1082 Article 85-91 GDPR.

1083 Article 44-50 GDPR.

Therefore, these provisions can be considered as crucial for the protection of the fundamental right to data protection.

Overall, it therefore emerges that only a fraction of the provisions of the GDPR meet the necessary relevance for the protection of the public interest. These are those provisions dealing with the processing of personal data and the transfer of personal data, as well as the provisions for special processing situations. Only these provisions may therefore be regarded as overriding mandatory provisions.

(iii) The Overriding Reach of the Provisions of the GDPR

Finally, the respective provision of the GDPR must provide an overriding reach in order to be classified as an overriding mandatory provision.[1084] For the provisions of the GDPR, the existence of such an overriding reach follows from Article 3 GDPR, which provides for an explicit definition of the territorial scope of application[1085]. Article 3 GDPR also covers situations located outside the European Union and, in any case, partially derogates from the general conflict-of-laws rules of Article 4 Rome II Regulation[1086]. Thus, those provisions of the GDPR that meet the further requirements for the classification as an overriding mandatory provision also possess the necessary overriding reach.

(d) Legal Consequences of a Classification as Overriding Mandatory Provision

In summary, the foregoing demonstrates that, courts of a member state of the European Union may apply provisions of the GDPR as overriding mandatory provisions beside the appliable law. This is true for those provisions of the GDPR which provide specific rules for the processing and transfer of personal data and which regulate special processing situations.

However, to the extent that provisions of the GDPR are to be classified as overriding mandatory provisions, these provisions do not in any case supersede those rules of the law referred to in Article 4 Rome II Regulation having the same area of regulation. Rather, it follows from the objective pursued by the GDPR of ensuring a comparable level of data protection and the complementary applicability of national law[1087] that a comparison of the different data protection laws is necessary. The GDPR only replace the data protection law referred to under Article 4 Rome II Regulation if the GDPR ensures a comparatively higher level of data protection. This is also supported by the fact that such a comparison contributes to the external harmony of the decision. In cases where the data protection law of the third country to which

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1084 See above B.II.2.a)(2)(c).

1085 For the relevance of this criterion, see above B.II.2.a)(2)(c).

1086 See above C.II.1.c)(2)(a)(ii).

1087 See above C.II.1.d)(1)(c)(ii)(b).

reference is made provides for a higher level of protection, it is not replaced by the provisions of the GDPR which are to be classified as overriding mandatory provisions. Similarly, a third-country court usually would not apply provisions of the GDPR as overriding mandatory provisions in these cases. Thus, to the extent that the data protection rules of the third-country law referred to provide for stricter rules, those rules apply irrespective of the classification of the provisions of the GDPR as overriding mandatory provisions.

(2) The Provisions of the GDPR as Rules Regulating the Performance and as Rules on Safety and Conduct

Provisions of the GDPR may also be classified as rules regulating the performance and as rules on safety and conduct. According to Article 12(2) Rome I Regulation and Article 17 Rome II Regulation, these rules must be taken into account beside the applicable law. The provisions of the GDPR dealing with the processing of personal data and the transfer of personal data, as well as the provisions for special processing situations, qualify as such rules regulating the performance and as rules on safety and conduct. Thus, Article 12(2) Rome I Regulation and Article 17 Rome II Regulation in principle allows them to be taken into account beside the law designated as applicable.

However, it should be noted that the applicability of a provision falling under both Article 16 Rome II Regulation and Article 17 Rome II Regulation in a cross-border situation is determined exclusively by Article 16 Rome II Regulation.[1088] In these cases, the classification of provisions of the GDPR as rules on safety and conduct has no significance for their applicability beside the law referred to in Article 4 Rome II Regulation. The same applies if a provision of the GDPR fulfils the requirements of Article 9(2) Rome I Regulation and Article 12(2) Rome I Regulation with regard to the law applicable to a contract. Consequently, in those cases, the classification of provisions of the GDPR as rules regulating the performance and as rules on safety and conduct has no bearing on their applicability in cross-border situations.

2. Filling the Gaps Left by the GDPR Through Conflict of Laws

The GDPR does not contain a comprehensive regime for data protection claims. As a result, the national law that fills the gaps left by the GDPR must be determined by the conflict of laws. In this respect, a distinction needs to be made with regard to the necessary gap-filling in the context of data protection issues. First, the GDPR, by its very design, does not conclusively

[1088] See above B.II.3.d)(1)(c).

regulate claims arising from data protection violations[1089] (a). Secondly, the provisions of the GDPR are themselves incomplete. To the extent that it is necessary to resort to national law in this respect, the applicable law also needs to be determined (b). Finally, the GDPR itself, in various provisions, leaves different matters to the law of the member states. Also in this regard, the applicable law has to be determined (c).

a) The Supplementary Nature of the GDPR

The claims established by the GDPR exist beside those under national law and do not supersede them.[1090] Thus, regardless of whether the facts of the case have a cross-border dimension, the examination of potential data protection claims cannot be limited to claims based on the GDPR. Rather, national law must always also be examined for corresponding regulations. Since the applicability of both, the relevant national law and the GDPR, is generally determined pursuant to Article 4 Rome II Regulation, this does not create additional difficulties in determining the applicable law. Instead, in cases where reference is made to the data protection law of a member state, the provisions of the GDPR and the provisions of the national data protection law of that member state apply, subject to the opening of the territorial scope of the GDPR.

b) The Complementary Function of National Law

However, even to the extent that the GDPR itself provides a basis for a claim, the requirements for the existence of the claim are not always fully regulated in the GDPR. An example is the absence of any regulation on the limitation of claims.[1091] As far as such a regulation is missing in the GDPR, the national law of the member state designated by the conflict of laws applies.[1092] Due to the broad scope of the law designated by the Rome II Regulation[1093], in European courts the law deemed applicable by Article 4 Rome II Regulation is regularly decisive in this respect. Based on the express provision in Article 15 lit. h) Rome II Regulation, this also applies to the limitation periods not regulated by the GDPR. To the extent to which a legal issue does not fall within the scope of the Rome II Regulation, a separate determination of the applicable law is required. If the relevant conflict of laws is not unified, this is done by recourse to the national conflict of laws of the *lex fori*.

1089 See already above C.

1090 See above C.

1091 Sabine Quaas, 'Art. 82 DSGVO', in Heinrich Amadeus Wolff, Stefan Brink and Antje v. Ungern-Sternberg (eds), *BeckOK Datenschutzrecht* (46th edn, C.H. Beck 2023) para 10.

1092 See also Christian Kohler, 'Conflict of Laws Issues in the 2016 Data Protection Regulation of the European Union' (2016) Rivista di diritto internazionale privato e processuale 653, 673 and Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) para 3.108 et seq. who, however, consider that the Rome II Regulation is not applicable in this respect.

1093 Cf. Article 15 Rome II Regulation, see on this already above C.I.4.

c) Applicable Law in Case of a Reference of the GDPR to the Law of the Member States

To the extent that the GDPR itself does not leave a legal issue unregulated, but expressly refers to the law of the member states for certain legal issues[1094], it must also be determined in these cases which member state's law is applicable in this respect. However, in contrast to the two situations mentioned above, there is some debate as to how the applicable law is to be determined in these cases. Some argue that the relevant conflict-of-laws rule should be taken from the relevant provision of the GDPR, which refers to the law of the member state, or from Article 3 GDPR.[1095] Others, however, rely on the general conflict-of-laws rules to determine the law applicable to the gaps explicitly left by the GDPR.[1096] In part, however, it is said to be up to the national legislator to create separate national conflict-of-laws rules.[1097]

(1) Data Protection Rules as Rules on Safety and Conduct

In order to determine the appropriate conflict-of-laws rules, it is necessary to take as a starting point the fact that the law referred to by the Rome II Regulation includes rules on safety and conduct. This follows firstly from Article 15 Rome II Regulation and secondly from the fact that Article 17 Rome II Regulation allows these rules on safety and conduct at the place and time of the event giving rise to the liability to be taken into account. A limitation to such a mere consideration, as provided for in Article 17 Rome II Regulation, is only possible if the rules on safety and conduct are in principle to be taken from the law referred to under Article 4 Rome II Regulation.[1098] If the rules on safety and conduct were not subject to this law, it would not be necessary merely to order that they be taken into account, but that they apply.

1094 See the list at Jiahong Chen, 'How the best-laid plans go awry: the (unsolved) issues of applicable law in the General Data Protection Regulation' (2016) 6 International Data Privacy Law 310, 314.

1095 Christian Kohler, 'Conflict of Laws Issues in the 2016 Data Protection Regulation of the European Union' (2016) Rivista di diritto internazionale privato e processuale 653, 657 fn. 14; Luís De Lima Pinheiro, 'Law Applicable to Personal Data Protection on the Internet: Some Private International Law Issues' (2008) 18 Anuario español de Derecho internacional privado 163, 175 et seq.; Marian Thon, 'Transnationaler Datenschutz: Das Internationale Datenprivatrecht der DS-GVO' (2020) 84 Rabels Zeitschrift für ausländisches und internationales Privatrecht 25, 43 et seq.

1096 Maja Brkan, 'Data Protection and Conflict-of-Laws: A Challenging Relationship' (2016) 2 European Data Protection Law Review 324, 337.

1097 Wolfgang Däubler, 'Das Kollisionsrecht des neuen Datenschutzes' (2018) Recht der Internationalen Wirtschaft 405, 411.

1098 Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 871; see also Recital 34 Rome II Regulation; indirect also Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 2 (16th edn, Sweet & Maxwell 2022) para 34-069; probably also Patrick Wautlet, 'Art. 17', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 1, according to whom Article 17 "aims to mitigate the consequences of the preference given under Art. 4 and other provisions of the Regulation, to the law of another place than the place where the harmful event was committed".

In principle, data protection rules may also constitute such rules on safety and conduct.[1099] To the extent that the provisions of the GDPR refer to the law of a member state, these are regularly rules relating to the processing of personal data and thus rules on safety and conduct.[1100] In principle, therefore, these provisions are also subject to the law designated under Article 4 Rome II Regulation.

Also, Article 17 Rome II Regulation is not a specific feature of the conflict of laws for non-contractual obligations of the European Union. A comparable regulation can be found, for example, in the Hague Convention on Road Traffic Accidents[1101], in the Hague Convention on Product Liability[1102] and in the national conflict-of-laws rules of the member states of the European Union[1103]. This type of rule serves the predictability of the applicable law to the parties involved[1104] and thus a generally accepted objective of conflict of laws[1105]. It is intended to ensure an adequate balance of the interests of the various parties.[1106] In addition, Article 17 Rome II Regulation also serves to protect state interests by taking due account of the rules the state enacts.[1107] Rules on safety and conduct are thus an expression of a legal principle of conflict of laws designed to protect both private and public interests. It therefore covers in particular those areas of law which, like data protection law, have a dual nature and serve to protect both public and private interests.

Thus, the Rome II Regulation is in principle also suitable for determining the applicable member state law in those cases in which the GDPR explicitly refers to the law of a member state. Since the applicability of the GDPR itself depends on a reference by the Rome II Regulation[1108], it is also excluded that the GDPR refers to the law of a member state, whereas

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1099 See above C.I.4.

1100 See e.g. Articles 6(3), 8(1)(2), 22(2), 23(1), for an exhaustive list see Jiahong Chen, 'How the best-laid plans go awry: the (unsolved) issues of applicable law in the General Data Protection Regulation' (2016) 6 International Data Privacy Law 310, 314.

1101 Article 7 Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.

1102 Article 9 Convention of 2 October 1973 on the Law Applicable to Products Liability.

1103 Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"), COM(2003) 427, 25.

1104 With regard to Article 17 Rome II Regulation Jan von Hein, 'Article 17 Rome II', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 2 et seq.; Patrick Wautlet, 'Art. 17', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 1.

1105 See on this already above C.I.3.b)(1).

1106 With regard to Article 17 Rome II Regulation see Recital 34 Rome II Regulation; Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 871.

1107 Patrick Wautlet, 'Art. 17', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 1.

1108 See above C.II.1.c)-d).

the Rome II Regulation refers to the law of a third country and the reference of the GDPR therefore goes in vain.

(2) Application of the Rome II Regulation to Matters Referred to National Law by the GDPR

Thus, the categorisation of data protection rules as rules on safety and conduct suggests a determination of the applicable national law by means of the Rome II Regulation also for those legal issues where the GDPR refers to the law of the member states.

This is not contradicted by the fact that it would be more appropriate to rely on the respective provision of the GDPR, which refers to the law of a member state for a specific legal issue, to also determine which member state's law applies.[1109] The provisions of the Rome II Regulation are precisely designed to ensure an appropriate balance between the interests of the parties with regard to rules on safety and conduct and to take account of public interests.[1110] A further argument in favour of such a uniform determination of the applicable law is that – from the point of view of conflict of laws – it may not make any difference whether the European legislator expressly leaves a legal question to the law of the member state or whether the applicability of national law results solely from the absence of a positive regulation.

Moreover, the determination of the applicable law by the general conflict-of-laws acts also has the advantage that the applicable law is assessed by means of uniform conflict-of-laws rules for all issues not addressed by the GDPR. Thus, it is firstly not necessary to examine separately for each provision of the GDPR referring to the law of a member state on the basis of which criteria the respective member state's law is to be determined. But secondly, the general conflict of laws also ensures that an applicable law is determined, regardless of whether the legal issue in question is not addressed by the GDPR at all, or whether the GDPR explicitly refers to the law of the member states.

Thus, also in those cases where the GDPR explicitly refers to the law of a member state, the relevant member state's law is determined by means of the Rome II Regulation. Also in this respect, no specific conflict-of-laws content can be derived from the GDPR.

3. Scope of Regulation of the GDPR

The GDPR only lays down rules on substantive law. In doing so, it does not comprehensively regulate the issues that arise in connection with data protection, but leaves a large number of

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1109 This argument is made by Anna Bizer, *Persönlichkeitsrechtsverletzungen in sozialen Medien* (Mohr Siebeck 2022) 361 et seq.

1110 See above C.II.2.c)(1).

issues unregulated or expressly leaves them to the national legislator.[1111] In terms of conflict of laws, the applicability of the GDPR depends on a reference to the law of a member state of the European Union by the general conflict-of-laws rules. Where the general conflict-of-laws rule refers to a law of a third country, provisions of the GDPR may apply beside the applicable law. With regard to the conflict of laws, the GDPR does not differ from any other claim under data protection law. Thus, in particular, the requirements for consent to data processing and the limitation period for data protection claims are subject to the law declared applicable under the Rome II Regulation.[1112]

Conversely, the GDPR itself does not regulate any issue that is not also subject to the Rome II Regulation. The provisions of the GDPR are therefore fully consistent with the scope of the Rome II Regulation as defined in Article 15 Rome II Regulation. From a European perspective, their applicability is thus determined solely by whether the Rome II Regulation considers the law of a member state of the European Union to be applicable.

III. *De Lege Ferenda*: a Dedicated Provision for Data Protection Claims

From a European perspective, the law applicable to data protection claims is determined by the Rome II Regulation.[1113] This regulation establishes the applicable law irrespective of whether it is the law of a member state of the European Union. Thus, the Rome II Regulation also refers to the law of a third country, provided that the connecting factors – in particular those of Article 4 Rome II Regulation – refer to the law of that country. With regard to the law applicable to data protection claims, this raises the question of whether data protection laws of third countries fall within the scope of the Rome II Regulation (1.). Second, the conflict-of-laws rules of the Rome II Regulation should fulfil their function and thus, in particular, not limit the territorial scope of application of third-country data protection laws to such an extent as to render them without practical significance (2.). Finally, to the extent that these conflict-of-laws rules are deemed inappropriate, it should be considered whether a dedicated conflict-of-laws rule for data protection claims is worth pursuing in the future and how such a rule should be designed (3.).

