Where All Roads Lead: Private Enforcement of Data Protection Laws against Social Networking Services under Rome I

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SUMMARY

In the EU, the recent entry into the force of the General Data Protection Regulation (GDPR) is expected to inspire a greater number of private enforcement claims arising from the infringement of data protection laws. Social networking services (SNS) such as Facebook, Twitter or Instagram carry a significant risk of being faced with such claims due to the services they offer and their business model, both of which have the processing of personal data at their center. This being said, although a regulation, the GDPR still allows for many instances where the Member States may enact divergent data protection laws, while providing no solution for conflict of laws issues. This Thesis analyzes the possibility and the extent of resort to Rome I in determining the applicable law to those claims raised against SNSs by their users. It concludes that the protective connecting factor found under Art. 6(2) of Rome I should be effectively implemented to ensure that the users enjoy maximum protection while providing legal certainty for SNSs.

RÉSUMÉ

Le Règlement Général sur la Protection des Données (RGPD) est récemment entré en vigueur et il devrait susciter, au sein de l'UE, de nombreux recours privés pour la violation des lois sur la protection des données. Les services des réseaux sociaux (SNS) tels que Facebook, Twitter ou Instagram présentent un risque important d'être confrontés à de telles réclamations en raison des services qu'ils proposent et de leur modèle économique, les deux étant centré sur le traitement des données personnelles. En revanche, même s'il s'agit d'un règlement, le RGPD permet, dans de nombreux cas, l'adoption par des États membres de règles divergentes en matière de protection des données alors qu'il ne propose aucune solution aux problèmes de conflits de lois. Ce mémoire analyse la possibilité et l'étendue de l'application du Règlement Rome I pour déterminer le droit applicable aux réclamations formulées contre les SNS par leurs utilisateurs. Il conclut que le facteur de rattachement de protection prévu à l'article 6 (2) de Rome I devrait être mis en œuvre de manière efficace pour garantir aux utilisateurs une protection maximale tout en assurant la sécurité juridique des SNS.

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LIST OF ABBREVIATIONS

AG	*Advocate General*
Art.	*Article*
B2B	*Business to Business*
B2C	*Business to Consumer*
BAG	*German Federal Labor Court*
BGH	*German Federal Court of Justice*
Brussels I	*Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*
Brussels I (recast)	*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*
CC	*French Civil Code*
CPC	*French Civil Procedural Code*
CJEU	*Court of Justice of the European Union*
Commercial Agents Directive	*Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents*
Consumer Rights Directive	*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*
DCFR	*Draft Common Frame of Reference*

Directive 95/46/EC	*Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*
DPAs	*Data protection authorities*
EDPB	*European Data Protection Board*
EEA	*European Economic Area*
EEA Agreement	*Agreement on the European Economic Area*
EGBGB	*German Introductory Act to the Civil Code*
EU	*European Union*
FTC	*Federal Trade Commission*
FTC Act	*Federal Trade Commission Act of 1914*
GDPR	*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*
HQ	*Headquarters*
Rome Convention	*80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980*
Rome I	*Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations*
Rome II	*Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations*
Rome Regulations	*Rome I and Rome II collectively*

SNS	*Social networking services*
TFEU	*Treaty on the Functioning of the European Union*
UK	*United Kingdom*
Unfair Terms Directive	*Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*
US	*United States of America*
WP 29	*The Working Party on the Protection of Individuals with regard to the processing of personal data established by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995*

INTRODUCTION

> "All of this, of course, will be mere electronic wallpaper, the background to the main programme in which each of us will be both star and supporting player. Every one of our actions during the day, across the entire spectrum of domestic life, will be instantly recorded on video-tape. In the evening, we will sit back to scan the rushes, selected by a computer trained to pick out only our best profiles, our wittiest dialogue, our most affecting expressions filmed through the kindest filters, and then stitch these together into a heightened re-enactment of the day. Regardless of our place in the family pecking order, each of us within the privacy of our own rooms will be the star in a continually unfolding domestic saga, with parents, husbands, wives, and children demoted to an appropriate supporting role."[1]

It is hard to imagine that Ballard wrote the above paragraph some forty years ago, before the invention of the internet, before the proliferation of personal computers, and far before the world economy went digital. Nonetheless, it was harder to imagine at that time that these would all become reality. Indeed, the emergence of the information society has profoundly changed the way people interact with each other. In the front seat of this shift sit the online platforms, such as social networking services ("SNS").[2] These SNSs, such as Facebook, Twitter, or Instagram, can be accessed by their users via their web browsers, on personal computers or mobile applications. As such, users are increasingly opting for SNSs for socialising, promoting their businesses, trading, or reading the news.[3]

The medium on which SNSs operate, the internet, has been challenging the principle of territoriality when determining the applicable law under private international law.[4] In

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[1] J G Ballard, "The Future of the Future, Vogue UK 1977" in *Users Guide Millenn Essays Rev*, 1st Picador USA ed. ed (New York: Picador USA, 1996) at 226.

[2] SNSs are described as "*the application systems that offer users functionalities for identity management (1) (i.e. the representation of the own person e.g. in form of a profile) and enable furthermore to keep in touch (2) with other users (thus the administration of own contracts)*." See; Alexander Richter & Michael Koch, "Functions of social networking services" (2008) CSCW Web 20 Eur Dev Collab Des Sel Pap COOP08 at 1.

[3] Hans-W Micklitz, Przemysław Pałka & Yannis Panagis, "The Empire Strikes Back: Digital Control of Unfair Terms of Online Services" (2017) 40:3 J Consum Policy Consum Issues Law Econ Behav Sci 367 at 372.

[4] Dan Jerker B Svantesson, *Private International Law and the Internet* (Kluwer Law International, 2007) at 8.

the same vein, the cross-border transfer of users' personal data by and to SNSs is not only commonplace, but integral to the functioning of SNS's business model.[5] Reinforced by the recent investigations launched against Facebook with regard to processing of Facebook users' personal data by Cambridge Analytica,[6] the fact that these SNSs build a business model which depends on the personal data of their users attracted the attention of privacy advocates.[7] As a result, the enforcement of data protection laws, either public or private, has been put under scrutiny to ensure the maximum level of privacy for the users of these services. This Thesis elaborates on the private enforcement of data protection laws, in other words, the disputes brought by data subjects which are heard before courts, with a specific attention to those disputes brought against SNSs.

There are several particularities of SNSs that render their practice harder to analyze from the perspective of compatibility with data protection laws. First, more often than not, their operations include an international element: the facts that (i) they operate online, (ii) they mostly cater to users worldwide, (iii) their servers are located in different countries, (iv) they are often headquartered in the US, and above all, (v) their business model is based on the (more likely cross-border) flow of personal data include an unavoidable international element, which in the world of private international law, is referred to as the "*foreign element*".[8] Consequently, when analyzing whether or not an SNS processes personal data lawfully, the satisfactory response depends on careful analysis of the above circumstances before pinpointing the data protection laws which SNSs need to respect.

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[5] According to this business model, although the users benefit from an SNS free of charge, they are expected to share their personal data with the SNS which is then commercialized. Such commercialization takes place as making available consumer profiling and marketing tools created on the basis of the previously shared personal data, for the advertisers by the SNS. See; Alessandra Cervone, "Unfair Contract Terms and Sharing of Data with Facebook, Towards a Better Protection of Social Media Users: The Whatsapp Cases" (2018) 4:2 Riv Ital AntitrustItalian Antitrust Rev at 205.

[6] Carole Cadwalladr & Emma Graham-Harrison, "Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach" (2018) 17 The Guardian.

[7] Stefan Weiss, "The need for a paradigm shift in addressing privacy risks in social networking applications" in *Future Identity Inf Soc* (Springer, 2008) 161 at 161.