1111 See above C.II.2.
1112 See above C.I.4.
1113 See above C.I.2.-3.

1. Third-Country Data Protection Law and the Scope of the Rome II Regulation

The applicability of third-country data protection laws is determined by the Rome II Regulation. With respect to the data protection law of the member states, it has already been established that the Rome II Regulation is the authoritative legal act and that the applicability of the Rome II Regulation to this type of claim is not excluded. In this respect, Article 4 Rome II Regulation is the relevant conflict-of-laws provision for determining the applicable law.[1114]

The same applies to data protection laws of third countries. The specific design of the substantive scope of application of the third-country data protection law is irrelevant. The applicability of Article 4 Rome II Regulation is not linked to special characteristics of the data subject or to special processing situations. Rather, it is based solely on the existence of an unlawful act and a damage, concepts that are interpreted autonomous and broad.[1115] Thus, it covers in principle any data protection claim, including claims based on data protection laws of third countries.

2. The Rome II Regulation and the Scope of Third-Country Data Protection Law

However, it is doubtful whether the Rome II Regulation is not inappropriate for determining the law applicable to data protection claims arising from third-country data protection laws. This would be the case in particular if the data protection law of the third country, to which the Rome II Regulation refers, contains a provision on the territorial scope of application and this territorial scope of application is systematically not opened up when the Rome II Regulation refers to this law.[1116]

This approach should not be confused with a statute-based approach to determining the applicable law. The latter approach focuses on assessing the applicability of a law in relation to the legal acts of other legislators.[1117] The present analysis, in contrast, merely examines the scope of application left to foreign legal acts when the conflict-of-laws rules of the *lex fori* intersect with the territorial scope of application of the substantive rules of the *lex causae*. It is therefore not a question of a positive determination of the scope of application in cross-border cases, but of determining the consequences of the interaction between conflict of laws and rules on the territorial scope of application in substantive law.

1114 See above C.I.3.

1115 See above C.I.3.a)(1)-(2).

1116 As the references made by the Rome II Regulation are to substantive law – according to Article 24 Rome II Regulation – the conflict of laws of the third country is irrelevant.

1117 See Peter Hay, Patrick Borchers, Symeon Symeonides and Christopher Whytock, *Conflict of Laws* (6th edn, West Academic Publishing 2018) para 2.3 et seq., Symeon Symeonides, 'Private International Law: Idealism, Pragmatism, Eclecticism' (2017) 384 Recueil des Cours 9, 40 with further references.

With regard to the suitability of the Rome II Regulation for determining the law applicable to a data protection claim, it is also necessary to examine how the legal systems of third countries determine the law applicable to data protection claims at the level of conflict of laws. It is important to avoid a situation where different data protection laws apply depending on the court seized. This would lead to uncertainties and a potential rush to court. Accordingly, the conflict-of-laws rules also aim to determine the applicable law as uniformly as possible and independently of the court seized.[1118] They strive for international decisional harmony.
It is therefore first necessary to examine whether and according to which criteria third country legal systems determine the law applicable to data protection claims and how the territorial scope of application of their data protection rules is designed (a). Then it will be analysed how the Rome II Regulation interacts with the data protection laws of third countries in the light of these conflict-of-laws and data protection rules (b).

a) Third-Country Conflict of Laws and Data Protection Law

Although the basic principles of data protection law show many similarities worldwide and in particular many data protection laws are modelled on the provisions of the GDPR[1119], there are still significant differences in detail[1120]. Thus, the legal assessment of a data protection claim depends at least to some extent on which data protection rules apply in the specific case. The following section will therefore take a closer look at the criteria used by third-country data protection laws to determine their territorial scope of application. In doing so, those legal acts that differ from the GDPR in their approach will be examined in more detail.[1121] This applies to data protection law in the USA (1) and to data protection law in China (2). Both legal systems also have in common that they are home to a number of large companies that process personal data.[1122] They are therefore of great practical importance in determining the law applicable to data protection claims.

1118 See also above C.III.2.b)(1)(a).

1119 American Law Institute, *Principles of the Law, Data Privacy* (American Law Institute 2020) Introductory Note para 11.

1120 American Law Institute, *Principles of the Law, Data Privacy* (American Law Institute 2020) Introductory Note para 7; see for a comparison of data privacy rules in different countries e.g. Emmanuel Pernot-Leplay, 'China's Approach on Data Privacy Law: A Third Way between the U.S. and the EU?' (2020) 8 Penn State Journal of Law & International Affairs 49, 62 et seq.; Philip Weber, Nan Zhang and Haiming Wu, 'A comparative analysis of personal data protection regulations between the EU and China' (2020) 20 Electronic Commerce Research 565.

1121 Even if the individual legal acts use terminology that differs from that of the GDPR, the provisions of the individual legal acts on the territorial scope will be presented below using the terminology of the GDPR, even if this is accompanied by imprecision.

1122 Of the ten largest internet companies by market capitalization, in May 2024 seven are based in the USA and three in China, see Companies Market Cap, 'Largest internet companies by market cap' <https://companiesmarketcap.com/internet/largest-internet-companies-by-market-cap/> accessed 6 May 2024.

(1) The Law of the USA

In U.S. law, at least at the federal level, there is a fundamentally different understanding of the right to data protection compared to the GDPR. In the European Union, the right to data protection is characterised by a particularly strong reference to fundamental rights.[1123] In contrast, in the United States the right to data protection at the federal level is understood more as a commodity that the data subject can dispose of at will.[1124] Accordingly, data processing in the United States is generally permitted under federal law unless the processing is expressly prohibited.[1125]

The absence of a fundamental rights approach to data protection law in U.S. federal law is reflected in the fact that there is no comprehensive data protection law at the federal level in the United States. Instead, there are various statutes that contain privacy provisions for specific areas or individuals.[1126] Attempts to create a more comprehensive data protection law at the federal level have stalled.[1127] In contrast, several states have enacted dedicated data protection laws, emphasising the fundamental rights dimension of data protection law.[1128] In this regard, the California Consumer Protection Act has served as a template for other states in the creation of data protection regulations.[1129]

Reflecting the multiplicity of legal sources, the United States is also missing a uniform subject matter of protection under data protection law.[1130] Nevertheless, basic data protection requirements may be found in the various federal and state regulations.[1131]

1123 See above C.I.2.b)(2).

1124 Paul Schwartz and Karl-Nikolaus Peifer, 'Transatlantic Data Privacy Law' (2017) 106 The Georgetown Law Journal 115, 121, 132; Paul Schwartz and Daniel Solove, 'Reconciling Personal Information in the United States and European Union' (2014) 102 California Law Review 877, 880 et seq.

1125 Paul Schwartz and Karl-Nikolaus Peifer, 'Transatlantic Data Privacy Law' (2017) 106 The Georgetown Law Journal 115, 121, 135, 136, 147; Paul Schwartz and Daniel Solove, 'Reconciling Personal Information in the United States and European Union' (2014) 102 California Law Review 877, 881.

1126 Shawn Marie Boyne, 'Data Protection in the United States' (2018) 66 The American Journal of Comparative Law 299; American Law Institute, *Principles of the Law, Data Privacy* (American Law Institute 2020) Introductory Note para 1, 5; Stuart Pardau, 'The California Consumer Privacy Act: Towards a European-style Privacy Regime in the United States' (2018) 23 Journal of Technology Law & Policy 68, 73; Michael Rustad and Thomas Koenig, 'Towards a Global Data Privacy Standard' (2019) 71 Florida Law Review 365, 381; Lindsey Barrett, 'Confiding in Con Men: U.S. Privacy Law, the GDPR, and Information Fiduciaries' (2019) 42 Seattle University Law Review 1057, 1068 et seq.; Joel Reidenberg, 'Data Protection in the Private Sector in the United States' (1993) 7 International Review of Law, Computers & Technology 25, 28 et seq.

1127 See extensively Anna Wright Fiero and Elena Beier, 'New Global Developments in Data Protection and Privacy Regulations: Comparative Analysis of European Union, United States, and Russian Legislation' (2022) 58 Stanford Journal of International Law 151, 163 et seq.

1128 Cal. Civ. Code 1798.199.40 (c); C.R.S. 6-1-1302 (a) (I-II).

1129 Lars Hornuf, Sonja Mangold and Yayun Yang, *Data Privacy and Crowdsourcing* (Springer 2023) 34.

1130 Paul Schwartz and Daniel Solove, 'Reconciling Personal Information in the United States and European Union' (2014) 102 California Law Review 877, 887-889.

1131 Michael Rustad and Thomas Koenig, 'Towards a Global Data Privacy Standard' (2019) 71 Florida Law Review 365, 381.

(a) Determining the Applicable Law to Data Protection Claims under U.S. Law

In the conflict of laws of the United States[1132], data protection claims are classified as tortious claims. This is initially supported by the fact that in the substantive law of the United States, data protection infringements are classified as tortious acts[1133].[1134] Furthermore, under U.S. conflict of laws, strict liability is also considered to be tort liability.[1135] As in European conflict of laws, this suggests that the concept of tort is broadly defined in the conflict of laws of the United States.[1136]

In determining the law applicable to tort claims, a strict distinction must be drawn in the conflict of laws of the United States between conduct-regulation rules and loss-distribution rules.[1137] Conduct-regulation rules are prophylactic rules that regulate conduct in order to prevent injury. Loss-distribution rules are rules that prohibit, allocate or limit liability after the tort has occurred.[1138] In contrast to the Rome II Regulation – which only explicitly addresses conduct regulating rules by allowing their consideration beside the applicable law[1139] – U.S. conflict of laws strictly separates these two issues and determines the applicable law for both issues independently. This distinction is also reflected in the draft Restatement Third of Conflict of Laws.[1140]

For data protection claims, this implies first and foremost a classification of data protection law as conduct-regulation rules. Data protection law establishes provisions which, at least in the

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1132 The conflict of laws in the United States is specific to each state, but potential commonalities are summarised in the American Law Institute's Restatements of Conflict of Laws. Since the present analysis is not intended to be a comprehensive discussion of the US conflict of laws for data protection claims, but only a selective comparison, only the basic characteristics of the conflict of laws of a majority of the states will be examined in more detail below, at the cost of limiting the accuracy of the discussion. For an overview of the variety of methodological approaches in the USA, see the table in Symeon Symeonides, 'Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey' (2021) 69 The American Journal of Comparative Law 177, 195.

1133 Cf. Joel Reidenberg, 'Data Protection in the Private Sector in the United States' (1993) 7 International Yearbook of Law, Computers and Technology 25, 36; Michael Roch, 'Filling the Void of Data Protection in the United States: Following the European Example' (1996) 12 Santa Clara Computer and High-Technology Law Review 71, 88-92 and especially 92, who emphasises that a contractual claim may only be given where the subject matter of the contract is a data processing. This legal categorisation corresponds to that already set out above for European conflict of laws, see C.I.1.b).

1134 Cf. American Law Institute, 'Restatement of the Law, Third Conflict of Laws Tentative Draft No. 4' § 5.05(1) according to which "[t]he characterization of issues or claims is performed under the law of the forum […]".

1135 Cf. Peter Hay, Patrick Borchers, Symeon Symeonides and Christopher Whytock, *Conflict of Laws* (6th edn, West Academic Publishing 2018) 906.

1136 See above C.I.3.a).

1137 See for the relevance of this distinction in the individual states Peter Hay, Patrick Borchers, Symeon Symeonides and Christopher Whytock, *Conflict of Laws* (6th edn, West Academic Publishing 2018) 786 et seq.

1138 Padula v Lilarn Props. Corp. at 84 N.Y.2d 519 (1994) 644 N.E.2d 1001 620 N.Y.S.2d 310.

1139 Article 17 Rome II Regulation.

1140 American Law Institute, 'Restatement of the Law, Third Conflict of Laws Tentative Draft No. 4' § 6.03.

first instance[1141] are intended to prevent a violation of the right to data protection and which classify conduct – data processing – under specific circumstances as unlawful. Another argument in favour of such an understanding is that data protection is in any case also a matter of public law.[1142] However, public law and the *public enforcement* of rules are typically not intended to compensate for a loss, but to have a prophylactic effect by regulating behaviour in order to prevent injuries from occurring. Thus, the rules that determine the law applicable to conduct-regulation rules identify the applicable data protection law.

With regard to conduct-regulation rules, the law of the country where the tort was committed applies to cross-border torts.[1143] However, this does not apply if the injured party can show that the place where the damage occurred[1144] was reasonably foreseeable for the tortfeasor.[1145] Thus, if the injured party can prove a reasonable foreseeability, he or she has a *de facto* right to choose between the law at the place of action and the law of the place where the damage occurred. The law of the place of common habitual residence, in contrast, is relevant only for loss-distributing rules, but not for conduct-regulation rules.[1146]

On the basis of these connecting factors, the applicable data protection law is therefore generally the law of the place of action, i.e. the place where the data processing took place. In addition, the data subject has a right of choice if he or she can prove that the place where the damage occurred was reasonably foreseeable to the data processor. Locating the place where the damage occurred for non-physical injuries is also considered difficult for U.S. conflict of laws.[1147] Depending on the data processing in question, the place where the damage occurred – as in the context of the Rome II Regulation[1148] – will have to be located at the place where the data subject's control over his or her personal data is affected. Accordingly, with respect to the

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1141 On the relevance of the primary regulatory purpose for rules that can be classified as both conduct-regulation and loss-distribution rules, see Peter Hay, Patrick Borchers, Symeon Symeonides and Christopher Whytock, *Conflict of Laws* (6th edn, West Academic Publishing 2018) 792; see also American Law Institute, 'Restatement of the Law, Third Conflict of Laws Tentative Draft No. 4' § 6.03.

1142 Felix Zopf, 'Two Worlds Colliding – The GDPR In Between Public and Private Law' (2022) 8 European Data Protection Law Review 210; Gabriela Zanfir, 'Tracing the Right to Be Forgotten in the Short History of Data Protection Law: The "New Clothes" of an Old Right', in Serge Gutwirth, Ronald Leenes, Paul de Hert (eds), *Reforming European Data Protection Law* (Springer 2015) 227, 236; see on this from a European perspective above A.II.2.

1143 American Law Institute, 'Restatement of the Law, Third Conflict of Laws Tentative Draft No. 4' § 6.09(a); a similar rule is suggested by Symeon Symeonides, *Choice of Law* (Oxford University Press 2016) 247 et seq.

1144 Notwithstanding the terminology of U.S. and Chinese conflict of laws, the terminology of European conflict of laws is used below to facilitate comparison with European conflict of laws.

1145 American Law Institute, 'Restatement of the Law, Third Conflict of Laws Tentative Draft No. 4' § 6.09(b).

1146 Symeon Symeonides, *Choice of Law* (Oxford University Press 2016) 189; see also American Law Institute, 'Restatement of the Law, Third Conflict of Laws Tentative Draft No. 4' § 6.07.

1147 Peter Hay, Patrick Borchers, Symeon Symeonides and Christopher Whytock, *Conflict of Laws* (6th edn, West Academic Publishing 2018) 721.

1148 See above C.I.3.b)(4).

applicability of U.S. data protection provisions, a company operating in the United States will be presumed to be subject to U.S. data protection law – including its sector-specific data protection rules – if the requirements for U.S. jurisdiction are met.[1149] The place of common habitual residence, in contrast, is of no relevance for data protection law in the absence of a classification as a loss-distributing rule.

(b) Territorial Scope of Data Protection Law in the Legal System of the U.S.

In view of the various legal sources for data protection claims in the United States, it is apparent that the regulations on the territorial scope of application in the respective legal acts vary widely.

(i) The Territorial Scope of Data Protection Law in U.S. Federal Law

In some cases, data protection law does not contain any regulation of its territorial scope of application. This applies first of all to the non-binding Principles of the Law, Data Privacy of the American Law Institute. These do not provide for any limitation of the territorial scope[1150], although the territorial scope of the GDPR in particular was taken into account in the drafting of these principles.[1151] But also the federal law of the U.S. contains data protection provisions whose territorial scope of application is not explicitly stated. For example, the Video Privacy Protection Act[1152] does not contain any regulation on its territorial scope. Similarly, the Children's Online Privacy Protection Act[1153], which deals with the processing of children's personal information online, does not regulate its territorial scope. At the same time, however, the provisions of the Children's Online Privacy Protection Act show that the legislature was aware of the possibility of interstate and even transnational application.[1154] Similarly, the Fair Credit Reporting Act[1155], which provides consumers with data protection rights with respect to personal information maintained by consumer rating agencies, does not specify its territorial scope. The same is true of the Health Insurance Portability and Accountability Act[1156], which covers personal data processed by the health care and health care insurance industries.

On the other hand, there are also U.S. federal laws dealing with, *inter alia*, data protection that explicitly address their territorial scope. One such law is, for example, the Cable

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1149 Shawn Marie Boyne, 'Data Protection in the United States' (2018) 66 The American Journal of Comparative Law 299, 341.

1150 Cf. American Law Institute, *Principles of the Law, Data Privacy* (American Law Institute 2020) § 1(b).

1151 American Law Institute, *Principles of the Law, Data Privacy* (American Law Institute 2020) Introductory Note para 2.

1152 18 U.S.C. 2710.

1153 15 U.S.C. 6501-6508.

1154 Cf. 15 U.S.C. 6501 (2) (A).

1155 15 U.S.C. 1601-1693r.

1156 110 Stat. 1936.

Communications Policy Act.[1157] Among other things, this act provides for the protection of the personal data of subscribers to certain cable services.[1158] The territorial scope of the Cable Communications Policy Act is limited to all persons engaged in providing such services within the United States, and to the facilities of cable operators which relate to such services.[1159] Similarly, the Telephone Consumer Protection Act[1160], which restricts telephone solicitations and the use of automated telephone equipment, contains an express provision regarding its territorial scope. Under this provision, the data protection provisions to be developed by the Federal Communication Commission apply only to residential telephone subscribers.[1161] The Computer Fraud and Abuse Act, which, *inter alia*, protects against the unauthorised obtaining of information from a protected computer,[1162] also limits its territorial scope of application. Under this act, only computers used in or affecting interstate or foreign commerce or communication are protected, including a computer located outside the United States used in a manner affecting interstate or foreign commerce or communication of the United States.[1163]

The legal situation for U.S. federal law is therefore diverse. While in some cases there is no regulation of the territorial scope of application, some legal acts contain a regulation on their territorial scope of application. The criteria used in this context are linked to the habitual residence of the data subject[1164], the orientation of the data processor to the United States[1165], or the purpose of the computer from which the data is collected[1166].

(ii) The Territorial Scope of Data Protection Law in U.S. State Law

At the state level, *inter alia*, California, Colorado, and Virginia have so far enacted comprehensive data protection laws.[1167] All three statutes contain provisions regarding their territorial scope. According to § 1798.140 (d) (1) California Civil Code, the provisions of the

1157 47 U.S.C. 521-573.
1158 47 U.S.C. 551.
1159 47 U.S.C. 152 (a).
1160 47 U.S.C. 227.
1161 47 U.S.C. 227 (c) (1).
1162 18 U.S.C. 1030 (a) (2) (A).
1163 18 U.S.C. 1030 (e) (2) (B).
1164 47 U.S.C. 227 (c) (1).
1165 47 U.S.C. 152 (a).
1166 18 U.S.C. 1030 (e) (2) (B).
1167 Anna Wright Fiero and Elena Beier, 'New Global Developments in Data Protection and Privacy Regulations: Comparative Analysis of European Union, United States, and Russian Legislation' (2022) 58 Stanford Journal of International Law 151, 171, 192; Connecticut (Data Privacy Act, CT Gen Stat § 42-515 et seq.), Delaware (Personal Data Privacy Act, 6 DE Code § 12D-101 et seq.), Oregon (Consumer Privacy Act, SB 619 (2023)), Tennessee (Information Protection Act, T.C.A. § 47-18-3201 et seq.), Texas (Privacy and Security Act, TX Bus & Com Code § 541.001 et seq.), Utah (Consumer Privacy Act, UT Code § 13-44-101 et seq.), Montana (Consumer Data Protection Act, SB 384 (2023) SF 262), Iowa (Consumer Data Protection Act, SF 262), Tennessee (TN Code § 47-18-301 et seq.), Indiana (Consumer Data Protection Act, IN Code § 24-15-3-1 et seq.) have enacted comprehensive data protection laws. However, the following analysis is limited to the data protection laws mentioned above.

California Consumer Protection Act[1168] apply if the data processor is doing business in California. In addition, it must exceed a certain revenue threshold, process in certain ways personal data of at least 100.000 data subjects habitually residing in California in a year, or derive at least 50% of its annual revenue from certain types of data processing from such data subjects. The Colorado Privacy Act[1169], requires for its territorial applicability that the data processor is doing business in Colorado or directs its business activities to individuals habitually resident in Colorado. In addition, under the CPA, the data processor must process the personal data of at least 100.000 consumers who are habitually resident in Colorado within a one-year period. Where the data processing generates revenue or obtains a benefit for goods or services, the personal data required in this respect is reduced to the personal data of 25.000 consumers.[1170] The Virginia Consumer Data Protection Act's[1171] territorial scope provision is substantially similar to that of the CPA, but a reduction in the threshold of personal data processed only applies if 50% of the revenue is derived from the sale of personal data.[1172]

The laws enacted in the various federal states, which focus on a comprehensive data protection as their object, contain very similar provisions regarding their territorial scope of application. In each case, the requirement is that the data processor conducts business in the respective state[1173] or at least that the data processor directs its business activities to data subjects habitually resident in the respective state[1174]. In addition, the data processor must process the personal data of persons who have their habitual residence in that state[1175] or the data processor must exceed a certain turnover threshold[1176].

As a result, data protection rules at the federal level differ significantly from those at the state level. Some of the formers do not contain any provisions on territorial scope at all and otherwise determine the territorial scope according to the habitual residence of the data subject, the orientation of the data processor towards the United States or the location of the data processing. In contrast, state data protection laws essentially depend on the habitual residence of the data subject. Only under the CCPA is it sufficient in this respect if the data processor, in addition to operating in the relevant state, instead exceeds a certain turnover threshold.

1168 Cal Civ Code § 1798.100-1798.199.100 (CCPA).
1169 C.R.S. § 6-1-1301-1313 (CPA).
1170 C.R.S. § 6-1-1303.
1171 VA Code 59.1-575-484 (VCDPA).
1172 VA Code 59.1-576.
1173 CCPA.
1174 CPA, VCDPA.
1175 CCPA, CPA, VCDPA.
1176 CCPA.

(2) The Law of China

The conflict of laws of China has been codified in the Conflict-of-Laws Act in 2010.[1177] A comprehensive regulation for data protection law was created in 2021 with the Personal Information Protection Act.

(a) The Law Applicable to Data Protection Claims under Chinese Law

In China, the notion of tort is understood broadly. It covers any "[…] act committed by the tortfeasor who, through his own fault, infringes upon proprietary or personal rights of others and shall assume civil liability pursuant to law, as well as other harmful actions subject to civil liability under special legal provisions."[1178] The juxtaposition of "act committed by the tortfeasor who, through his own fault" and "other harmful actions" makes it clear in particular that fault is not a constitutive requirement for the existence of a tort. Moreover, the broad wording of "harmful acts" suggests that no unlawful behaviour is required. Furthermore, it follows from the development of the conflict-of-laws rule for torts, that damage is not necessary to constitute a "tort" for the purposes of Chinese conflict of laws. Originally, the Chinese conflict-of-laws rule on tort was directed at "claims for damages compensation", now it encompasses "tort liability", the latter term being regarded as an extension of the former term.[1179] The revised wording of the rule thus suggests a dispense with the requirement of damage. Therefore, any violation of data protection laws is subject to the Chinese conflict-of-laws rules on tort.

The Chinese Conflict-of-Laws Act contains two provisions on torts that are potentially suitable for determining the law applicable to data protection claims. First, Article 44 sentence 2 Chinese Conflict-of-Laws Act[1180] provides that the law of the common habitual residence of the tortfeasor and the injured party shall apply. In the absence of such a common habitual residence, the law at the place of the tortious act shall be decisive. This place may be both the place of action and the place where the damage occurred.[1181] It is for the court to decide which of these two places is decisive in determining the applicable law in a particular case. However,

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1177 Act on the Application of Laws over Foreign-related Civil Relationship of 16 October 2011.

1178 Guoyong Zou, 'The Evolution and the Latest Developments of Chinese Conflicts Law for Tort' (2014) 9 Frontiers of Law in China 582, 583.

1179 Guoyong Zou, 'The Evolution and the Latest Developments of Chinese Conflicts Law for Tort' (2014) 9 Frontiers of Law in China 582, 591.

1180 Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations, Adopted at the 17th session of the Standing Committee of the 11th National People's Congress, 28 October 2010.

1181 Zheng Sophia Tang, Yongping Xiao and Zhengxin Huo, *Conflict of Laws in the People's Republic of China* (Edward Elgar 2016) para 9.17 et seq.; Zhengxin Huo, 'An Imperfect Improvement: The New Conflict of Laws Act of the People's Republic of China' (2011) 60 The International and Comparative Law Quarterly 1065, 1089.

the court will generally apply the law that is more favourable to the injured party.[1182] Second, Article 46 Chinese Conflict-of-Laws Act provides that claims arising from an infringement of personality rights are governed by the law of the victim's habitual residence.

To determine the law applicable to data protection claims, it is therefore necessary to first clarify whether, from the perspective of the Chinese legislator, data protection claims are to be classified as violations of personality rights. If these claims were to arise from a violation of personality rights within the meaning of Article 46 Chinese Conflict-of-Laws Act, this provision would designate the law of the data subject's habitual residence as applicable. Such a classification of these claims is supported by the fact that Article 46 Chinese Conflict-of-Laws Act – according to its wording – is also intended to cover claims based on a violation of privacy. However, the relationship between privacy and data protection in Chinese law is controversial. Some argue that the Chinese Personal Information Protection Law, which regulates data processing and serves to protect data, is intended to protect data privacy[1183]. Others, however, argue that privacy and data protection are two distinct legal interests.[1184]

If one assumes that the law applicable to data protection claims is determined by Article 44 Chinese Conflict-of-Laws Act, a choice of law and a common habitual residence of the parties will primarily determine the applicable law. Subsidiarily, the determination of the applicable law depends on the place of action and the place where the damage occurred in relation to the processing of personal data. The place of action is the place where data are processed. This is the place where the IT infrastructure is located by means of which data are processed. In line with the considerations under Article 4 Rome II Regulation, in the case of a data protection claim under Article 44 Chinese Conflict-of-Laws Act, the place where the damage has occurred is to be determined according to the manner in which the data are processed.[1185] If the data processing takes place in the form of disclosure of the personal data to third parties, the place where the third party obtained knowledge is decisive. For all other data processing, the location of the data subject is decisive. These are the places where the data subject's ability to exercise control over his or her personal data is directly and immediately limited, and where the right to data protection is thus violated.[1186]

1182 Guangjian Tu, 'The Codification of Conflict of Laws in China: What Has/Hasn't Yet Been Done for Cross-Border Torts?' (2012/2013) 14 Yearbook of Private International Law 341, 345; Zhengxin Huo, 'An Imperfect Improvement: The New Conflict of Laws Act of the People's Republic of China' (2011) 60 The International and Comparative Law Quarterly 1065, 1089.

1183 Igor Calzada, 'Citizens' Data Privacy in China: The State of the Art of the Personal Information Protection Law (PIPL)' (2022) 5 smart cities 1129, 1133, 1136.

1184 Rogier Creemers, 'China's emerging data protection framework' (2022) 8 Journal of Cybersecurity 1, 8.

1185 For further details, see above C.I.3.b)(4)(b).

1186 See above C.I.3.b)(4)(b) for details on locating the place where the damage occurs in the case of a data protection violation under the Rome II Regulation. These considerations may also be drawn upon for

Thus, the primary connecting factor for determining the law applicable to a data protection claim under Chinese conflict of laws is the location of the data subject. For most types of data processing, this is the place where the damage occurred within the meaning of Article 44 Chinese Conflict-of-Laws Act. Only if the data processing takes the form of a disclosure of personal data to third parties, the place where the third party obtains knowledge is decisive. In addition, the location of the data subject, if it has been consolidated into a habitual residence, may also be the relevant connecting factor under Articles 44 and 46 Chinese Conflict-of-Laws Act. Furthermore, the place of data processing may also be relevant as the place of action under Article 44 Chinese Conflict-of-Laws Act.

(b) Data Protection Law in the Legal System of China

Chinese law provides for a comprehensive regulation of data protection law. Previously, Chinese law – similar to the law of the USA – contained a variety of different sector-specific rules that only addressed, *inter alia*, data protection law.[1187] In 2021, however, the Chinese legislature established a comprehensive data protection law within a single piece of legislation, the Personal Information Protection Act.[1188]

Territorially, the provisions of the PIPL apply to the processing of personal data in China.[1189] Where data processing takes place outside of China, the PIPL applies to the processing of personal data of individuals located in China. This necessitates that the data processing serves the purpose of providing products or services to individuals located in China or the purpose of analysing and evaluating the behaviour of individuals located in China.[1190] Furthermore, the PIPL is applicable when it is declared applicable by other laws or administrative regulations.[1191] The territorial applicability of the PIPL thus generally requires that the processing takes place in China itself or – alternatively – that the data subject is located in China and its behaviour is analysed and evaluated or products or services are made available to this data subject.

Chinese conflict of laws, as it is merely a matter of factually localising the violation of a specific legal interest, the right to data protection.

1187 Emmanuel Pernot-Leplay, 'China's Approach on Data Privacy Law: A Third Way between the U.S. and the EU?' (2020) 8 Penn State Journal of Law & International Affairs 49, 70 et seq.; Philip Weber, Nan Zhang and Haiming Wu, 'A comparative analysis of personal data protection regulations between the EU and China' (2020) 20 Electronic Commerce Research 565, 568 et seq.

1188 PIPL.

1189 Article 3(1) PIPL.

1190 Article 3(2) PIPL.

1191 Article 3(3) PIPL.

b) The Interplay of the Rome II Regulation and Third-Country Data Protection Laws

A comparison of the various legal systems at the level of conflict of laws and the rules on the respective territorial scope of application reveals that the respective rules of all three legal systems exhibit certain similarities, while also displaying differences (1). In light of these discrepancies, it is necessary to assess the suitability of the conflict-of-laws rules set forth in the Rome II Regulation to determine the applicable law to data protection claims with a third-country nexus (2).