[8] John R Stevenson, "The Relationship of Private International Law to Public International Law" (1952) 52:5 Columbia Law Rev 561 at 561.

The second challenge relates to the unique nature of the consequences of violations of data protection laws by SNSs. Even without the risks created by an online platform, privacy harms are one of a kind. This is due to the fact that a breach of privacy cannot be reversed, for instance, the dissemination of personal data cannot be undone. Injunctions provide little relief, as the violations are not easy to observe and not easily prevented.[9] Such negative effect is exacerbated due to the fact that SNSs operate in an online platform, where enormous amounts of personal data are processed in a matter of seconds. As such, data subjects, who are the users of SNSs, rely on public and private enforcement of data protection laws to ensure compliant practice. While the public enforcement of these laws falls outside of the scope of this Thesis, it is significantly more common than private enforcement. It is certain that data breaches lead to significant pecuniary and mostly non-pecuniary loss;[10] however, court litigation brought by data subjects is "*extremely rare*"[11] which is truly problematic because the private enforcement of data protection laws is an integral part of the control which the data protection laws confer on data subjects. Therefore, the possibilities which empower ordinary citizens as data subjects should be explored. This Thesis aims to provide a roadmap based in EU law for the determination of the law applicable to these extremely rare private enforcement claims which would eventually increase the likelihood of these claims.

Third, it is the common practice of SNSs to conclude an online contract (typically referred to as Terms of Use),[12] which adds to the international dimension of the analysis, as these Terms of Use commonly include an applicable law clause. The table below provides different examples:

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[9] Siewert Lindenbergh, "Damages as a Remedy for Infringements upon Privacy" in Katja S Ziegler, ed, *Hum Rights Priv Law Priv Auton* (Oxford; Portland, Or.: Hart, 2007) at 93.
[10] *Ibid* at 95.
[11] Douwe Korff, *New Challenges to Data Protection Study - Working Paper No. 2: Data Protection Laws in the EU: The Difficulties in Meeting the Challenges Posed by Global Social and Technical Developments*, SSRN Scholarly Paper ID 1638949 (Rochester, NY: Social Science Research Network, 2010) at 98.
[12] In practice, "Terms of Use", "Terms of Service", "Terms and Conditions" and "General Terms and Conditions" are used interchangeably. Throughout this Thesis, the phrase "Terms of Use" will be used to collectively refer to all of the above.

SNS	Target		Law Chosen		HQ
Facebook	All		Law of the Habitual Residence of the User [13]		US
Twitter	All		No Law Chosen		US
Youtube	Germany		England[14]		US
Pinterest	EEA	Non-EEA	EEA[15]	California	US
SoundCloud	All		Germany[16]		Germany
Tumblr	All		New York[17]		US
Flickr	All		California[18]		US
Busuu	All		England[19]		Spain
Amazon[20]	Germany		Luxembourg[21]		US

[13] If you are a consumer, the laws of the country in which you reside will apply to any claim, cause of action, or dispute (…) In all other cases, (…) the laws of the State of California will govern these Terms and any claim, without regard to conflict of law provisions. See; "Facebook Terms of Service", online: *Facebook* <https://www.facebook.com/legal/terms/update>.

[14] The terms and your relationship with YouTube under the Terms shall be assessed in accordance with English law. See; "Nutzungsbedingungen - YouTube", online: <https://www.youtube.com/t/terms>.

[15] These Terms shall be governed by the laws of the State of California, without respect to its conflict of laws principles. If you are not a consumer in the EEA, (…) our dispute will be determined under California law. If you are a consumer in the EEA, this won't deprive you of any protection you have under the law of the country where you live and access to the courts in that country. See; "Terms of service", online: *Pinterest Policy* <https://policy.pinterest.com/en/terms-of-service>.

[16] Except where otherwise required by the mandatory law of the United States or any member state of the European Union (i) this Agreement is subject to the laws of the Federal Republic of Germany, excluding the UN Convention on Contracts for the International Sale of Goods (CISG) and excluding the principles of conflict of laws (international private law); (…) See; "Terms of Use on SoundCloud", online: <https://soundcloud.com/terms-of-use#applicable-law-and-jurisdiction>.

[17] This Agreement shall be governed in all respects by the laws of the State of New York as they apply to agreements entered into and to be performed entirely within New York between New York residents, without regard to conflict of law provisions. See; "Tumblr", online: <https://www.tumblr.com/policy/en/terms-of-service>.

[18] These Terms of Use and your use of the Services will be governed by and construed in accordance with the laws of the State of California (…) . See; "Help", online: *Flickr* <https://www.flickr.com/help/terms>.

[19] The Terms of Service and the relationship between you and busuu shall be governed by the laws of England without regard to any conflict of law provisions of any jurisdiction. See; "Terms and Conditions", online: *busuu* <https://www.busuu.com/en/terms>.

[20] Although Amazon is not an SNS, its Terms of Use apply to SNSs operating under Amazon's corporate umbrella, such as Goodreads.

[21] Luxembourg law applies, excluding the UN Sales Convention (CISG) and the conflict of laws. (…) If you are a consumer with habitual residence in the EU, you also enjoy protection of the mandatory provisions of the law of your state of residence. "Amazon.de Hilfe: AMAZON.DE ALLGEMEINE GESCHÄFTSBEDINGUNGEN", (2 July 2018), online: <https://web.archive.org/web/20180702183852/https://www.amazon.de/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=201909000>.

Table 1. The applicable laws determined in the Terms of Use of SNSs

Thus, the Terms of Use have two functions with regard to the determination of applicable law: (i) the existence of a contract between the parties renders the dispute a "contractual dispute"[22] in most instances, thereby making Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I") applicable; (ii) the nature of Terms of Use as a type of consumer contract must be considered; (iii) the common inclusion of applicable law clauses in Terms of Use raises the issue of the validity of these clauses, which requires an analysis of data protection laws with regard to their status under private international law.

All of the above particularities of SNSs, namely, the intrinsic "foreign element" to their operations, the unique nature of privacy harms and the fact that most Terms of Use include governing law clauses, lead to the need to discuss these considerations in the context of both data protection laws such as the GDPR and private international law instruments such as Rome I.[23] Accordingly, the roadmap to determine the law applicable to the private enforcement of data protection laws against SNSs, requires drawing connections between the Terms of Use as the contractual component, the GDPR and Member States' data protection laws as the substantive law applicable and Rome I as the conflict of laws legislation. In connecting these three elements together, this Thesis

[22] Daniel J Solove & Paul M Schwartz, *Consumer privacy and data protection*, second edition. ed, Aspen select series (New York: Wolters Kluwer, 2018) at 171.

[23] Both of these fields have seen significant change in the EU over the past years. With regard to data protection laws, the replacement of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("Directive 95/46/EC") by the Regulation 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 ("GDPR") has been a major step towards harmonization of data protection laws in the EU. On the other hand, the enactment of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome Regulations") harmonized the conflict of laws rules at the EU level and 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 ("Brussels I (recast)") was aimed at harmonizing the rules on the determination of jurisdiction.

establishes the applicability of those provisions of Rome I which set forth the conflict of laws rules with regard to consumer contracts, to private enforcement claims raised by the users of SNSs arising from the violation of data protection laws.