(1) The Similarities and Differences of the Different Legal Systems

Analysing the legal systems of China, the European Union and the United States of America reveals a number of similarities and differences. These can be found at the level of conflict of laws (a) and with regard to the territorial scope of application of the data protection regulations (b).

(a) A Comparative Analysis of the Conflict of Laws of Data Protection

With regard to conflict of laws, all three legal systems have in common that they do not provide a conflict-of-laws provision specifically designed for data protection claims. Instead, a determination of the law applicable to data protection claims is based on the general conflict-of-laws rules or on a conflict-of-laws rule dealing with violations of personality rights.

With regard to the conflict of laws, it further emerges that all three legal systems determine the law applicable to data protection claims, at least in part, based on the place where the damage occurred. This connecting factor leads to a differentiation according to the specific type of data processing, which in turn results in a distinction between the location of the data subject and, in the case of data processing in the form of disclosure of personal data to third parties, the place of disclosure.

In the context of the Rome II Regulation, the place where the damage occurred is of the most comprehensive importance. Article 4 Rome II Regulation deviates from this connecting factor only if the data subject and the data processor have their registered office or habitual residence in the same country or if there is another relationship between the parties. In the United States, the conflict of laws is primarily based on the place of data processing as the place of action. However, the data subject is free to choose the place where the damage occurred, i.e. its location or the place where the personal data is disclosed. Yet, such a choice is only viable if this place was foreseeable for the data processor. Chinese conflict of laws also provides under its general tort conflict-of-laws rule for a right to choose between these two places. In contrast to the U.S. conflict of laws, this right is not contingent on the foreseeability of the location to the tortfeasor.

Furthermore, both the Chinese Conflict-of-Laws Act and the Rome II Regulation concur on the primacy of a common habitual residence of the parties in determining the applicable law. Only the Rome II Regulation, however, provides for an accessorial connection of data protection claims in case of a manifestly closer connection.[1192]

Thus, for the determination of the law applicable to data protection claims, all three legal systems examined here link the applicable law at least in part to the location of the data subject and the place of disclosure of the personal data to a third party. This place is most pronounced in the law of the European Union as the *loci damni* of the infringement of the right to data protection. However, the conflict-of-laws rules of the United States and China also rely on this place to determine the applicable law. In contrast, the place of the data processing as such – as *loci delicti commissi* – only matters under Chinese and U.S. conflict of laws. A common habitual residence of the data subject and the data processor is merely relevant under the Rome II Regulation and Chinese conflict of laws. Only the Rome II Regulation provides for an accessory connection.

Therefore, in terms of international decisional harmony, this harmony is ensured if the Rome II Regulation determines the applicable law on the basis of the place where the damage occurs. Reliance on the common habitual residence of the data subject and the data processor as a connecting factor is also familiar to both European and Chinese conflict-of-laws rules. If, in contrast, there is an accessory connection to a pre-existing relationship, under the Rome II Regulation this will generally lead to the law of the habitual residence or the registered office of the data processor. However, this connecting factor is unknown to Chinese and U.S. conflict of laws for tort claims.

On the whole, therefore, the conflict-of-laws rules examined here for determining the law applicable to data protection claims largely rely on similar connecting factors and refer to the same legal systems. Deviations are typically observed in specific circumstances only where the parties are linked by a shared habitual residence or where there is a contractual obligation between them. Therefore, there is no need to adapt the Rome II Regulation to ensure international decisional harmony determining the law applicable to data protection claims.

[1192] Peter Hay, Patrick Borchers, Symeon Symeonides and Christopher Whytock, *Conflict of Laws* (6th edn, West Academic Publishing 2018) 807 consider such a connecting factor for US law only for loss-distributing rules.

(b) Similarities and Differences in the Territorial Scope of the Data Protection Laws

With regard to the provisions on the territorial scope of application, the law of the United States provides a plethora of different rules on the territorial scope of application. To the extent to which state law addresses data protection claims and regulates its territorial scope, it is based on the habitual residence of the data subject[1193], the targeting of the data processor to the United States[1194], or the purpose of the computer from which the data is collected[1195]. State data protection laws cumulatively tie their territorial scope to a business activity[1196] or to a focus of the business activity on data subjects in the respective state[1197] and the processing of personal data of individuals who are habitually resident in that state[1198]. In some cases, however, mere business activity in the respective state is sufficient from a territorial perspective[1199]. The territorial applicability of the Chinese PIPL requires the data processing to take place in China itself[1200] or – alternatively – the data subject to be located in China and their behaviour to be analysed and evaluated or products or services to be made available to these individuals[1201].

A comparison of these regulations on the territorial scope of application with those of the GDPR reveals that those acts which comprehensively address data protection make their territorial applicability typically dependent on two criteria. Firstly, the data processor must either direct its activities to the respective state or operate within it. Secondly, the data subject must have a certain connection to the respective state. In this context, the former criterion is regularly accorded greater weight. The activity of the data processor in the respective state – albeit implemented in a different manner – is sufficient under Chinese[1202] and European[1203] law for the opening up of the territorial scope of application. This also applies in the broadest sense to the CCPA, which – in addition to the activity of the data processor in the respective state – only requires that a certain turnover threshold must be exceeded.[1204] This is in contrast to the CPA and VCDPA, where the location of data processing is not a determining factor in the territorial scope of application. Conversely, the location of the data subject within a state always

1193 47 U.S.C. 227 (c) (1).
1194 47 U.S.C. 152 (a).
1195 8 U.S.C. 1030 (e) (2) (B).
1196 CCPA.
1197 CPA, VCDPA.
1198 CCPA, CPA, VCDPA.
1199 CCPA.
1200 Article 3(1) PIPL.
1201 Article 3(2) PIPL.
1202 Article 3(1) PIPL.
1203 Article 3(1) GDPR.
1204 Cf. § 1798.140 (d) (1) (A) California Civil Code.

necessitates an additional corresponding targeting of the data processor to that state in order to establish the territorial scope of application of the respective data protection law.

In light of the data protection laws examined here, it is sufficient for the opening of the territorial scope of application if the data subject is located in the respective state and the data processor directs its business activities to this state or operates in this state. However, it is always required for both criteria to be present cumulatively. In this respect, the provisions of the PIPL, the CPA, the CCPA and the VCDPA demonstrate a clear similarity to those of Article 3(2) GDPR.[1205] With regard to the opening of the territorial scope of the CCPA[1206], the PIPL[1207] and the GDPR[1208], it is already sufficient for the data processor to be operating in the respective state. In contrast to the PIPL, however, the CCPA and the GDPR do not depend on the location of the data processing itself.[1209]

(2) Territorial Scope of Third-Country Data Protection Laws in Light of the Rome II Regulation

Consequently, the provisions on the territorial scope of application of the various data protection laws exhibit certain similarities.

(a) The Territorial Scope of Foreign Data Protection Law and the Rome II Regulation

Nevertheless, the extent to which a determination of the applicable law by Article 4 Rome II Regulation would render the reference to the data protection law of this legal system ineffective must be considered. If Article 4 Rome II Regulation refers solely to the respective legal system where the territorial scope of application of the data protection law of that legal system were not given, the conflict of laws would be largely deprived of its meaning. It is therefore necessary to ascertain in which instances Article 4 Rome II Regulation refers to one of these states to determine the law applicable to a data protection claim, but the territorial scope of its data protection laws is not opened up. The pivotal issue is whether the connecting factors employed by the Rome II Regulation are also relied upon to assess the territorial scope of the data protection laws or whether the latter base their territorial applicability on prerequisites which are incompatible with the connecting factors of the Rome II Regulation.

1205 For the PIPL, see also Daniel Albrecht, 'Chinese first Personal Information Protection Law in contrast to the European GDPR' (2022) Computer Law Review International 1, para 13.

1206 § 1798.140 (d) (1) (A) California Civil Code.

1207 Article 3(1) PIPL.

1208 Article 3(1) GDPR.

1209 This is explicitly stated in Article 3(1) GDPR.

(b) Article 4(2) Rome II Regulation

To the extent that Article 4(2) Rome II Regulation refers to the law of the common habitual residence, the territorial scope of the CCPA, the CPA and the VCDPA is often given in these cases – subject to the respective thresholds being exceeded. In these situations, the data subject is habitually resident in the respective state. However, in addition, a business activity or a targeting of the same to the respective state is required under the CCPA, the CPA and the VCDPA.

In contrast, the PIPL requires that the data subject is located in China at the time of data processing. However, with regard to Article 4(2) Rome II Regulation there may be situations where the data subject is habitually resident but not located in China at the time of data processing.[1210] In such cases, however, the territorial scope of the PIPL may still be given because the data processor is processing the data at its registered office or habitual residence, and therefore in China.[1211] To the extent that Article 4(2) Rome II Regulation results in the application of Chinese law to a data protection claim, the territorial scope of the PIPL is also regularly opened.

Thus, only in very limited cases is the territorial scope of application of the PIPL, the CCPA, the CPA and the VCDPA not opened if Article 4(2) Rome II Regulation refers to the respective legal system.

(c) Article 4(1) Rome II Regulation

According to Article 4(1) Rome II Regulation, the *lex loci damni* applies. For data protection infringements, the place where the data subject's control over his or her personal data is affected is generally decisive. Depending on the specific type of data processing, this is the location of the data subject, the place of disclosure of the personal data or the habitual residence of the data subject.[1212]

The location of the data subject is a necessary, but not sufficient, criterion for establishing the territorial scope of both the U.S. and Chinese data protection laws. Furthermore, the place of data processing – which might coincide with the location of the data subject or the place of disclosure of the personal data – triggers the application of the PIPL.[1213] In contrast, the place of disclosure of personal data to a third party is generally not a dedicated criterion for the territorial scope of application provided for by the respective data protection laws. However, it cannot be ruled out that the place of disclosure of personal data coincides with the criteria which

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1210 Cf. Article 3(2) PIPL.
1211 Article 3(1) PIPL.
1212 See above C.I.3.b)(4).
1213 Article 3(1) PIPL.

the legal systems examined here impose for opening up the territorial scope of application of their data protection laws.

Consequently, even if the applicable law is identified in accordance with Article 4(1) Rome II Regulation, the territorial scope of application of third-country data protection laws is frequently opened, at least for some types of data processing. In any case, in those situations it is not excluded from the outset that the territorial scope of application of the data protection law of the designated third-country legal system is given.

(d) The Coordinative Function of Conflict of Laws

It can therefore be seen that in many cases where the Rome II Regulation refers to a third-country law for data protection claims, the territorial criteria of the scope of application of the respective third-country data protection law are also met. However, the reference to a third-country law does not automatically open the territorial scope of application of the third-country data protection law in every case.

Regarding the resulting regulatory gaps for data protection claims, these do not necessarily require an adaptation of the Rome II Regulation to determine the law applicable to data protection claims. Rather, the coordinating function of conflict of laws must also be taken into account in this respect.[1214] The purpose of conflict of laws is not to decide whether a legal system is applicable, but which legal system is to be applied. In principle, therefore, it has a coordinating function. This function of conflict of laws is limited when the application of the conflict-of-laws rule regularly results in the inapplicability of a third-country legal system because the territorial scope of the substantive law is not opened up. In these cases, the conflict-of-laws rule clearly fails to fulfil its function of coordinating the different legal systems, since the substantive rules of at least one legal system are not applicable at all. However, if there are regulatory gaps only in limited areas, this does not affect the coordinating function of conflict of laws. In contrast, these gaps are a reflection of the coordinating function of the conflict of laws, which has to reconcile several potentially applicable laws. In such cases, it is rather up to the substantive legislator to ensure that the territorial scope of application of the respective data protection law is also opened up in these cases by a correspondingly broad definition of the territorial scope of application.[1215]

De lege lata, therefore, it has been shown that it is in principle possible to determine the law applicable to data protection claims by means of Article 4 Rome II Regulation. There is no exclusive relationship between the connecting factors of the Rome II Regulation and the criteria

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1214 See already above A.II.1.b)(1).

1215 See on the relation of conflict of laws and the territorial scope of application already above A.II.1.

used by the data protection laws of the third countries examined to determine their territorial scope. On the contrary, the connecting factors and these criteria are often similar or even partially identical. This is particularly true for the connecting factor of the common habitual residence of the parties and the location of the data subject as the place where the damage occurs. This coordination of conflict-of-laws applicability on the one hand and the opening of the territorial scope of application on the other suggests that the existing conflict-of-laws rules and in particular Article 4 Rome II Regulation are essentially fulfilling their coordinating function.

3. A Proposal of a Dedicated Conflict-of-Laws Rule for Data Protection Claims

Thus, the Rome II Regulation regularly refers to a legal system in situations where the provisions on the territorial scope of application also consider the data protection rules of that legal system to apply. However, this still does not indicate whether the Rome II Regulation actually refers to the legal system with which data protection claims are most closely connected. The coordinating function entails that conflict of laws strives to apply the most appropriate law to the facts of the case. In accordance with the objectives of conflict of laws, the law with the closest connection to the facts of the case must be determined.[1216] Therefore, a conflict-of-laws rule fails to fulfil its function if it does not apply the law which is closest connected to the facts of the case. However, the specific determination of this closest connection is essentially the task of the legislator.[1217]

In the following, therefore, various proposals for determining the law applicable to data protection claims are examined (a). On this basis, the examined proposals are to be compared and it will be examined whether a dedicated conflict-of-laws rule for data protection claims should be created (b).

a) Existing Specific Rules to Determine the Law Applicable to Data Protection Claims

In the following, four approaches to specific conflict-of-laws rules for data protection claims will be examined in more detail. First, it will be explored whether and how the provisions of the GDPR could be extended to refer to the law of a third country (1). Another possibility would

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1216 Gisela Rühl, 'Private international law, foundations', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 1381, 1388; this is also expressly stated in some conflict-of-laws codifications, see e.g. § 1(1) Austrian Bundesgesetz über das internationale Privatrecht of 15 June 1978 or Article 8(1) Book 10 Dutch Nieuw Burgerlijk Wetboek of 1 January 1992.

1217 Heinz-Peter Mansel, 'Connecting factor', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 1 (Edward Elgar 2017) 442, 443.

be to have recourse to the conflict-of-laws provision discussed in the legislative process of the Rome II Regulation in cases of invasion of privacy (2). The conflict-of-laws rule proposed by the German Council for Private International Law for this type of claim might also be drawn upon (3). Finally, the conflict-of-laws rule of the Swiss IPRG for data protection claims could also serve as a model (4).

(1) The Multilateralization of Article 3 GDPR

A dedicated conflict-of-laws rule for the law applicable to data protection claims may be derived first of all from Article 3 GDPR. Indeed, this provision solely determines whether the rules of the GDPR are applicable at the level of substantive law in territorial terms. However, the criteria on which the GDPR is based could also be relied upon to determine the applicable law at the level of conflict of laws. To allow these criteria to also refer to the law of a third country, though, the criteria employed by the GDPR would have to be rephrased accordingly.[1218] To this end, it is first necessary to identify the abstract criteria by means of which the GDPR decides on its territorial scope.

The GDPR bases its territorial applicability on the activity of the data processor in the European Union[1219] and on the location of the data subject in the European Union, insofar as this is connected to a business activity directed at the data subject[1220]. It could be deduced from these rules that the law applicable to data protection claims is determined by means of the place of activity of the data processor or the location of the data subject and a business activity directed at the data subject.

In favour of drawing on Article 3 GDPR to develop a conflict-of-laws rule that also refers to the legal system of a third country, it could be argued that the data protection rules of third countries subject their territorial applicability to comparable criteria.[1221] A multilateralization of Article 3 GDPR would therefore ensure that the territorial scope of application of third-country data protection rules is also opened in case of a reference by such a conflict-of-laws rule. This would avoid that the reference to this law would be ineffective due to a lack of an applicable law at the substantive level. Moreover, from a European perspective, such a multilateralization of the reference would result in a potential synchronisation of international

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1218 On the bilateralisation of provisions of European Union law, see also Jürgen Basedow, *EU Private Law* (Intersentia 2022) para X-28 et seq.

1219 Article 3(1) GDPR.

1220 Article 3(2) GDPR.

1221 See above C.III.2.a).

jurisdiction and applicable law for the GDPR[1222], which would accelerate procedures and avoid mistakes in the application of substantive law.

However, against such a multilateralization speaks already the uncertainty as to the relationship between the two potential connecting factors identified in Article 3 GDPR – the place of activity of the data processor and the location of the data subject. In particular, it is unclear whether there is a hierarchical relationship between these connecting factors or whether the data subject should have a right of choice. In addition, if the business activity is not directed to the location of the data subject, only the connecting factor of the place of activity of the data processor will lead to a seamless determination of the applicable law. Accordingly, in pursuing this approach some prefer to focus only on this connecting factor for the establishment of a multilateral conflict-of-laws rule.[1223] However, it is precisely this connecting factor that is only sporadically found as a criterion for determining the territorial scope of application in the various data protection laws of the USA and China. There is thus a risk that a determination of the applicable law according to this connecting factor will be confronted with a data protection law whose territorial scope is not opened up.

(2) Draft Conflict-of-Laws Rules in the Legislative Process of the Rome II Regulation

Another approach to identify a specific conflict-of-laws rule for data protection claims could also be derived from the legislative history of the Rome II Regulation. During the legislative process, the Rome II Regulation contained several drafts for a conflict-of-laws provision, which mainly addressed the law applicable to privacy claims.[1224] According to a draft of the European Parliament, this provision should also have explicitly determined the law applicable to data protection claims. The connecting factor envisaged for this provision was the habitual residence or registered office of the data processor.[1225] Even after the entry into force of the Rome II

1222 Article 79(2) sentence 1 GDPR.

1223 Marian Thon, 'Transnationaler Datenschutz: Das Internationale Datenprivatrecht der DS-GVO' (2020) 84 Rabels Zeitschrift für ausländisches und internationales Privatrecht 25, 60; Martina Melcher, 'Es lebe das Territorialitätsprinzip?', in Susanne Gössl (ed), *Politik und Internationales Privatrecht* (Mohr Siebeck 2019) 129, 143-146.

1224 Cf. already Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"), COM(2003) 427 final, 35.

1225 European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (COM(2003)0427 - C5-0338/2003 - 2003/0168(COD)), A6-0211/2005, 22 (Article 6); European Parliament, Recommendation for Second Reading on the Council common position for adopting a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (9751/7/2006 - C6-0317/2006 - 2003/0168(COD)), A6-0481/2006, 15 (Article 7a(2,3).

Regulation, the European Parliament reiterated its support for the implementation of a comparable conflict-of-laws rule in a resolution.[1226]

However, this connecting factor provided for in the various proposals has rightly not been accepted, at least as far as data protection claims are concerned. The registered office or habitual residence of the data processor as such is not a sufficient prerequisite for the opening up of the territorial scope of application at the substantive level under any of the data protection laws examined here. The scope of application of these laws is only established if the data processor also processes personal data in the course of its activities in this country[1227], if the data processing takes place in that country[1228] or – rather unlikely in a cross-border situation – if the data subject has his or her habitual residence in that country. Thus, in any case, an additional territorial requirement must be met in order for the data protection law of the designated legal system to apply. This is at least the case for the data protection laws of the legal systems examined here. Under this connecting factor, there is therefore a structural risk that the conflict of laws will refer to the law of a country whose data protection law is not territorially applicable in the specific case. The registered office or habitual residence of the data processor is therefore an inappropriate connecting factor for data protection claims, at least if it is the only connecting factor relied upon.

(3) Proposal of the German Council for Private International Law

A rule for establishing the law applicable to data protection claims could also be based on a proposal of the German Council for Private International Law. This council has proposed an amendment to the Rome II Regulation, which would include an Article 4a. The first paragraph of this article would establish a presumption for non-contractual obligations arising from violations of privacy or rights relating to personality. This presumption posits that in the case of a distance tort under Article 4(1) Rome II Regulation, the damage should be presumed to have occurred in the state in which the person who suffered the damage had their habitual residence at the time of the occurrence of the damage. A distance tort is supposed to be given if the tortfeasor and the injured party do not have their habitual residence in the same state at

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1226 European Parliament, Resolution of the European Parliament of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations ("Rome II") (2009/2170(INI)) [2013] OJ C 261 E/17, 21 (Article 5a); on this draft, see David Kenny and Liz Heffernan, 'Defamation and privacy and the Rome II Regulation', in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2015) 315, 342.

1227 Article 3(1) GDPR.

1228 Article 3(1) PIPL.

the time of the occurrence of the damage.[1229] In the absence of a distance tort, the law of the common habitual residence applies under the Rome II Regulation in any event, regardless of the proposal.[1230] The result of this proposal is that the law of the data subject's habitual residence generally applies. This law is only deviated from in the case of a manifestly closer relationship[1231] or, in the case of a distance tort, if the data processor can prove a different place where the damage occurred.

In favour of transferring this proposal to the determination of the law applicable to data protection claims argues that this proposal would entail only a minimally invasive change to the Rome II Regulation. Moreover, the data protection laws of all legal systems examined here also link their territorial applicability at the substantive law level, at least alternatively, to the location of the data subject. Recourse to the place of habitual residence at the level of conflict of laws would therefore often result in the territorial applicability of the respective data protection law also being given at the level of substantive law.

However, this proposal illustrates why – also at the level of conflict of laws – a violation of the right to privacy on the one hand and an infringement of the right to data protection on the other hand require separate conflict-of-laws rules. Although both types of infringements show a certain degree of overlap, they are legally distinct phenomena. The flexibility introduced by a mere presumption takes into account the multiplicity of interests – many of them conflicting – that may become relevant in the context of privacy claims.[1232] However, such flexibility due to the multiplicity of interests involved is not usually necessary when dealing with claims based on data protection law. Such claims typically involve personal data that is supposed to remain in the sphere between the data subject, data controller and data processor. Moreover, the interests affected by data protection claims are often limited to the data subject's right to data protection and the rights and legal interests of the data controller and data processor – in particular, from a European perspective, the right to engage in work and the freedom to provide services.[1233] It is only in cases where the data protection claim arises because third parties gain

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1229 The wording of this proposal is reproduced in Abbo Junker, 'Der Reformbedarf im Internationalen Deliktsrecht der Rom II-Verordnung drei Jahre nach ihrer Verabschiedung' (2010) Recht der Internationalen Wirtschaft 257, 259.

1230 Article 4(2) Rome II Regulation.

1231 Article 4(3) Rome II Regulation.

1232 Emphasising the importance of balancing the fundamental rights involved in determining the law applicable to a violation of personality rights, Michael von Hinden, 'Ein europäisches Kollisionsrecht für die Medien', in Dietmar Baetge, Jan von Hein and Michael von Hinden (eds), *Die richtige Ordnung* (Mohr Siebeck 2008) 573, 579 et seq.; on the need for flexibility in these cases with regard to the criterion of foreseeability, see also David Kenny and Liz Heffernan, 'Defamation and privacy and the Rome II Regulation', in Peter Stone and Youseph Farah (eds), *Research Handbook on EU Private International Law* (Edward Elgar 2015) 315, 339 et seq.

1233 Article 15 CFR, Article 56 et seq. TFEU.

knowledge of the personal data that a situation of interests comparable to that of a violation of privacy rights may exist.[1234]

Furthermore, legal certainty and predictability of the applicable law are central objectives in determining the applicable law, alongside justice in the individual case.[1235] The connecting factors of the conflict-of-laws rules should therefore be designed, as far as possible, in such a way as to allow for an unambiguous determination of the applicable law. Against this background, in the interests of legal certainty and predictability, the applicable law should be identified by means of an unambiguous connecting factor. However, there is no unambiguity if the applicable law depends on the data processor proving a closer connection – and therefore a legal concept that depends on various criteria – with the law of any other country. This applies at least to those data protection claims where personal data have not left the sphere of the data subject, data controller and data processor. In these cases, at least, a presumption is therefore not an appropriate rule for determining the law applicable to data protection claims.

(4) Article 139 IPRG

Finally, a rule for determining the law applicable to data protection claims might also be derived from the Swiss Federal Act on Private International Law[1236]. This law contains a specific conflict-of-laws rule for the law applicable to violations of personality rights. This rule is also expressly intended to apply to violations of personality rights resulting from the processing of personal data, as well as to violations of the right of access to personal data.[1237] Article 139 IPRG is not limited by the classification of the data processing as a violation of personality rights according to the *lex causae*. Rather, in the context of Article 139(3) IPRG, only the processing of personal data is decisive, not the existence of an associated violation of personality rights.[1238] Article 139(3) IPRG therefore encompasses in principle any claim under data protection law.

Under Article 139(3) IPRG, the data subject has the right to choose the law of the place of the data processor's registered office or habitual residence, the data subject's habitual residence or

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1234 For the consequences of this for the determination of the applicable law, see above C.I.3.b)(4)(b)(ii).

1235 See on this already above C.I.3.b)(1); Gisela Rühl, 'Private international law, foundations', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 1381, 1388; see also Recital 14 Rome II Regulation and more general Peter Hay, 'Flexibility versus Predictability and Uniformity in Choice of Law Reflections on Current European and United States Conflicts Law' (1991) 226 Recueil des Cours 292, 334 et seq.

1236 Schweizer Bundesgesetz über das Internationale Privatrecht (IPRG).

1237 Article 139(3) IPRG; the provision covers any form of data processing, see Jolanta Kren Kostkiewicz, *IPRG/LugÜ Kommentar* (2nd edn, Orell Füssli 2019) Art. 139 IPRG para 11.

1238 Frank Vischer and Tarkan Göksu, 'Art. 139 IPRG', in Markus Müller-Chen and Corinne Widmer Lüchinger (eds), *Zürcher Kommentar zum IPRG*, Band II (3rd edn, 2018) para 32.

the law of the place where the damage occurred.[1239] The last two options may only be chosen if the data processor could reasonably have expected the damage to occur in that state. In the case of a denial of a right to information, the place where the damage occurred is sometimes considered to be at the place of data processing, sometimes at the habitual residence of the data processor or at the place where the information should have been provided.[1240] The reason for the possibility of choice granted by Article 139(3) IPRG is that the data processor should not be able to escape liability by selecting its habitual residence or registered office.[1241]

In favour of the Swiss regulation, it can be argued that it provides a dedicated regulation for determining the law applicable to data protection claims, which is moreover open to different concepts of data protection law in other legal systems. Furthermore, the explicit regulation of claims to information also avoids difficulties in the characterisation of these claims. By establishing a dedicated provision, it is clarified that these claims are to be classified as any other claims in the event of an infringement of the right to data protection. This provision thus avoids the problem of qualifying such claims as arising from a tort.[1242]

One problem with Article 139(3) IPRG is that it links the applicable law to two vague legal concepts – place where the damage occurred and foreseeability – the interpretation of which is even disputed. This results in considerable legal uncertainty in the determination of the applicable law and, in particular, significantly limits the possibilities of the data processor to determine the applicable law.[1243] This lack of predictability is further aggravated by the extensive freedom of choice of the data subject. The multiplicity of eligible legal systems requires the data processor to comply with the data protection laws of up to three different legal systems. In particular, it will not be able to limit itself to complying with the strictest data protection rules.[1244] This would presuppose that the various data protection rules differ only quantitatively, and not qualitatively. Article 142(2) IPRG, which provides for the consideration of the rules of conduct and safety at the place of the act, does not mitigate this result either. If such a consideration were permitted under Article 139(3) IPRG, the data processor could influence the standard of data processing to be complied with by choosing the place of data

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1239 Article 139(1) IPRG.

1240 Andreas Bucher, 'La protection de la personnalité en droit international privé suisse', in François Dessemontet and Paul Piotet (eds), *Mélanges Pierre Engel* (Diffusion Payot 1989) 15, 24; Frank Vischer and Tarkan Göksu, 'Art. 139 IPRG', in Markus Müller-Chen and Corinne Widmer Lüchinger (eds), *Zürcher Kommentar zum IPRG*, Band II (3rd edn, 2018) para 34; David Rosenthal and Yvonne Jöhri, *Handkommentar zum Datenschutzgesetz* (2nd edn, Schulthess 2021) Art. 139 IPRG para 24.

1241 Botschaft zum Bundesgesetz über den Datenschutz (DSG), 23. March 1988, BBl 1988 II 413, 489.

1242 See on this issue in the context of Article 4 Rome II Regulation above C.I.3.a).

1243 David Rosenthal and Yvonne Jöhri, *Handkommentar zum Datenschutzgesetz* (2nd edn, Schulthess 2021) Art. 139 IPRG para 2, also criticising the lack of predictability.

1244 David Rosenthal and Yvonne Jöhri, *Handkommentar zum Datenschutzgesetz* (2nd edn, Schulthess 2021) Art. 139 IPRG para 17.

processing accordingly. However, this would be at odds with the intention of the Swiss legislator who sought to empower the injured party to counter the evasion of a high standard of data protection.[1245] Article 142(2) IPRG therefore does not apply in the context of Article 139(3) IPRG.[1246]

Such an extensive possibility of choice of the applicable law is also not necessary to achieve the self-imposed objective of the Swiss legislator of preventing data processors from circumventing a high standard of data protection. This objective would already be achieved if only the place where the damage occurred was taken into account and the criterion of foreseeability was abandoned. With regard to the criterion of foreseeability, Article 139 IPRG does not impose high requirements in any case.[1247] Contrary to the situation in relation to violations of the right to privacy, the location of the data subject is usually identifiable or at least subject to control by the data processor in the context of data protection claims.

Moreover, the place of the data subject's habitual residence is in principle not relevant in case of data processing. While the right to privacy is inseparably linked to the person, the right to data protection is linked to the personal data itself.[1248] Thus, the legal interest in the event of an infringement of data protection is not affected at the place of the data subject's habitual residence. Rather, it is affected at the place where the data subject is located at the time of the data processing as the place where the data subject exercises control over his or her personal data.

b) A Proposal for a New Conflict-of-Laws Rule for Data Protection Claims

Therefore, each of the proposals or conflict-of-laws rules examined here is afflicted with various disadvantages. It is therefore questionable what conclusions may be drawn from these rules for a conflict-of-laws rule to be developed for data protection claims. In this respect, it is first of all necessary to consider whether there is a need for a dedicated conflict-of-laws rule for these claims at all and how such a rule would fit into the existing system of European conflict of laws (1). Furthermore, it is to be examined how the subject matter (2) and the connecting factor (3) of such a conflict-of-laws rule should be formulated. Finally, it is to be addressed to what extent the law thus referred to applies to a data protection claim (4).