OBJECTIVE AND METHODOLOGY

There are three reasons why this Thesis addresses a gap in the doctrine and practice of private enforcement of data protection laws. First, this Thesis is a product of the significant lack of attention by private international law scholars to the field of data protection, and vice versa. Svantesson rightly argues that there are two sides to the coin: on one hand, data privacy lawyers have come to the conclusion that private international law related issues are too complex to deal with, and are therefore deemed "*too hard*" to tackle; on the other hand, private international lawyers have yet to realize that the problems posed by data protection laws are a major challenge in their field.[24]

Second, in order to take a step closer to achieving the sound implementation of data protection laws, it is essential that both types of enforcement, public and private, receive similar attention. Judges, lawyers and scholars alike, often consider data protection laws to be part of public or administrative law enforced by state authorities, which lead to administrative fines as opposed to compensation claims.[25] Often, this view leads to private privacy enforcement being neglected in the doctrine.

Third, the difficulty of bringing legal action is increased by legal uncertainties, and the costs of litigation and especially when the respondent is located in a foreign country, which is usually the case for lawsuits filed in the EU against SNSs.[26] Consequently, this Thesis aims to further promote these claims, through providing a scholarly roadmap to

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[24] Dan Svantesson, "Enforcing privacy across different jurisdictions" in *Enforc Priv* (Springer, 2016) 195 at 196.
[25] Lydia Lundstedt, *International Jurisdiction Over Cross-Border Private Enforcement Actions Under the GDPR*, Faculty of Law, Stockholm University Research Paper No. 57 (Rochester, NY: Social Science Research Network, 2018) at 3.
[26] See; Table 1.

unveiling some of the mystery from the viewpoint of the data subject as regards the applicable law, in a way which offers legal certainty to SNSs.

This Thesis predominantly adopts following a doctrinal approach. Since this Thesis concerns disputes involving SNSs, examples and/or hypothetical brief case-studies are included which reference the Terms of Use of SNSs. Neither the hypothetical examples, nor the hypothetical case-studies relate to existing or possible disputes before national courts or arbitral tribunals. Chapter 3 adopts a comparative approach, additionally emphasizing the historical evolution of the mentioned concepts within the respective jurisdictions.

LIMITATION OF SCOPE

The scope of this Thesis is subject to certain limitations to achieve the desired analytical depth. First of all, although the doctrine often treats the concepts of jurisdiction and applicable law[27] together; the concept of jurisdiction will refer to the "*jurisdiction to adjudicate*" or the competence of the courts to rule over a particular dispute, throughout this Thesis. On the other hand, the notion of applicable law, or conflict of laws, points to the set of rules which determine what State's domestic law will apply to a dispute. This work predominantly concerns the determination of applicable laws, and the issues concerning the determination of jurisdiction will not be elaborated.

Secondly, the analysis in this Thesis is limited to the analysis of those contractual disputes where Rome I provides the applicable conflict of laws rules. Therefore, without regard to whether or not the EU data protection laws are applicable, private enforcement claims which fall outside the material and/or territorial scope of Rome I, including non-contractual disputes brought on the basis of Rome II[28], fall outside the scope of this Thesis.

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[27] Maja Brkan, "Data protection and European private international law: observing a bull in a China shop" (2015) 5:4 Int Data Priv Law 257 at 259.

[28] In any case, in accordance with Art. 1(1)/g of Rome II, non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation are excluded from the scope of Rome II.

Third, this Thesis relates to the private enforcement of data protection laws by data subjects against SNSs and does not concern the public enforcement by data protection authorities ("DPA").

STRUCTURE

This Thesis provides support for several interim conclusions in the following order; (i) that the GDPR, although a regulation, still permits divergent data protection laws to be enacted by the Member States of the EU (Chapter 1), (ii) that Terms of Use of SNSs qualify as consumer contracts therefore rendering Rome I the applicable conflict of laws legislation (Section 2.1), (iii) that the special consumer protective provisions of Rome I, which stipulate a protective connecting factor for the benefit of the consumer, provide sufficient protection to data subjects in their private enforcement claims, while also maintaining legal certainty for SNSs (Section 2.2), (iv) that the doctrinal arguments classifying Member States' data protection laws as overriding mandatory provisions hinder the implementation of the consumer protective provisions of Rome I, while failing to take into account the difference between German and French approaches to the definition of overriding mandatory provisions (Section 3.1 and Section 3.2); and (v) that the German approach should prevail and also influence the jurisprudence of the Court of Justice of the European Union ("CJEU") to ensure sound implementation of the special consumer protective provisions of Rome I (Section 3.3). All in all, this Thesis concludes that the private enforcement of data protection laws in the EU against SNSs should be subject to the consumer protective provisions of Rome I as lex specialis.

1 THE PRIVATE PRIVACY ENFORCEMENT REGIME UNDER THE GDPR: A CONFLICT OF LAWS ANALYSIS

Published in the Official Journal of the EU on May 4th, 2016, the GDPR marked a substantial transition and reform in legislation on personal data protection. The GDPR became effective on May 25th, 2018 and repealed Directive 95/46/EC.[29] *Inter alia*, the GDPR aims to strengthen individual rights through facilitation of private enforcement actions[30] since these were not commonplace under Directive 95/46/EC.[31] However, although still rare, data subjects are increasingly engaging in direct court actions against controllers or processors.[32] With a view to reinforcing this trend, Art. 79(1) of the GDPR stipulates that each data subject has the right to an effective judicial remedy, without prejudice to any administrative remedy otherwise available. Although a similar private enforcement regulation was already in place under Directive 95/46/EC, Art. 79(1) of the GDPR confirms that an action can be brought "*against the controller or the processor*", which was previously unclear under the Directive 95/46/EC. Lundstedt argues that the previous lack of clarification led to an interpretation that a judicial remedy was solely available against an administrative decision, such as a decision taken by a DPA, in the form of the right to appeal.[33] Second, while Directive 95/46/EC left it to the discretion of the Member States to determine whether to require the data subject to resort to an administrative remedy (such as lodging a complaint before the DPA), prior to bringing a

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[29] For the non-EU countries which are part of the EEA, namely Iceland, Liechtenstein and Norway, GDPR's entry into force is subject to its formal incorporation into the EEA Agreement. The incorporation took place on July 6th, 2018 and the GDPR. For more information, see "General Data Protection Regulation incorporated into the EEA Agreement | European Free Trade Association", online: <http://www.efta.int/EEA/news/General-Data-Protection-Regulation-incorporated-EEA-Agreement-509291>.

[30] Communication from the Commission to the European & Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, "Safeguarding Privacy in a Connected World A European Data Protection Framework for the 21st Century", online: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52012DC0009> at 6.

[31] Lundstedt, *supra* note 25 at 3.

[32] David Wright & Paul de Hert, *Enforcing privacy: regulatory, legal and technological approaches* (2016) at 211.

[33] Lundstedt, *supra* note 25 at 6.

private enforcement action, the GDPR ensures that the data subject is not under an obligation to refer the matter to the DPA before filing for a civil remedy.[34]

The implications of the availability of private enforcement actions for private international law are twofold; namely, the determination of jurisdiction and the applicable law. Although Directive 95/46/EC did not include a jurisdictional regime, the GDPR introduced one; on the other hand, Directive 95/46/EC had an applicable law provision, whereas the GDPR does not address the determination of the applicable law.

With regard to the new jurisdictional regime, Art. 79(2) regulates the jurisdiction in which the private enforcement claims shall be brought:

> "Art. 79(2) - Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an *establishment*. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her *habitual residence*, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers." *(emphasis added)*

As explained above in the Introduction, disputes concerning the violation of data protection laws commonly have an international dimension, and the GDPR sets forth the "establishment" of the controller or the processor or the habitual residence of the data subject as connecting factors for the determination of jurisdiction. The introduction of a rule on jurisdiction for private enforcement claims was a novelty of the GDPR.[35] Instead of leaving the determination of jurisdiction to Brussels I (recast), the GDPR has created its own jurisdictional regime. Without Art. 79(2) of GDPR, Art. 4(1) and Art. 63(1) of Brussels I (recast) would have been applicable, thus a legal person, such as an SNS, would need to be sued where it has its registered seat, central administration or main establishment. In contrast, Art. 79(2) of GDPR has introduced a legal regime where the claimant can file lawsuits in his/her place of residence, as well, which is an exception to Brussels I (recast) regime.. It is submitted that Art. 25 of Brussels I (recast) regulating the

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[34] Lee A Bygrave & Oxford University Press, *Data privacy law: an international perspective* (Oxford: Oxford University Press, 2014) at 187; Lundstedt, *supra* note 25 at 7.