1245 See above fn 423.

1246 According to Anton Heini and Tarkan Göksu, 'Art. 142 IPRG', in Markus Müller-Chen and Corinne Widmer Lüchinger (eds), *Zürcher Kommentar zum IPRG*, Band II (3rd edn, 2018) para 17 not all rules on conduct and safety are subject to Article 142 IPRG.

1247 Jolanta Kren Kostkiewicz, *IPRG/LugÜ Kommentar* (2nd edn, Orell Füssli 2019) Art. 139 IPRG para 9; Axel Buhr, Simon Gabriel and Dorothée Schramm, 'Art. 139 IPRG', in Andreas Furrer, Daniel Girsberger and Markus Müller-Chen (eds), *Internationales Privatrecht* (3rd edn 2016) para 13.

1248 David Rosenthal and Yvonne Jöhri, *Handkommentar zum Datenschutzgesetz* (2nd edn, Schulthess 2021) Art. 139 IPRG para 23.

(1) The Necessity for a Distinct Conflict-of-Laws Rule Relating to Data Protection Claims

Matters relating to data protection law and associated data protection claims are a global phenomenon. Article 4 Rome II Regulation has, in principle, proven to be an appropriate rule for determining the applicable law to data protection claims. This conflict-of-laws rule neither significantly limits the scope of application of the GDPR[1249], nor refers to a third-country legal system whose data protection laws are, in principle, territorially inapplicable in those cases[1250]. Nevertheless, there are some arguments in favour of introducing a separate conflict-of-laws rule. Firstly, the mere fact that a conflict-of-laws rule performs its coordinating function by referring to a legal system whose substantive rules are also intended to be applied in the individual case is only a necessary condition for the establishment of a conflict-of-laws rule. These rules must be in fact the most appropriate rules also from a conflict-of-laws point of view. In other words, the reference to a legal system whose rules on the territorial scope of application deeming the respective legal acts applicable is a necessary, but not a sufficient condition for the suitability of a conflict-of-laws rule. Rather, in the individual case, it must also refer to the law which is most closely connected to the matter in question.[1251] This prompts the question of whether connecting factors that deviate from Article 4 Rome II Regulation are required for claims arising in the context of data protection law.

Secondly, the adoption of a specific conflict-of-laws rule would also increase legal certainty. This is particularly relevant because of the legal nature of Article 3 GDPR as well as the interpretation of the term "country in which the damage occurs" within the meaning of Article 4(1) Rome II Regulation regarding data protection claims. Thirdly, an explicit conflict-of-laws rule would obviate the difficulties encountered in subsuming data protection claims under the Rome II Regulation as such and under Article 4 Rome II Regulation in particular.[1252] Fourthly, a dedicated conflict-of-laws provision would permit an explicit legal differentiation between data protection claims based on situations in which personal data remain within the sphere of the data subject, data controller and data processor and those situations in which data are disclosed to third parties.

There is, therefore, a strong case for creating a separate conflict-of-laws rule for data protection claims. As these claims are considered to arise out of a non-contractual obligation[1253], a

1249 See above C.II.1.c)(2)(a).
1250 See above C.III.2.b)(2).
1251 See already above C. III. 3.
1252 See above C.I.1.-3.
1253 See above C.I.1.

conflict-of-laws provision for data protection claims should be included in the Rome II Regulation. Given that some of these claims are granted independently of any infringement of a legal interest or the occurrence of damage, a conflict-of-laws provision to be created for data protection claims should be included in the third chapter of the Rome II Regulation.

(2) Subject Matter of a Conflict-of-Laws Rule for Data Protection Claims

The subject matter of a conflict-of-laws rule to be drafted for data protection claims is governed by several requirements. First of all, it should take into account the plurality of the different national data protection laws with regard to the group of persons and the situations covered (a). At the same time, its specific design must also allow for a clear demarcation from other conflict-of-laws rules and, in particular, from the determination of the law applicable to claims based on violations of the right to personality (b). Finally, it must take account of the fact that data protection claims do not necessarily require a violation of data protection law (c).

(a) Guidelines Derived from Data Protection Law for the Subject Matter

There is no single global approach to data protection law and the rights that flow from it. In particular, the various rules differ in terms of the categories of persons protected and the situations covered by each data protection law.

In terms of scope, data protection law in the United States is particularly weak at the federal level and limited to certain sectors.[1254] Something different applies by contrast to the comprehensive data protection laws of the individual states in the United States. In principle, these cover all situations in which personal data are processed. However, the data protection laws of the individual states in the United States are limited in terms of the subjects protected. By their wording, they apply only to consumers, a term that is understood differently in the various data protection laws. Sometimes it is broadly defined to include any natural person[1255], while other U.S. data protection laws rely on a definition similar to that in Article 6(1) Rome I Regulation is used[1256]. According to their wording, the Chinese PIPL and the European GDPR provide the broadest scope of application. In principle, these laws cover all processing of personal data relating to natural persons.[1257]

For the development of a conflict-of-laws rule, this implies the need for a generally broad definition of its subject matter in terms of the group of persons and the situations covered. This is the only way to cover the widest possible range of approaches to data protection. Admittedly,

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1254 See above C.III.2.a)(1)(b)(i).
1255 Cf. for the CCPA, Civ Code CA § 1798.140 (i).
1256 Cf. for the CPA, C.R.S. § 6-1-1303 (6) and for the VCDPA, VA Code § 59.1-575.
1257 Article 3(1) PIPL, Article 4(1) GDPR.

provisions of the *lex causae* are also subject to the relevant conflict-of-laws rules even if they are governed by a different categorisation in their substantive national law. The only requirement is that their intended scope and regulatory purpose is covered by the conflict-of-laws rule of the *lex fori*.[1258] However, a broad subject matter of a conflict-of-laws provision to be drafted avoids correspondingly difficult questions of interpretation.

Accordingly, the subject matter of the personal scope of application of a conflict-of-laws provision should not be limited to certain data subjects or data processors. Firstly, such a general limitation of the personal scope to certain parties is generally alien to the other conflict-of-laws rules of the Rome II Regulation[1259]. Secondly, in view of the plurality of the different data protection laws, the absence of such a limitation of the scope avoids difficult questions of interpretation when determining the scope of the reference of the conflict-of-laws rule. For the same reason, the substantive scope of application should also not be limited to certain forms of data processing or areas of law.

(b) The Distinction from Claims Based on a Violation of the Right to Privacy

However, the subject matter of the conflict-of-laws rule to be developed must be designed in such a way as to allow for delimitation, in particular with regard to the determination of the applicable law for claims based on a violation of the right to privacy. Such a separate analysis under conflict of laws is already inherent in the regulation of the substantive scope of application of the Rome II Regulation.[1260] Moreover, the European legislator, in its drafts for a conflict-of-laws rule on the law applicable to claims arising from a violation of the right to privacy, has also assumed that these claims require a separate and distinct assessment.[1261]

1258 Paul Torremans, Uglješa Grušić, Christian Heinze, Louise Merrett, Alex Mills, Carmen Otero García-Castrillón, Zheng Sophia Tang, Katarina Trimmings, Lara Walker and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 45 et seq., 48; so implicitly also for the Rome II Regulation Guillermo Monero, 'Art. 15', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 6 et seq.

1259 See, in contrast, Article 6(2) Rome II Regulation.

1260 See above C.I.2.

1261 Cf. in this respect the differentiation in European Parliament, Recommendation for Second Reading on the Council common position for adopting a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (9751/7/2006 - C6-0317/2006 - 2003/0168(COD)), A6-0481/2006, 15 (Article 7a(1),(3)); European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (COM(2003)0427 - C5-0338/2003 - 2003/0168(COD)), A6-0211/2005, 22 (Article 6(1),(3)) and European Parliament, Resolution of the European Parliament of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("Rome II") (2009/2170(INI)), [2013] OJ C 261 E/17, 21 (Article 5a (1),(4)).

For the purpose of this delimitation, the subject matter of such a conflict-of-laws provision should be exclusively linked to the act of personal data processing.[1262] Accordingly, only those claims of the *lex causae* that explicitly require the processing of personal data are subject to the application of this conflict-of-laws provision. In this respect, it is also irrelevant whether the purpose of this provision is only to protect the right to data protection or also to protect the right to privacy. In contrast, claims based on a violation of the right to privacy not requiring a data processing are to be considered separately.

This formal criterion ensures a clear demarcation from other claims, in particular from claims based on a violation of the right to privacy. Another advantage of this design of the subject matter is that it respects the exclusion of claims based on violations of privacy rights under the Rome II Regulation *de lege lata*.[1263] Thus, there is no need to change the substantive scope of the Rome II Regulation. In addition, the data protection laws examined here are directed precisely at such processing of personal data. A parallelism of the subject matter in substantive law and in conflict of laws also facilitates the identification of the relevant provisions of the *lex causae*. This further supports the reliance on this subject matter for a conflict-of-laws rule.

Nor can it be argued against this subject matter that, under this criterion, claims arising out of a single act and seeking the same legal consequence under substantive law are assessed differently under conflict of laws. This may be the case for data protection claims, where the processing of data gives rise to data protection claims that are predicated on the data processing and, at the same time, to claims based on an associated violation of the right to privacy. However, under conflict of laws, it is possible that claims arising from the same facts and having the same legal consequence are governed by different laws.[1264]

(c) The Preventive Effect of Data Protection Claims

In addition, the subject matter should not be limited to a violation of data protection rules, but should generally refer to a non-contractual obligation in the context of the processing of personal data. This ensures that claims which do not require a violation of data protection law, but which typically also arise in the context of data processing, are also subject to this conflict-of-laws rule.[1265]

1262 See on the distinction *de lege lata* already above C.I.2.b)(3).

1263 Article 1(2) lit. g) Rome II Regulation; see also above C.I.2.b).

1264 See already above C.I.2.c); for example, a single act may give rise to both contractual and tortious claims, which may potentially be governed by different laws under the Rome I Regulation and the Rome II Regulation.

1265 See on this problem under Article 4 Rome II Regulation already above C.I.3.a)(1).

The subject matter of a conflict-of-laws provision to be introduced in the Rome II Regulation should therefore be geared towards "non-contractual obligation out of the processing of personal data".

(3) Connecting Factor

In order to assess the relevant connecting factor for a conflict-of-laws provision determining the law applicable to data protection claims, it is first necessary to identify the requirements that a connecting factor must typically meet under the Rome II Regulation (a). These requirements demand a primary connection to the location of the data subject (b) and, alternatively, a right of choice for the data subject (c). Where the data processing consists of the disclosure of personal data on a large scale, a special connecting factor is required (d). Finally, where there is a common habitual residence and a manifestly closer connection, there should be a derogation from the aforementioned connecting factors (e).

(a) Relevant Considerations for the Design of the Connecting Factors

The Rome II Regulation itself defines three objectives: Certainty in the determination of the applicable law, foreseeability of the applicability of that law and fairness through an appropriate balancing of interests in the individual case in the determination of the applicable law.[1266] In addition, the principle of proximity underlying the European conflict of laws is also to be taken into account.[1267] These requirements have to be borne in mind when drafting a conflict-of-laws rule.

In order to determine an appropriate connecting factor for the law applicable to data protection claims, the various connecting factors of the relevant conflict-of-laws provisions and the criteria of the provisions on the territorial scope of the data protection laws might serve as a basis. These link the applicability of a legal system or a data protection law to the location or the habitual residence of the data subject, the *loci delicti* or *loci damni* of the data processing or the place of activity of the data processor. If the location of the data subject is used, it is also necessary that the data processor has directed his or her activities to that place.

(b) The Place Where the Damage Occurred

In light of the international decisional harmony and in order to ensure the most comprehensive possible application of the data protection laws examined here[1268], a conflict-of-laws provision

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1266 Recital 14, 16 Rome II Regulation.

1267 Paul Lagarde, 'Le Principe de Proximité dans le Droit International Privé Contemporain' (1986) 196 Recueil des Cours 9, 32.

1268 See above C.III.2.b)(1)(a).

should primarily be linked to the place where the damage of the data processing occurred (*loci damni*). This connecting factor is supported by the consideration in European conflict of laws that the place where the damage occurred is in principle foreseeable. Furthermore, the place where the damage occurred is generally assumed by the European legislator to strike a fair balance between the interests of the parties.[1269]

Due to the difficulties in determining the place where the damage occurred for data protection claims[1270], this place should be expressly specified in a conflict-of-laws provision to be adopted. To the extent that the place where the damage occurred must be specified, a distinction should be made for the different types of data processing. Where data are processed by a disclosure to third parties, the law at the place where a third party could potentially gain knowledge of the personal data should apply. For all other types of data processing, the location of the data subject at the time of data processing should be decisive. These specified connecting factors allow for a determination of the applicable law in a reliable and unambiguous manner.

However, the place where the damage occurred must be supplemented by a criterion of foreseeability. Such a foreseeability criterion should be granted in favour of the data subject in the case of disclosure of personal data to third parties. For all other types of data processing, a foreseeability criterion should be provided in favour of the data processor.

A foreseeability criterion in favour of the data processor takes account of the fact that – at the level of substantive law – in addition to the location of the data subject, a directing of the activities of the data processor is regularly required in order to establish a territorial scope. Moreover, the criterion of foreseeability ensures the predictability of the application of this particular law for both parties. As it will often be difficult for the data subject to assess the foreseeability for the data processor, the foreseeability should be presumed in favour of the data subject.

The criterion of foreseeability in favour of the data subject is necessary from a conflict-of-laws perspective, as the data subject has no influence on the further use of his or her personal data by the data processor after data have been collected. In particular, the place where the third party could potentially obtain knowledge of the personal data is completely outside of the data subject's knowledge and control, unless the data subject has given informed consent to such disclosure. Since the data processor can ensure foreseeability by informing the data subject at the time of data collection, there is no need for a presumption of foreseeability for the data subject in this respect.

1269 Recital 14, 16 Rome II Regulation.

1270 See above C.I.3.b).

(c) Limited Choice of Law by the Data Subject

In the absence of the necessary foreseeability, the data subject must be granted a subsidiary right to choose between the law of the data subject's habitual residence and the law of the registered office or habitual residence of the data processor. The choice of law of the data subject, limited to these two places, is independent of the specific manner in which data are processed.

The subsidiary recourse to these connecting factors reflects the fact that data protection law – at least from a European perspective – has a strong fundamental rights character. It is thus primarily concerned with the protection of the data subject.[1271] This protection of fundamental rights may be ensured by linking the applicable law to the habitual residence of the data subject, if the facts of the case have a cross-border element and the data subject enjoys such protection in his or her state of habitual residence.[1272] Admittedly, in this context, a situation may arise where a corresponding protection of fundamental rights exists in the country of the habitual residence or the registered office of the data processor, but not in the country of the habitual residence of the data subject. However, from a conflict-of-laws perspective it seems more appropriate to maintain fundamental rights of a data subject in cross-border situations than to grant fundamental rights to the data subject merely because of the existence of a cross-border element in the situation.[1273] A subsidiary recourse to the habitual residence of the data subject is also supported by the fact that it subjects the data subject to the jurisdiction of his or her home country, thus giving preferential treatment to the data subject. The data processor, in contrast, is generally not worthy of protection as he usually decides itself which data subjects' personal data it processes. In contrast, the data subject often has no corresponding choice, especially in the case of very large internet companies.