[35] Ioannis Revolidis, "Judicial Jurisdiction over Internet Privacy Violations and the GDPR: A Case of Privacy Tourism" (2017) 11 Masaryk UJL Tech 7 at 12.

choice of forum is not applicable due to the effect of Art. 79(2) being *lex specialis*, therefore Art. 79(2) of GDPR cannot be excluded by a jurisdiction clause.[36] Since this Thesis focuses on the determination of applicable law and not jurisdiction, this issue will not be further elaborated upon.

On the other hand, the GDPR did not replace the governing law regime of the repealed Directive 95/46/EC with a new one. Seemingly, this is consistent with the EU legislator's choice of a regulation instead of a directive. Unlike a directive, pursuant to Art. 288(2) of the Treaty on the Functioning of the European Union ("TFEU"), the GDPR is a directly applicable legal tool in Member States without the need for further implementation into national law.[37] In the same vein, the proposal for the GDPR specified the aim for absolute harmonization of the Member States' data protection laws through a regulation:

> "A Regulation is considered to be the most appropriate legal instrument to define the framework for the protection of personal data in the Union. The direct applicability of a Regulation in accordance with Article 288 TFEU will *reduce legal fragmentation and provide greater legal certainty by introducing a harmonised set of core rules*, improving the protection of fundamental rights of individuals and contributing to the functioning of the Internal Market."[38] *(emphasis added)*

The same is reflected in Recital 9 of the GDPR with a focus on risks created as a result of online activities:

> "The objectives and principles of Directive 95/46/EC remain sound, *but it has not prevented fragmentation in the implementation of data protection across the Union*, legal uncertainty or a widespread public perception that there are significant risks to the protection of natural persons, in particular with regard to online activity. *Differences in the level of protection of the rights and*

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[36] Lukas Feiler, Nikolaus Forgó & Michaela Weigl, *The EU General Data Protection Regulation (GDPR) a commentary* (Woking, Surrey, United Kingdom: Globe Law and Business, 2018) at 284.
[37] Daniel Rücker & Tobias Kugler, *New European General Data Protection Regulation, a practitioner's guide: ensuring compliant corporate practice*, first edition. ed (München: C.H. Beck ;, 2018) at 4.
[38] "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) COM/2012/011 final - 2012/0011 (COD)", online: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012PC0011&from=EN>, s 3.1.

> *freedoms of natural persons, in particular the right to the protection of personal data, with regard to the processing of personal data in the Member States may prevent the free flow of personal data throughout the Union.* Those differences may therefore constitute an obstacle to the pursuit of economic activities at the level of the Union, distort competition and impede authorities in the discharge of their responsibilities under Union law. *Such a difference in levels of protection is due to the existence of differences in the implementation and application of Directive 95/46/EC*." *(emphasis added)*

It is therefore apparent that the GDPR is aimed at preventing the disharmony in the data protection laws of Member States by using a uniform regulation. However, the GDPR still gives considerable room to Member States to adopt divergent data protection laws, thus making the determination of applicable law still relevant. This Chapter will elaborate on the extent to which Member States can diverge from the rules set out by the GDPR (Section 1.2), while summarizing the discussions around Directive 95/46/EC (Section 1.1). In doing so, it will provide evidence for the argument that national courts will still need to deal with the determination of an applicable law for private enforcement of data protection laws.

1.1 DIRECTIVE 95/46/EC

Contrary to the impression given by the *travaux préparatoires* or the Recital of the GDPR, Directive 95/46/EC was seen as a harmonization of privacy law.[39] Because of this attempt to harmonize personal data protection[40], the European legislators adopted the "*country of origin principle*"[41] which was also adopted for several other areas of law, such as cross-border television broadcasting and e-commerce, around the time when Directive

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[39] Peter P Swire, "Elephants and Mice Revisited: Law and Choice of Law on the Internet" (2005) 153:6 Univ Pa Law Rev 1975 at 1983; Colin J Bennett, *Regulating privacy: data protection and public policy in Europe and the United States* (Ithaca: Cornell University Press, 1992). Rücker & Kugler, *supra* note 37 at 1.

[40] However, Directive 95/46/EC did not apply to any behavior directly, it required Member States to adopt their data protection laws in conformity with the Directive 95/46/EC. See; P P Swire, "Of Elephants, Mice, and Privacy: International Choice of Law and the Internet" (1998) 32:4 Int Lawyer 991 at 999.

[41] Ralf Michaels, "Eu Law as Private International Law? Reconceptualising the Country-of-Origin Principle as Vested-Rights Theory" (201505) 2:2 J Priv Int Law 195 at 201.

95/46/EC was enacted.[42] The matters relating to applicable of law were resolved in Art. 4(1), which reflected a view that insofar as an infrastructure takes advantage of a state's facilities, then it must be in conformity with that state's laws:[43]

> "Art. 4 – 1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:
> (a) the processing is carried out in the context of the activities of an establishment of the controller[44] on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;
> (b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;
> (c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community."

According to the conflict of laws regime[45] of Directive 95/46/EC, Spanish law would be applicable to a controller established in Spain, whereas if the processor[46] was established in Spain while the controller was established in France; then French law would be applicable ("*establishment test*"). Alternatively, when the controller is not established in a Member State, but makes use of equipment situated on the territory of that Member State, the controller is subject to the data protection laws of that Member State provided the equipment is not used for purposes of transit only ("*equipment test*").[47] Aimed at regulating the conflict of laws issues arising from the divergent data protection laws adopted by the Member States, Art. 4 was regarded as necessary, but also unnecessarily strict. In

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[42] Lokke Moerel, "Back to basics: when does EU data protection law apply?" (2011) 1:2 Int Data Priv Law 92 at 94.
[43] Joel R Reidenberg, "Technology and Internet Jurisdiction" (2005) 153:6 Univ Pa Law Rev 1951 at 1962.
[44] Controller means a natural or legal person which alone or jointly with others determines the purposes and means of the processing of personal data.
[45] Certain scholars claim that Art. 4(1) of Directive 95/46/EC can also be interpreted as a jurisdiction clause alongside conflict of laws. For further information on this subject, see: Christopher Kuner, "Data protection law and international jurisdiction on the Internet (part 1)" (2010) 18:2 Int J Law Inf Technol 176 at 180.
[46] Processor means a natural or legal person which processes personal data on behalf of the controller.
[47] Swire, *supra* note 40 at 1007.

particular, Swire has criticized the "*sweeping implications*" of Art. 4(1)/c concerning choice of law and jurisdiction for websites around the world.[48] He further argued that the extraterritorial effect of Art. 4 meant that websites established outside Europe would need to conform their actions to the laws of distant countries.[49] In the same vein, Moerel claimed that the provision was "*extraordinarily complex*" and it "*causes widespread confusion within the international business community*".[50]

In line with these criticisms, during the implementation of the Directive 95/46/EC for more than two decades, Art. 4(1) started to fall short for the controllers established on the territory of several Member States.[51] Especially in instances where the controller claims it is established in a third country, the meaning of "*establishment*" or "*use of equipment*", the connecting factors enshrined in Art. 4(1), began to be disputed.[52] Although Data Protection Working Party[53] ("WP 29") Opinion on Non-EU Based Websites[54], Opinion 5/2009[55] and Opinion 8/2010[56] attempted to shed light on the applicable law discussions,

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[48] *Ibid*.
[49] *Ibid* at 1010.
[50] Moerel, *supra* note 42 at 92. In the same direction, see; Shakila Bu-Pasha, "Cross-border issues under EU data protection law with regards to personal data protection" (2017) 26:3 Inf Commun Technol Law 213 at 217.
[51] Swire, *supra* note 40 at 1007.
[52] Swire, *supra* note 40; Lee Bygrave, "Determining Applicable Law Pursuant to European Data Protection Legislation'(2000)" 16 Comput Law Secur Rep 252.
[53] The WP 29 was an advisory body made up of representatives from the data protection authorities of each EU member state, the EU Commission, and the European Data Protection Supervisor. Upon entry into force of the GDPR, May 25, 2018, the European Data Protection Board ("EDPB") replaced the WP 29. The WP 29 has an advisory role and its guidelines are not legally binding, although the CJEU has on recent occasions cited WP opinions as being of persuasive authority. Unlike the WP, in addition to having an explicit regulatory power to issue guidelines, recommendations and best practice to encourage consistent application of the GDPR, the EDPB will have the power to make legally binding decisions in limited circumstances.
[54] Data Protection 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" (2002) 56 Ref WP, online: <http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2002/wp56_en.pdf>.
[55] Data Protection Working Party, "Opinion 5/2009 on online social networking" (2009) 163 Ref WP, online: <http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2009/wp163_en.pdf>.
[56] Data Protection Working Party, "Opinion 8/2010 on applicable law" (2010) 179 Ref WP, online: <http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2010/wp179_en.pdf>.

Opinion 8/2010 later needed to be updated[57] in the light of the CJEU's judgement in *Google Spain*.[58]

In terms of social networking services ("SNS") practice, Art. 4(1)/a ensured that if Facebook's establishment in Ireland was acting as the controller in processing the personal date of users residing in the EU, then Irish data protection laws were applicable.[59] Indeed, Facebook attempted to escape the application of other Member States' data protection laws by only determining Facebook Ireland as the data controller, through fulfillment of the "*establishment test*" under Art. 4(1)/a.[60] By doing so, Facebook aimed to comply solely with the data protection laws of Ireland. Nonetheless, the national courts of Member States such as the High Court of Berlin[61] and Brussels Court of First Instance[62], ruled that Facebook Ireland did not qualify as the data controller, as it was not competent to determine the purposes and means of processing of personal data.[63] Instead, Facebook, Inc., headquartered in California, US qualified as the data controller, therefore Facebook was not subject to the "*establishment test*" under Art. 4(1)/a, thus paving the way for the application of Art. 4(1)/c, namely the "*equipment test*".[64]

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[57] Data Protection Working Party, "Update of Opinion 8/2010 on applicable law in light of the CJEU judgement in Google Spain" (2015) 179 update Ref WP, online: <http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2015/wp179_en_update.pdf>.
[58] Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (2014) Case C‑131/12.
[59] Aleksandra Kuczerawy, *Facebook and its EU users–Applicability of the EU data protection law to US based SNS* (Springer, 2009) at 82.
[60] Bu-Pasha, *supra* note 50 at 215.
[61] Tim Van Canneyt, "The Belgian Facebook Recommendation: How the Nomination of a Single EU Data Controller is Under Fire - Privacy, Security and Information Law Fieldfisher", (2015), online: <https://privacylawblog.fieldfisher.com/2015/the-belgian-facebook-recommendation-how-the-nomination-of-a-single-eu-data-controller-is-under-fire>.
[62] Stephanie De Smedt & Christophe Geuens, "Data Protection Authority Publishes 2016 Annual Report" (2017) 3 Eur Data Prot Rev 222 at 222.
[63] According to the Art. 4 of the GDPR, data controller is defined as "the natural or legal person, public authority, agency or other body which, alone or jointly with others, *determines the purposes and means of the processing of personal data*; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law."
[64] Bu-Pasha, *supra* note 50 at 215.

In accordance with Art. 4(1)/c, non-EU based websites shall conform with national data protection laws of a Member State so long as they make use of equipment located in the territory of that Member State. In terms of SNS practice, it is important to clarify the definition of the term "*equipment*". For instance, WP 29 put forward that a user's computer constitutes the type of equipment referred to under Art. 4(1)/c.[65] Accordingly, by placing cookies[66] on the hard disk of the user's computer, thus enabling linking of all the information that the user collects during subsequent sessions, the controller is able to create detailed user profiles. This opinion rendered by WP 29 therefore meant that the national law of the EU Member State of Facebook's users would be applicable.[67] However, this position was not in conformity with trends in other areas of law, which did not acknowledge a computer or telecommunications equipment as a basis for a connecting factor.[68] As such, this view was criticized by the scholarship which argued that it complicates the situation of all non-EU based controllers, since it results in controllers such as Facebook being obliged to comply with the data protection laws of each Member State where the users benefit from SNS activity.[69]

The Court of Justice of the European Union ("CJEU") reaffirmed the broad interpretation of the territorial scope of Directive 95/46/EC in *Google Spain*.[70] Although the issues in that case related to a search engine and not an SNS, the jurisprudence is significant as it revealed the CJEU's approach to determining the data protection laws applicable to online activity in private privacy enforcement. Although the case is known for the discussions around the right to be forgotten, in *Google Spain*, the CJEU rendered

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[65] Data Protection Working Party, *supra* note 54 at 10.
[66] Cookies are pieces of data created by a webserver that can be stored in text files that may be put on the Internet user's hard disk, while a copy may be kept by the website. They are a standard part of HTTP traffic. They contain information about the individual that can be read back by the web site that placed it. A cookie can contain any information the web site wants to include in it: pages viewed, advertisements clicked, user identification number and so on. See; *Ibid*.
[67] Kuczerawy, *supra* note 59 at 82.
[68] Christopher Kuner, "Data protection law and international jurisdiction on the Internet (Part 2)" (2010) 18:3 Int J Law Inf Technol 227 at 229.
[69] Swire, *supra* note 40 at 1010; Kuner, *supra* note 68 at 234; Kuczerawy, *supra* note 59 at 82.
[70] Dan Jerker B Svantesson, "Article 4 (1)(a)'establishment of the controller'in EU data privacy law—time to rein in this expanding concept?" (2016) 6:3 Int Data Priv Law 210 at 211.

its judgment on the applicable data protection laws for search engines. During the proceedings, Google argued that neither Art. 4(1)/a nor Art. 4(1)/c was applicable to Google Spain, which was arguably a commercial representative of Google, Inc., headquartered in California, US. However, the CJEU adopted a functional approach, and referred to the business model of the search engines, which is similar to that of an SNS.[71] The CJEU ruled that the condition for the "*free*" search engine services, is cross-subsidized by the profits gained from advertising services.[72] Hence, it was found that if the revenue generating limb (Google Spain) of an establishment (Google, Inc.) is found in a Member State, the two establishments are "*inextricably linked*",[73] thus rendering the data protection laws of Spain applicable. This broad[74] and functional[75] interpretation of the territorial scope of Directive 95/46/EC is reflected in the GDPR, where the extraterritorial application is overtly adopted. Unlike the Directive 95/46/EC, the GDPR is not ambiguous in terms of its application to non-EU based websites. Nevertheless, the question of determining which Member States' data protection laws apply still needs further elaboration.