In favour of a right to choose the law of the data processor's habitual residence or registered office argues that such a choice does not impose an additional burden on the data processor. Typically, due to *public enforcement* and the lack of coordination between *public* and *private enforcement* in data protection law[1274], the data processor is required to comply with the data protection laws at his registered office or place of habitual residence in any case.

1271 Recital 10 GDPR; see already above C.I.2.b)(2).

1272 On the consideration of fundamental rights under conflict of laws, see James Fawcett, Máire Ní Shúilleabháin and Sangeeta Shah, *Human Rights and Private International Law* (Oxford University Press 2016) para 2.100 et seq., 16.01 et seq. and especially 14.01 et seq. (on Privacy and Defamation).

1273 Emphasising the importance of maintaining a specific level of protection e.g. Articles 3(3),(4), 6(2) sentence 2 Rome I Regulation as well as the directives providing for conflict-of-laws rules. See on those directives already above B.II.2.c).

1274 Wolfgang Wurmnest and Merlin Gömann, 'Comparing Private Enforcement of EU Competition and Data Protection Law' (2022) 13 Journal of European Tort Law 154, 166 et seq.; see already above C.II.1.a)(2).

However, in order to avoid a situation where there is no choice of law and therefore no possibility to determine the applicable law, the law of the data subject's habitual residence should apply by default. This mechanism corresponds to the one provided for in Article 7 Rome II Regulation. The application of the law of the data subject's habitual residence in the absence of a choice of law typically reflects the interests of the data subject.

(d) Special Connecting Factor in Case of Mass Data Disclosure

It is necessary to make an exception to the previously mentioned connecting factors with regard to data processing in which the data are disclosed to an indefinite number of third parties. Firstly, this group of cases has a particularly close relationship to and a particularly high degree of overlap with claims resulting from the violation of the right to privacy. Secondly, the draft legislation of the European legislature also indicates that a special conflict-of-laws provision was deemed necessary with regard to disclosure to an indefinite group of persons.[1275]

The particular proximity of these claims to claims for violations of the right to privacy suggests referring to the case law of the ECJ on the determination of international jurisdiction for claims arising from a violation of the right to personality. In this respect, the ECJ has ruled that these claims are to be asserted in each case and to the extent in the country in which the violation of personality rights occurs.[1276] Nevertheless, the injured party may also pursue their claims in their entirety at the habitual residence or domicile of the tortfeasor or at the centre of the injured party's interests, which is typically situated at the place of the data subject's habitual residence.[1277]

This case law on the determination of the place where the damage occurred in cases of a violation of the right to personality with regard to international jurisdiction can also be applied *de lege ferenda* to the determination of the place where the damage occurred for the applicable

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1275 European Parliament, Recommendation for Second Reading on the Council common position for adopting a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (9751/7/2006 - C6-0317/2006 - 2003/0168(COD)), A6-0481/2006, 15 (Article 7a(1),(3)); European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (COM(2003)0427 - C5-0338/2003 - 2003/0168(COD)), A6-0211/2005, 22 (Article 6(1),(3)) and European Parliament, Resolution of the European Parliament of 10. May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("Rome II") (2009/2170(INI)) [2013] OJ C 261 E/17, 21 (Article 5a (3),(4).

1276 ECJ, C-68/93 *Shevill and Others v Presse Alliance* [1995] ECLI:EU:C:1995:61 para 29 et seq., 33; see already above C.I.3.b)(2).

1277 ECJ, C-68/93 *Shevill and Others v Presse Alliance* [1995] ECLI:EU:C:1995:61 para 24 et seq., 33; ECJ, C-509/09 and C-161/10 *eDate Advertising and Others* [2011] ECLI:EU:C:2011:685 para 49, 52; tracing the development of this case law Jan-Jaap Kuipers, 'Personality rights', in Jürgen Basedow, Giesela Rühl, Franco Ferrari, and Pedro de Miguel Asensio (eds), *Encyclopedia of Private International Law*, Volume 2 (Edward Elgar 2017) 1351, 1353 et seq.

law.[1278] Transferred to the law applicable to data protection claims, this implies that the data subject may choose between two laws. Firstly, the data subject's claims are governed by the law of his or her habitual residence or by the law of the registered office or habitual residence of the data processor. Additionally, the data subject may assert his or her data protection claims in the country in which the data is disclosed to an indefinite number of third parties. However, the scope of the latter claim is limited to those claims based on the disclosure in this state.

(e) Common Habitual Residence and Manifestly Closer Connection

Irrespective of the nature of the data processing at issue, a conflict-of-laws rule for data protection claims should always refer primarily to the common habitual residence of the parties to the claim. This is supported firstly by the fact that a reference to the data processor's registered office or habitual residence does not impose an additional burden on the data processor. Due to the parallel enforcement of data protection law under private law and public law, the data processor will regularly also have to comply with the provisions of data protection law at its registered office or place of habitual residence.[1279] Therefore, the application of this law to claims by individuals does not regularly impose an additional burden on them. Secondly, the location or habitual residence of the data subject is already of significance at other levels of the conflict-of-laws provision proposed here.

Furthermore, a conflict-of-laws rule for data protection claims should also include an escape clause in the form of a reference to a law with a manifestly closer connection. The escape clause is a conflict-of-laws rule which reflects a general principle of the Rome II Regulation[1280] and can be found in several conflict-of-laws provisions of the Rome II Regulation[1281]. The link to the law of the country with a manifestly closer connection is intended in particular to ensure parallelism with the law applicable to a contract in the event of a contractual connection

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1278 Gerhard Wagner, 'Article 6 of the Commission Proposal: Violation of Privacy - Defamation by Mass Media' (2005) 13 European Review of Private Law 21 on ECJ, C-68/93 *Shevill and Others v Presse Alliance*; so implicitly also Collins of Mapesbury and Jonathan Harris (eds), *Dicey, Morris and Collins on the Conflict of Laws*, Volume 2 (16th edn, Sweet & Maxwell 2022) para 35-119 et seq.; but critically François Meier, 'Unification of choice-of-law rules for defamation claims' (2016) 12 Journal of Private International Law 492, 509 and Axel Halfmeier, 'Article 1 Rome II', in Gralf-Peter Calliess and Moritz Renner (eds), *Rome Regulations* (3rd edn, Wolters Kluwer 2020) para 60.

1279 This applies, for example, to a Chinese company that processes personal data of data subjects located in the European Union at its registered office in China and uses this personal data to provide services to the data subjects (Article 3(1) PIPL, Article 3(2)(a) GDPR).

1280 Ulrich Magnus, 'Art. 4', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 138.

1281 Cf. Article 4(3), 5(2), 10(4), 11(4), 12(2) lit. c) Rome II Regulation.

between the parties.[1282] Such a contractual relationship will frequently also exist in the case of data protection claims.

(f) Exclusion of Choice of Law

Furthermore, it is to be considered whether a conflict-of-laws rule for data protection claims should exclude the possibility of a choice of law. Such an exclusion of a choice of law is provided for in Article 6(4), 8(3) Rome II Regulation. The rationale underlying these exclusions is that these conflict-of-laws rules are intended to take account of the common interests of the community or a large number of injured parties.[1283] In this context, the relevance of data protection law to fundamental rights could be drawn upon, at least from a European perspective. Based on this, a conflict-of-laws provision regulating the law applicable to data protection claims might also be designed to take account of the protection of a common interest of the community.

Nevertheless, this analysis fails to acknowledge that a mere relation to fundamental rights in a conflict-of-laws provision may not preclude the admissibility of a choice of law. This is already supported by the fact that the principle of party autonomy is a central element of European conflict of laws.[1284] Furthermore, the Rome II Regulation already provides elsewhere for situations in which a choice of law may be detrimental to individuals and in which a choice of law is excluded.[1285] Conversely, however, it follows that a choice of law which has effect only between the parties to the choice-of-law agreement is generally permissible in all other cases including those cases involving fundamental rights.

Consequently, there is no need for an exclusion of the choice of law for a conflict-of-laws provision for data protection claims. However, the choice of law for data protection claims is in any case subject to the general restrictions on choice of law of the Rome II Regulation. In particular, it is only possible for individuals not pursuing a commercial activity if the processing on which the claim is based has already taken place[1286] and is subject to certain formal requirements[1287].

1282 Richard Plender and Michael Wilderspin, *The European Private International Law on Obligations* (5th edn, Sweet & Maxwell 2020) para 18-123.

1283 Peter Mankowski, 'Art. 6', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 181.

1284 See Recital 31 Rome II Regulation; on the importance of the principle of party autonomy in the Rome II Regulation, see Peter Mankowski, 'Art. 14', in Ulrich Magnus and Peter Mankowski (eds), *European Commentaries on Private International Law*, vol. III (ottoschmidt 2019) para 1-5.

1285 See Article 14(1) lit. b) Rome II Regulation.

1286 Article 14(1) sentence 1 Rome II Regulation.

1287 Article 14(1) sentence 2 Rome II Regulation.

(4) Extent to which Reference is Made to the Applicable Law

Once the applicable law has been identified by means of the subject matter and the connecting factor, it is necessary to define the scope of the reference made by this conflict-of-laws rule. Firstly, this applies from a substantive point of view in terms of which legal issues are governed by the law considered applicable (a). Secondly, however, it must also be ascertained to what extent this conflict-of-laws rule determines the applicable law from a territorial perspective (b).

(a) Legal Issues Covered by the Reference

The substantive scope of the reference is essentially governed by the incorporation of a conflict-of-laws provision to be created for data protection claims into the Rome II Regulation.[1288] Accordingly, Article 15 Rome II Regulation also applies to the substantive scope of the reference in these cases. This rule provides for a comprehensive application of the law referred to by the conflict-of-laws provisions of the Rome II Regulation.[1289]

However, it is unclear which claims of the law referred to are encompassed by the conflict-of-laws rule for data protection claims. In particular, a distinction must be drawn to claims arising from a violation of privacy rights and general non-contractual claims. The conflict-of-laws rule for data protection claims does not refer to the latter types of claims. In order to identify which claims are subject to the conflict-of-laws rule for data protection claims, a formal approach must be taken in accordance with the design of the connecting factor. Insofar as a claim under substantive law presupposes the processing of personal data, this claim is included in the scope of the reference. It is irrelevant whether – according to the understanding of the *lex causae* – this provision also or exclusively serves to protect privacy rights.

Consequently, a two-step analysis is required in cases where claims are asserted based on facts relating to data processing. Firstly, the conflict-of-laws rule for data protection claims must be applied to determine whether the applicable law contains substantive rules regulating data processing as such. Secondly, it is necessary to analyse whether the data processing affects the privacy rights of the data subject. If this is found to be true, the further relevant claims are determined by the national conflict of laws of the *lex fori*.[1290] If there is no such relevance in terms of privacy rights, the further applicable law is determined by the Rome II Regulation. In the latter case, due to the parallelism of the connecting factors relied upon, the same law will normally be relied upon as that found applicable under the conflict-of-laws rule for data protection claims.

1288 See above C.III.3.b)(1).

1289 This is consistent with the approach set out in Article 4 Rome II Regulation, see in detail above C.I.4.

1290 Article 1(2) lit. g) Rome II Regulation.

(b) Territorial Scope of the Reference

A separate issue, however, is the territorial scope of the law declared applicable by the conflict-of-laws rule. In this context, two issues must be distinguished.

(i) Territorial Limitations of the Effects Regulated by the Referred Law

Firstly, there is the previously addressed issue of whether the use of certain connecting factors results in the effects regulated by the law referred to being territorially limited.[1291] With regard to data processing in the form of disclosure to an indefinite number of persons, it has already been established that any legal consequences can only be asserted under certain legal systems. Legal consequences for any damage can only be enforced at the centre of interest of the data subject or at the place of habitual residence or registered office of the data processor. Where data protection claims based on this type of data processing are brought under the laws of other jurisdictions, claims may only be made to the extent that the right to data protection is impaired in that jurisdiction. However, for any other data processing, the territorial scope of the reference for data protection claims is not limited.

(ii) Territorial Limitation of a Measure Under International Law

The aforementioned issue must be distinguished from situations in which the applicable law in principle covers all legal consequences from a territorial perspective, but a sovereign measure based on this law is territorially restricted on a substantive level for reasons of international law. For example, in the case of a data protection claim based on a disclosure to an indefinite number of persons, the applicable law is not limited from a conflict-of-laws perspective if the claim is asserted under the law of the centre of interest of the data subject or the law of the registered office or habitual residence of the data processor. However, this does not exclude that the applicable data protection law may itself limit its territorial scope on the basis of international law.

In this regard, it is crucial to be aware that a restriction of this type is not based on conflict-of-laws considerations and has no significance for the determination of the applicable law per se. Rather, it is an expression of a limited power of cognition of sovereign authority, stemming from the concept of jurisdiction, to limit the extraterritorial application of data protection law.[1292] From a private-law perspective, it is therefore part of substantive law and international

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1291 See above C.I.3.b)(2), C.I.3.b)(4)(b)(ii).

1292 On the question of extraterritoriality for the law of the European Union, see Marise Cremona and Hans-W Micklitz (eds), *Private Law in the External Relations of the EU* (Oxford Unversity Press 2016), explicitly addressing the question of extraterritoriality of European data protection law Ana Gascón Marcén, 'The extraterritorial application of European Union Data Protection Law' (2019) 23 Spanish Yearbook of International Law 413; Dan Svantesson, 'Extraterritoriality and targeting in EU data privacy law: the weak spot undermining the regulation' (2015) 5 International Data Privacy Law 226.

procedural law but not of conflict of laws. In principle, such a limitation must therefore also be determined separately for the data protection law of each country. However, it is also worth analysing this phenomenon in the context of conflict of laws. It demonstrates that the effective scope of the law designated as applicable by the conflict-of-laws rules may be limited. Yet, it is then unclear how to deal with such a territorial restriction from a conflict-of-laws perspective. Regarding such a limitation, the ECJ has ruled on the right to erasure under Article 17 GDPR, deciding that its effects are in principle limited to the territory of the European Union.[1293] This was justified by the European legislator having only weighed up the various fundamental rights concerned from a European perspective.[1294] Moreover, corresponding data protection rights would be unknown in numerous third countries and the GDPR would only intend to ensure a uniform data protection law in the European Union.[1295] Thus, to the extent that a conflict-of-laws rule for data protection claims refers to the law of a member state of the European Union, a decision based on that law is from a European perspective limited to the territory of the European Union – at least if it relates to a claim for erasure.

However, it is unclear whether it can be generalised from this judgment that claims based on the GDPR are generally limited to the territory of the European Union[1296] and to what extent such a limitation is mandatory[1297]. Rather, in light of the balancing of the relevant fundamental rights and taking into account the social function of the right to data protection[1298], it can be reasonably assumed that this limitation postulated by the ECJ will regularly affect only a very specific subset of data processing. As a general rule, this concerns situations where the data processing takes place in the form of disclosure of personal data to third parties. In these situations, a complex balancing of the right to data protection with the right to freedom of information and consideration of its social function is required.[1299] If – in contrast – the data

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1293 ECJ, C-507/17 *Google LLC v Commission nationale de l'informatique et des libertés* [2019] ECLI:EU:C:2019:772 para 73.

1294 ECJ, C-507/17 *Google LLC v Commission nationale de l'informatique et des libertés* [2019] ECLI:EU:C:2019:772 para 61.

1295 ECJ, C-507/17 *Google LLC v Commission nationale de l'informatique et des libertés* [2019] ECLI:EU:C:2019:772 para 59, 66.