1.2 GDPR

As explained above, although the conflict of laws regime under Directive 95/46/EC was far from unambiguous, however, at least it had managed to set forth the guidelines within which the CJEU determined the applicable law.[76] In an attempt to reduce legal fragmentation, the data protection reform employed a regulation, which proved to be the most notable difference between the Directive 95/46/EC and the GDPR. This being said, Art. 3 of the GDPR regulating the territorial scope does not address the conflict of laws

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[71] Google Spain, para. 67.
[72] For further information, please see Section 2.1
[73] Google Spain, para. 56.
[74] Bu-Pasha, *supra* note 50 at 218.
[75] Orla Lynskey, "Control over Personal Data in a Digital Age: Google Spain v AEPD and Mario Costeja Gonzalez" (2015) 78:3 Mod Law Rev 522 at 531.
[76] Jiahong Chen, "How the best-laid plans go awry: the (unsolved) issues of applicable law in the General Data Protection Regulation" (2016) 6:4 Int Data Priv Law 310 at 311.

issues between the data protection laws of Member States, while maintaining that the GDPR applies extraterritorially:

> "Art. 3 – 1. This Regulation applies 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*.
> 2. This Regulation applies to the processing of personal data of data subjects who are in the Union *by a controller or processor not established in the Union*, where the processing activities are related to:
> (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
> (b) the monitoring of their behaviour as far as their behaviour takes place within the Union." *(emphasis added)*

At first glance, adoption of a regulation which is extraterritorially applicable seems to resolve the conflict of laws issues that were relevant during the period when Directive 95/46/EC was in place. However, the complications around the determination of applicable law are still relevant, because the GDPR continues to give way to the adoption of national data protection laws by allowing divergence. It is not possible to claim that the GDPR harmonizes the private enforcement regime applicable to the infringements of data protection laws, either in form, nor in substance. Wagner and Benecke further elaborate that the GDPR gives "*significant space to maneuver*" to Member States which is atypical for European regulations.[77]

1.2.1 POSSIBLE PROCEDURAL DIVERGENCES

With the exception of the right to compensation under Art. 82[78], the GDPR continues to grant Member States discretion as regards the determination of the form of judicial remedy. The GDPR is silent on whether national courts can issue orders or injunctions to enforce the rights of data subjects, for instance the right to erasure or

[77] Julian Wagner & Alexander Benecke, "National Legislation within the Framework of the GDPR" (2016) 2 Eur Data Prot Law Rev EDPL 353 at 357.
[78] Denis Kelleher & Karen (Barrister) Murray, *EU data protection law* (London: Bloomsbury Professional, 2018) at 376.

rectification. This poses a contrast with the public enforcement of data protection laws, where the GDPR explicitly provides the DPAs with the authority to order the rectification or erasure of personal data; or restrict the processing.[79]

In this vein, while the Irish Data Protection Act allows for injunctive relief, the Swedish Data Protection Act does not provide for this remedy.[80] On the other hand, even for the right to compensation, which is seemingly harmonized in form, the comprehensive analysis concluded by O'Dell reveals that differences in the translation of Art. 82 into the official languages of the EU are unnecessarily ambiguous, which needs to be clarified on the national level.[81] The lack of harmonization in this respect then leads to the continued relevance of solutions found in private international law under the GDPR, as the provisions of liability and compensation will still be assessed by national law, since they are a matter of substantive law.[82]

1.2.2 POSSIBLE SUBSTANTIVE DIVERGENCES

First, the GDPR does not prevent Member States adopting rules which are not covered by the GDPR.[83] Secondly, and perhaps more importantly, the GDPR allows Member States to deviate from its standards. All of these deviations have the potential to give rise to a conflict of laws issue. In his comprehensive analysis, Chen identified 37 matters under the GDPR that would create a low, moderate or high risk of conflict of laws. The list below includes those which carry moderate or high risk, while leaving out the matters with low risk or purely procedural matters.[84] Accordingly, those which carry high

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[79] Lundstedt, *supra* note 25 at 8.
[80] *Ibid* at 10.
[81] Eoin O'Dell, "Compensation for Breach of the General Data Protection Regulation" (2017) 40:1 Dublin Univ Law J 97 at 44.
[82] Antonella Galetta & Paul De Hert, "The Proceduralisation of Data Protection Remedies under EU Data Protection Law: Towards a More Effective and Data Subject-oriented Remedial System?" (2015) 8:1 Rev Eur Adm Law 125 at 148.
[83] Chen, *supra* note 76 at 212.
[84] Chen identifies the impact of some provisions as minimal, such as Art. 6(1)/e on public interest, Art. 9(2)/b on sensitive data involving public interest, Art. 9(2)/h on healthcare system, Art. 9(2)/I on public health, Art. 10 on criminal record, Art. 17(3)(b),(c) on exemption from the right to erasure, Art. 35(10) on specific impact assessment, Art. 36(5) and Art. 58(3)/c on prior consultation, Art. 37(4) on the designation of a data protection

susceptibility to raise conflict of laws issues, relate to matters which are likely to result in an involvement of several stakeholders and/or cross-border processing. The ones identified as "*moderate risk*" are labelled as such because of the hybrid nature of the public and private interests to which they relate.[85]

Article No.	**Subject Matter**	**Risk of Conflict**
6(1)/c	Legal obligation	Moderate
8	Minors' consent	High
9(2)/a	Consent to process sensitive data	Moderate
9(2)/b	Sensitive data for labour law purposes	High
9(2)/j, 89(2)(3)	Processing for archiving, research and statistical purposes	Moderate
9(4)	Genetic, biometric and health data	Moderate
14(5)/c	Right to information regarding obligatory disclosure	Moderate
14(5)/d	Right to information regarding professional secrecy	Moderate
17(1)/e	Right to erasure	High
22(2)/b	Automated decision making	High
23(1)	General restrictions on obligations and rights	Moderate
26(1)	Responsibilities of joint controllers	High
28(3)/a	Processors' obligation to follow instructions	Moderate
28(3)/g	Processors' obligation of erasure	Moderate
29, 32(4)	Unauthorized processing	Moderate
84	Penalties	High
85	Freedom of expression and information	High
88(1)	Employment data	High
89(2)	Derogations for research and statistical purposes	Moderate
91	Processing by religious associations	Moderate

officer, Art. 49(1)/d on public interest regarding transfers to third countries, Art. 49(5) on limitations on transfers to third countries, Art. 83(7) on administrative fines on public bodies, Art. 86 on official documents, Art. 87 on identification number, Art. 89(3) on derogations for archiving purposes, Art. 90 on investigative power and obligations of secrecy. For further information, see; *Ibid* at 313. Procedural issues are issues relating to the composition, appointment, duties and powers of national supervisory authorities, which are considered to be unlikely to raise a problem regarding the determination of applicable law. See; *Ibid*.

[85] Chen, *supra* note 76 at 313.

Table 2. List of high and moderate risk matters on which Member States can diverge[86]

Some examples referred to in Table 1, namely those under Art. 6, Art. 8 and Art. 9, can be elaborated as follows:

> "Art 6 - 2. Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1[87] by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX."

Art. 6 of the GDPR sets out the six legal grounds based on which personal data can be legitimately processed. Therefore, by providing Member States leeway to determine the specific requirements with regard to compliance with a legal obligation[88] and necessities for performance of a task carried out in the public interest or in the exercise of official duty vested in the controller[89], the GDPR does not exclude Member State data protection laws which define the conditions of specific processing situations, such as more precisely determining the lawfulness of a given processing.[90] The shortcomings of divergent laws on a significant regulation such as lawfulness of processing is also addressed in the scholarship:

> "Furthermore, businesses will also have to be aware of any specific Member State law adapting the application of GDPR, art. 6 para. 1, subpara. c). Particularly in a cross-border context, different standards in the quality of laws of Member States may prove challenging. From a business perspective, this requires a careful evaluation of applicable laws."[91]

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[86] *Ibid* at 314.
[87] Art. 6(1)/c declares lawful the processing that is necessary for compliance with a legal obligation to which the controller is subject. Art. 6(1)/e allows processing which is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.
[88] Art. 6(1)/c of the GDPR.
[89] Art. 6(1)/e of the GDPR.
[90] Wagner & Benecke, *supra* note 77 at 354.
[91] Rücker & Kugler, *supra* note 37, para 382.

Yet, the GDPR does not address the determination of the applicable national laws, while further allowing space for Member State data protection laws to diverge on other issues such as the conditions applicable to the processing of a child's personal data in relation to information society services, such as an SNS:

> "Art. 8 – 1. (…) Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years."

This provision is particularly important because of its overt reference to information society services. Accordingly, Art. 8(1) of the GDPR requires that the child be 16 years or older, in order to deem the processing of his/her personal data lawful. For instance, suppose that Germany, France and Spain have determined 16, 15 and 14 years of age respectively; and that SoundCloud, an SNS based in Germany, processes the personal data of a 15-year-old French user through its branch in Spain, for the operation of its business in Spain. Under Art. 4 of Directive 95/46/EC, the only applicable law would have been Spanish law, based on which the processing is lawful.[92] However, the GDPR fails to provide this level of certainty, and the conflict of laws matters remains unsolved. The same is true for the determination of the conditions for the processing of special categories of personal data: [93]

> "Art. 9 - 4. Member States may maintain or introduce further conditions, including limitations, with regard to the processing of genetic data, biometric data or data concerning health."

It is apparent that EU legislator's omission to include a conflict of laws provision or to exclude Art. 4 of Directive 95/46/EC from the scope of Art. 94 of GDPR which repeals

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[92] Chen, *supra* note 76 at 316.

[93] Special categories of personal data (sensitive data) mean personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

Directive 95/46/EC, is a "*remarkable shortfall*".[94] While non-EU based SNSs are now certain that the GDPR is applicable to them by virtue of Art. 3, there is still a significant uncertainty as to which Member States' data protection laws are applicable. Despite the fact that as a regulation, the GDPR is meant to be directly and uniformly applicable, as far as the above provisions are concerned, there is a substantial possibility that the GDPR will result in creation of a complex multi-level data protection system.[95] In applying data protection laws, the courts will fist need to determine whether a certain data protection law falls within the scope preempted by the GDPR. Moreover, they will need to determine to which extent the national data protection law is applicable against the GDPR provision which regulates the same matter. Such an evaluation of rules, while requiring significant level of expertise, is the contrary to the end result aimed by adoption of a regulation.

This consequence renders the private international law instruments on the determination of applicable law relevant. Contrary to Directive 95/46/EC which provided a conflict of laws provision, the determination of the law applicable to private enforcement claims calls for a solution outside of the existing EU level data protection law, the GDPR. As this Thesis puts the private enforcement claims brought against SNSs at its center, the application of Rome I should be further elaborated. As put forth by WP 29, consent is the most common legal ground for processing, which function as a contract.[96] Against this backdrop, the evaluation of Rome I as a way to fill the legal gap in the GDPR, requires analysis of the contracts employed by SNSs, choice of law provisions therein, and the classification of such contracts as consumer contracts. In the absence of a conflict of laws provision which would serve as *lex specialis*, the in-depth analysis of Rome Regulations specifically tailored for each circumstance, although undesired, becomes crucial.

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[94] Feiler, Forgó & Weigl, *supra* note 36 at 316.
[95] Wagner & Benecke, *supra* note 77 at 360.
[96] Data Protection Working Party, "Opinion 15/2011 on consent" (2011) 187 Ref WP, online: <http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2011/wp187_en.pdf>.

1.3 INTERIM CONCLUSION

In conclusion, while aiming to harmonize Member States' data protection laws, the GDPR gives a significant discretion to Member States to enact divergent rules. The GDPR is aimed at preventing the divergent data protection laws of the Member States through a regulation, because it is claimed that the Directive 95/46/EC, being a directive, did not provide the necessary legal certainty. However, the GDPR still gives considerable room to Member States to adopt divergent data protection laws, and on important matters such as the lawfulness of processing, the age of consent and the right to erasure. Consequently, the possibility divergence renders the determination of applicable law still relevant.

Moreover, unlike Directive 95/46/EC, the GDPR does not address conflict of laws issues. This gap in the GDPR necessitates an outside private international law instrument to come into play and provide a solution for any conflict of laws. For contractual claims arising from the violation of data protection laws, this Thesis claims that the legal gap is filled by Rome I. However, as Rome I does not solely address the conflict of data protection laws, in order to determine which provision thereof will be applicable, the circumstances of the case at hand must be further analyzed. With regard to the claims against SNSs where the SNS and the user/data subject have agreed on the Terms of Use, such an agreement needs to be conceptualized within Rome I before the applicable provision is determined. Thereafter, the data protection laws need to be accurately categorized, with regard to their mandatory nature and whether or not they are directly applicable. Thus, the solution is by no means one-size-fits-all; Chapter 2 below will analyze the relationship between SNS practices and Rome I.

2 TERMS OF USE AND CONSUMER PROTECTION UNDER ROME I

SNSs face lawsuits around the globe as the reach of the Internet grows day by day. In an attempt to diminish the legal uncertainty they may encounter with regard to the law applicable to these disputes, it is common SNS practice to include a choice of law clause in their Terms of Use. Indeed, the national courts located in the EU, predominantly in Germany, have dealt with claims brought by consumer associations with regard to Terms of Use being invalid under data protection laws, consumer law or antitrust law.[97] In the EU, the law applicable to contractual disputes is determined by Rome I, which entered into force on 24 July 2008. In enacting Rome I, the EU legislators aimed to modernize the Rome Convention and create uniform European rules with regard to the private international law of contractual obligations.[98] Pursuant to Art. 24 of Rome I, Rome I has replaced the Rome Convention, while the Rome Convention is still applicable to litigation relating to contracts concluded before December 17th, 2009. Since Rome I is a regulation operating under Art. 267 of the TFEU, the ECJ is authorized to give preliminary rulings on its interpretation, at the request of national courts.[99] The choice of law rules in Rome I are binding and directly applicable on the courts of the Member States for which Rome I has entered into force. In general, as per Art. 1(1), Rome I applies to situations involving a conflict of laws, to contractual obligations in civil and commercial matters. Claims brought on the grounds of violations of the Terms of Use concluded with online service providers, of which SNSs are

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[97] "German Court Finds 25 Provisions in Google's Online Terms of Use and Privacy Policy to Be Unenforceable", (19 December 2013), online: *Socially Aware Blog* <https://www.sociallyawareblog.com/2013/12/19/german-court-finds-25-provisions-in-googles-online-terms-of-use-and-privacy-policy-to-be-unenforceable/>; "Facebook's new terms of service violates EU law, Belgian groups say", online: *CNET* <https://www.cnet.com/news/facebooks-new-terms-of-service-called-illegal-following-investigation/>; Alex Hern, "Facebook personal data use and privacy settings ruled illegal by German court", *The Guardian* (12 February 2018), online: <http://www.theguardian.com/technology/2018/feb/12/facebook-personal-data-privacy-settings-ruled-illegal-german-court>.

[98] Gralf-Peter Calliess, *Rome Regulations: commentary* (2015) at 2.