1296 Anna Bizer, *Persönlichkeitsrechtsverletzungen in sozialen Medien* (Mohr Siebeck 2022) 346.

1297 Alberto Miglio, 'Setting Borders to Forgetfulness: AG Suggests Limiting the Scope of the Search Engine Operators' Obligation to Dereference Personal Data' (2019) 5 European Data Protection Law Review 136 and Federico Fabbrini and Edoardo Celeste, 'The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders' (2020) 21 German Law Review 55; also critical Giancarlo Frosio, 'The Right to Be Forgotten: Much Ado About Nothing' (2017) 15 Colorado Technology Law Journal 307, 333 and Jure Globocnik, 'The Right to Be Forgotten is Taking Shape: CJEU Judgments in GC and Others (C-136/17) and Google v CNIL (C-507/17)' (2020) 69 Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil 380, 385.

1298 ECJ, C-507/17 *Google LLC v Commission nationale de l'informatique et des libertés* [2019] ECLI:EU:C:2019:772 para 60.

1299 The relevance of such a balancing is explicitly emphasised by the ECJ, see ECJ, C-507/17 *Google LLC v Commission nationale de l'informatique et des libertés* [2019] ECLI:EU:C:2019:772 para 45, 60.

processing remains within the sphere between the data subject and the data processor, the right to freedom of information is generally not affected and the number of potentially impacted fundamental rights on the part of the data processor is significantly reduced. In these cases, there is thus no basis for limiting the territorial scope of the claims granted, as postulated by the ECJ. Although a restriction may then be required in these situations from an international law perspective[1300], it can no longer be derived from the case law of the ECJ.

Notwithstanding the wider significance of the ECJ's decision on the territorial reach of the GDPR, nothing can be derived from such a limitation for the purposes of conflict of laws. It is up to the substantive legislator to ensure a territorial limitation of the effect of its data protection law in order to comply with international law. Moreover, the necessity for a conflict-of-laws rule to determine any supplementary applicable legal systems cannot be derived from such a limitation. It is not the role of conflict-of-laws rules to refer to a legal system that fully regulates the respective situation. This is evident from the fact that various data protection rules limit their scope of application not only by means of territorial, but also by means of substantive criteria.[1301] However, if the substantive scope of a provision is not opened up, this does not affect the determination of the applicable law as such. Accordingly, it is also irrelevant for the identification of the applicable law and the design of a conflict-of-laws rule which territorial reach the legislator assigns to its own substantive law.

(5) Proposal for a Conflict-of-Laws Rule for Data Protection Claims

On the basis of the preceding considerations, a conflict-of-laws rule for data protection claims could therefore be structured as follows:

Article 10a Rome II Regulation – Data Protection

(1) The law applicable to a non-contractual obligation out of the processing of personal data shall be:

(a) where the data processing takes the form of a transfer of personal data to third parties, the law of the country in which a third party takes or might take knowledge of the personal data, if the person whose data are processed (data subject) could foresee this place; or, failing that,

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1300 See Alberto Miglio, 'Setting Borders to Forgetfulness: AG Suggests Limiting the Scope of the Search Engine Operators' Obligation to Dereference Personal Data' (2019) 5 European Data Protection Law Review 136, 140.

1301 For example, the CCPA requires the data processor to be of a certain size in order to apply; the Virginia and Colorado privacy laws only protect consumers, cf. for the CPA, C.R.S. § 6-1-1303 (6) and for the VCDPA, VA Code § 59.1-575.

(b) for any other data processing, the law of the country in which the data subject is located at the time when the personal data are processed, unless the other party could not foresee this place; or, failing that,
(c) the law of the habitual residence of the data subject, unless the data subject chooses to base his or her claim on the law of the habitual residence of the other party.

(2) Where a data processing takes the form of a transfer of personal data to an indefinite number of third parties, the data subject might choose the law of the habitual residence of the other party or of its centre of interest instead of the law applicable according to paragraph 1 lit. a). Where in this situation the law according to paragraph 1 lit. a) applies, the claim governed by that law shall be limited in scope to the claims arising in this country.

(3) However, where both parties have their habitual residence in the same country at the time when the personal data are processed, the law of that country shall apply.

(4) Where it is clear from all the circumstances of the case that the data processing is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the data processing in question.

IV. Interim Conclusion

This chapter has shown that the law applicable to data protection claims is determined by the Rome II Regulation. This is not contradicted by the fact that claims based on a violation of the right to privacy are excluded from the scope of application of the Rome II Regulation. Although the right to privacy and the right to data protection overlap, each right has an independent scope of application. For the purposes of conflict of laws, a distinction can be made in situations where both rights are affected, depending on whether an asserted claim requires a data processing.
Under the Rome II Regulation, the relevant conflict-of-laws rule for all data protection claims is Article 4 Rome II Regulation. This is not contradicted by the fact that data protection claims are granted irrespective of the lawfulness of the data processing and that Article 4 Rome II Regulation requires the existence of a damage. Moreover, data protection claims are not subject to Article 10 Rome II Regulation. In order to assess for data protection claims the place where

the damage occurred within the meaning of Article 4(1) Rome II Regulation, a distinction must be drawn according to the specific type of data processing. If the data processing consists of a disclosure to a third party, the place where the damage occurred is the place where the third party may obtain knowledge of the data. However, for any other form of data processing the location of the data subject at the time of data processing is decisive. Alternatively, the data subject may invoke the right at his or her habitual residence or at the registered office or habitual residence of the data processor for any type of data processing.

Data protection claims based on the GDPR also only apply if the general conflict-of-laws acts of the European Union refer to the law of a member state of the European Union. In particular, no conflict-of-laws element can be derived from Article 3 GDPR. However, provisions of the GDPR can be applied as overriding mandatory provisions besides the applicable law. This is true for those provisions of the GDPR dealing with the processing of personal data and the transfer of personal data, as well as the provisions on special processing situations. In addition, these provisions can also be given effect as rules regulating the performance and as rules on safety and conduct in accordance with Article 12(2) Rome I Regulation, Article 17 Rome II Regulation.

A comparison of the GDPR with various data protection laws in the USA and China has shown that, although they differ in terms of their territorial scope of application, their scope of application is regularly opened up where Article 4 Rome II Regulation refers to these legal systems. Nevertheless, the introduction of a new conflict-of-laws rule *de lege ferenda* seems sensible in order to increase legal certainty as to the relevant conflict-of-laws rule for data protection claims. On the basis of a comparison of different possibilities to create a conflict-of-laws rule for data protection claims, a rule has been drafted.

Summary

In this analysis, the question of how to determine the applicable law for data protection claims in a cross-border context was examined. To this end, it has first been analysed to which rules data protection law is subject to from a European perspective. The central building block of data protection law in the European Union is the General Data Protection Regulation. The GDPR itself contains rules on its territorial application. Namely, Article 3 GDPR provides comprehensive rules on the territorial scope of application of the GDPR. Furthermore, Articles 44 et seq. GDPR contain provisions on data processing that apply irrespective of whether the requirements of Article 3 GDPR are met. However, the GDPR itself does not expressly regulate whether its provisions should always apply in cross-border situations, to the exclusion of other data protection rights, if its territorial scope is open.

The application of the provisions of the GDPR in a cross-border situation depends, first and foremost, on whether it is a private-law situation or a public-law situation. In a private-law situation, the applicable law is determined by the rules of conflict of laws. In a public-law situation, the rules of public international law apply. Provisions of data protection law do not escape the determination of their applicability in cross-border situations by conflict of laws because they are, at least in part, provisions of public law. Such provisions are also covered by the reference made by the conflict-of-laws rules of private international law. The applicability of the provisions of conflict of laws depends solely on whether the situation concerns a private-law relationship. To the extent that a cross-border private-law situation is given, the applicable data protection law is therefore determined by the rules of conflict of laws. The applicability of the GDPR in a cross-border situation therefore depends on the relevance of Article 3 GDPR in terms of conflict of laws.

The fact that a legal act itself defines its territorial scope of application is not a phenomenon that is limited to the GDPR or the law of the European Union, but is also known in national law. The significance of rules in national law that regulate their territorial scope of application for conflict of laws is the subject of extensive analysis. According to this analysis, a distinction must be made in national law between the determination of the territorial scope of application and the conflict-of-laws determination of the applicable law. In private-law situations, therefore, the conflict-of-laws reference to a legal system is generally a precondition for the application of the provision on the territorial scope of application.

The conflict of laws determines the applicable law by means of unilateral or multilateral conflict-of-laws rules. Conflict-of-laws rules may therefore derive not only from the conflict-of-laws acts themselves. Provisions with conflict-of-laws relevance may also originate in the

substantive law itself. Such a relevance has been assumed in particular for provisions of substantive law that define their own scope of application (self-limiting rules).

Self-limiting rules may contain a unilateral conflict-of-laws rule derived from the rule on their territorial scope of application. Whether a self-limiting rule contains such a unilateral conflict-of-laws rule must be determined on a case-by-case basis. Not every self-limiting rule provides for a conflict-of-laws element across the board. A structured analysis is necessary, taking into account in particular the criteria used to determine the territorial scope of application, the underlying interests of the legislator and the extent to which the territorial scope of application is limited by the general conflict-of-laws rules. A self-limiting rule, which also contains a conflict-of-laws element, may at the same time constitute an overriding mandatory provision.

The first chapter has thus shown, first, that data protection rules may also be subject to conflict of laws and, second, that substantive rules on the territorial scope of application may also contain unilateral conflict-of-laws rules. The second chapter examined the impact of the fact that the GDPR is an act of substantive law created by the European legislator on the law of data protection.

It was first established that the applicability of substantive law created by the European legislator, such as the GDPR, is subject to conflict of laws in private-law relationships, as is national substantive law. In this respect, it is irrelevant in which form – i.e. as a regulation or directive – the substantive law of the European Union is created. Substantive Union law, and therefore also the GDPR, only applies to cross-border private-law relationships where the law of a member state is designated as applicable by conflict-of-laws rules. Otherwise, where the law of a third country is applicable, substantive Union law may be given effect beside the applicable law as overriding mandatory provisions or as rules regulating the performance or as rules of safety and conduct.

Where an act of substantive Union law, such as the GDPR, is given effect beside the applicable law and that act is given effect on the basis of several conflict-of-laws rules, its classification as an overriding mandatory provision is decisive for its conflict-of-laws effects. If the provision classifies as an overriding mandatory provision of the *lex fori*, it takes precedence over an overriding mandatory provision of any other legal system that is given effect to by the conflict of laws. Whether a provision of substantive Union law is applied as part of the applicable law or whether it is given effect by the conflict of laws beside that law is important for two reasons. First, it is relevant to the question of the requirements to be imposed on the provision of substantive Union law and, second, it determines the legal consequences to be attached to its reference under the conflict-of-laws rules. It cannot therefore be set aside.

As Article 3 GDPR already illustrates, substantive Union law may also contain provisions on its territorial scope of application. In some cases, these provisions may simultaneously include a conflict-of-laws element. They then provide for a unilateral conflict-of-laws rule. These unilateral conflict-of-laws rules take precedence over the general conflict-of-laws rules of the European Union and the national conflict-of-laws rules. An analysis of various legal acts of substantive Union law demonstrates that the classification of whether the provision on the territorial scope of application of the respective legal act has a conflict-of-laws element is often assessed differently. Moreover, there is regularly no uniform systematic approach to this assessment. Similarly, the assessment of whether provisions of substantive Union law are to be classified as overriding mandatory provisions varies widely and is often made without justification. On the basis of the multi-stage test developed in the first chapter, however, the conflict-of-laws classification of the provisions on the territorial scope of application in the various acts of substantive Union law can largely be justified. This suggests that this test is also suitable for substantive Union law to determine whether a conflict-of-laws element is inherent in the respective provision on the territorial scope.

Where a provision on the territorial scope of application in substantive Union law contains a conflict-of-laws element, the general conflict-of-laws acts of the European Union are only superseded with regard to the relevant conflict-of-laws rule. In all other respects, the general conflict-of-laws acts apply. This is also true where provisions of substantive Union law are to be classified as overriding mandatory provisions. However, the general conflict-of-laws acts cannot limit the effects of the overriding mandatory provisions.

The second chapter has thus shown that substantive Union law applies in private-law relationships only if it is referred to by the conflict of laws and that substantive Union law may also contain unilateral conflict-of-laws rules as well as overriding mandatory provisions. The third chapter analyses how the law applicable to data protection claims is to be identified, taking into account the previous findings on the conflict-of-laws classification of provisions on the territorial scope of application in substantive Union law.

First, it has been shown that data protection claims are subject to the general conflict-of-laws acts and fall within the scope of the Rome II Regulation. To this end, a formal distinction is made between claims based on a violation of the right to privacy, depending on whether the claim is tied to data processing. The relevant conflict-of-laws rule for all data protection claims is Article 4 Rome II Regulation. In particular, all data protection claims fall within the notion of tort/delict and relate to damage within the meaning of Article 4(1) Rome II Regulation. In

order to determine the relevant place where the damage occurred under Article 4(1) Rome II Regulation, a distinction must be drawn according to the specific type of data processing.

With regard to the applicability of the GDPR in situations with a connection to countries outside the European Union, the GDPR is also subject to the determination of the applicable law pursuant to Article 4 Rome II Regulation. Article 3 GDPR does not constitute a unilateral conflict-of-laws rule. At the same time, the GDPR contains provisions that are to be classified as overriding mandatory provisions. However, this classification is limited to those provisions of the GDPR that contain specific rules for the processing and transfer of personal data and that regulate special processing situations.

Overall, it can be seen that the Rome II Regulation is generally suitable for determining the law applicable to data protection claims, including the data protection laws of third countries. However, an independent conflict-of-laws rule would, in particular, eliminate the legal uncertainty with regard to the connecting factors set out in Article 4(1) Rome II Regulation. On the basis of a comparative analysis of the data protection laws of various third countries and several proposals for a conflict-of-laws rule for data protection claims, a proposal for a dedicated conflict-of-laws rule for data protection claims has been developed.

As regards the specific subject matter of the analysis, it is therefore established that the law applicable to data protection claims is determined *de lege lata* in its entirety by Article 4 Rome II Regulation. However, the present study has implications that go beyond the conflict of laws of data protection. Rather, conclusions may be drawn for other substantive Union law as well. Due to the growing legislative activity in this area, the relationship between substantive Union law and conflict of laws is becoming increasingly important. In this context, the present analysis may, firstly, provide a general indication of how these legal acts are positioned in terms of conflict of laws. Secondly, the approach proposed here may be used to identify an element of conflict of laws in those acts of substantive Union law that contain a provision on their territorial scope.

With the increasing emergence of substantive Union law, relying equally on *private* and *public enforcement*, a further problem arises: that of coordinating *private* and *public enforcement*. This issue is particularly relevant and pressing to conflict of laws, as it contributes to the confusing situation where different authorities in one state may apply different laws to the same facts. However, the resolution of this conflict cannot be the task of private international law alone, but must be sought in the coordination of private international law, public international law and

the specific substantive legal act.[1302] This coordination has already progressed to varying degrees in different areas of law.[1303] Given the growing importance of this issue, it may be worthwhile to consider it from a more fundamental perspective.

1302 In this respect, arguing in favour of an approximation of private international law to public international law Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press 2009).

1303 See on this for data protection law and anti-trust law Wolfgang Wurmnest and Merlin Gömann, 'Comparing Private Enforcement of EU Competition and Data Protection Law' (2022) 13 Journal of European Tort Law 154.

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