[99] Peter Stone, *EU private international law* (2014) at 280.

an example, are within its scope.[100] Further, Art. 3(3) of Rome I stipulates that it applies even where only foreign element arises from a choice of law agreed to by the parties, in other words, in a situation exclusively connected with a single Member State, save for the foreign law chosen as applicable in the contract. For instance, when a resident of Spain concludes a Terms of Use with Busuu, established in Spain, Rome I would still be applicable as English law is chosen as applicable.

Unlike Swiss law[101], Rome I does not prohibit choice of law in consumer contracts. On the contrary, Art. 6(1) allows for a choice of law in business-to-consumer ("B2C") contracts, in accordance with Art. 3 of Rome I. However, Art. 6(2) provides that such choice of law may not deprive the consumer of the protection afforded by those rules which cannot be derogated from by contract of the country in which the consumer has his/her habitual residence (*protective connecting factor or preferential law approach*). Aimed at the protection of the weaker party that is the consumer, Art 6(2) of Rome I grants the law of the habitual residence of the consumer a protective status: the consumer is afforded the minimum protection provided by the law of his/her habitual residence. Therefore, from the viewpoint of the consumer/data subject, the more favorable provisions of the law of her home State will continue to apply.[102]

In order for this protective connecting factor to apply, a consumer contract between the parties must be in place.[103] This Chapter will analyze the relationship between Art. 6 of Rome I and Terms of Use. First, the status of Terms of Use as consumer contracts, and the criteria by which Terms of Use are considered consumer contracts pursuant to Art. 6(1) of Rome I, will be explained. Second, the applicability of Art. 6(2) of Rome I to private enforcement of data protection laws concerning the breach of Terms of Use will be dealt with. In doing so, the analysis will try to answer following questions: (i) When does the

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[100] Maja Brkan, "Data protection and conflict-of-laws: a challenging relationship" (2016) 2 Eur Data Prot Rev 324 at 337; Anthony Gray, "Conflict of laws and the cloud" (2013) 29:1 CLSR Comput Law Secur Rev Int J Technol Law Pract 58 at 60.
[101] Art. 120(2) of Federal Act on Private International Law.
[102] Calliess, *supra* note 98 at 190.
[103] Lundstedt, *supra* note 25 at 15.

concept of "consumer protection" under Art. 6 of Rome I overlap with "personal data protection – data subject protection"? (Section 2.1) (ii) Does Art. 6(2) of Rome I apply to private enforcement of data protection laws, as "rules protecting the consumer"? (Section 2.2.1) (iii) If so, does the argument accepting data protection laws as overriding mandatory provisions coexist with the applicability of Art. 6(2) of Rome I to privacy disputes arising from the breach of Terms of Use? (Section 2.2.2)

2.1 CATEGORIZING TERMS OF USE AS CONSUMER CONTRACTS UNDER ART. 6(1) OF ROME I

The concept of "consumer" corresponds broadly to that defined under Art. 6 of Rome I. Therefore, only a natural person who can be regarded as acting outside his trade or profession is a consumer. When determining the law applicable to private privacy enforcement disputes, it is therefore indispensable to put forth the criteria according to which Terms of Use are considered consumer contracts, thereby qualifying for the legal protections dedicated to consumers. In order to achieve this protection, the first criterion under Art. 6(1) of Rome I is that a natural person must conclude a contract. Although the requirement for a natural person is in parallel with that of a data subject under Art. 4 of the GDPR, the simple fact that this person concludes a contract does not suffice to characterize the transaction as a consumer contract.[104] As a second and key criterion, as underlined in the CJEU's ruling in *Kolassa*, the person must be acting in a way that can be regarded as outside of his/her trade or profession.[105] Also, SNS practice in this regard sheds light on the fact that SNSs regard –at least a portion of- their users as consumers. As referred to above, some SNSs differentiate between their consumer and non-consumer users in determining the governing law in their Terms of Use. For instance, according to Facebook's Terms of Use, a consumer may invoke the law of his/her habitual residence,

[104] Michael Wilderspin & Richard Plender, *The European Private International Law of Obligations* (Sweet & Maxwell, 2015), paras 9–008.
[105] Harald Kolassa v Barclays Bank plc (2015) Case C-375/13, para 23.

whereas for a trader, Terms of Use are subject to the laws of the State of California.[106] A similar distinction is also the case for Pinterest.[107]

With regard to the contract criterion, the most important question is whether or not "*free*" online services qualify as a contract. As opposed to e-commerce services such as Amazon, SNSs deliver their services free of charge.[108] However, there is a "*hidden cost*" resulting from the overlap between the status of consumer and data subject, where the consumers pay with their personal data. Since this personal data can be commercialized by the SNS in activities such as customer profiling and marketing, they carry significant monetary value.[109] For this reason, this personal data are considered as the consumers' counter-performance.[110] Such personal data may be collected overtly through registration forms, or covertly through sharing activity of the consumer, or even secretly via cookies.[111] In the same vein, the CJEU, in *Schrems II*, did not take into consideration the fact that Facebook offered its services for free and concluded that Mr. Schrems was entitled to consumer protection.

The second criterion, namely, being regarded as acting outside of his/her trade or profession, makes the classification harder when the data subject acts partly for a business purpose and partly for private reasons (*a dual-purpose contract*[112]). Many users of SNS services, similar to other online services such as cloud-based storage and e-mail services, may use their account with an SNS partly for a business purpose, such as opening a business page and setting up a professional account.[113] The CJEU discussed dual-purpose contracts

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[106] note 13.
[107] note 15.
[108] Marco Loos & Joasia Luzak, "Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers" (2016) 39:1 J Consum Policy 63 at 67.
[109] Alessandra Cervone, "Unfair Contract Terms and Sharing of Data with Facebook, Towards a Better Protection of Social Media Users: The Whatsapp Cases" (2018) 4:2 Riv Ital Antitrust Italian Antitrust Rev at 205.
[110] *Ibid*. For further information, see; Natali Helberger, Frederik Zuiderveen Borgesius & Agustin Reyna, *The Perfect Match? A Closer Look at the Relationship between EU Consumer Law and Data Protection Law*, SSRN Scholarly Paper ID 3048844 (Rochester, NY: Social Science Research Network, 2017) at 12.
[111] Loos & Luzak, *supra* note 108 at 67.
[112] Dual purpose contracts are also referred to as "mixed contracts"; Michael McParland, *The Rome I Regulation on the law applicable to contractual obligations* (Oxford University Press, 2015), para 12.113.
[113] Loos & Luzak, *supra* note 108 at 66.

and the criteria for their classification as consumer contracts in *Gruber*[114] and more recently in *Schrems II* [115]. Additionally, the criteria have been regulated by the Directive 2011/83/EU on Consumer Rights (Consumer Rights Directive). Nevertheless, the approaches adopted by the CJEU and the EU legislator were far from consistent until *Schrems II*, as the approach in *Gruber* favored more strictly construing the notion of "consumer", which resulted in the exclusion of a greater number of Terms of Use from consumer protection regulations, such as Art. 6(2) of Rome I.[116] On the other hand, the Consumer Rights Directive and the approach in *Schrems II* allows for a broader definition, as explained below.

2.1.1 THE NEGLIGIBLE BUSINESS PURPOSE TEST IN *GRUBER*

In *Gruber*, which concerned a farmer who had purchased roof tiles to be used both on his dwelling and his farm, the CJEU suggested that a dual-purpose contract is not a consumer contract unless the business aspect plays a negligible role:

> "[…] a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules [for consumer contracts], *unless the trade or professional purpose is so limited as to be negligible* in overall context of the supply, the fact that the private element is predominant being irrelevant in that respect." [117] *(emphasis added)*

This *negligible business purpose test* defeated an earlier understanding, evident in the Giuliano-Lagarde Report[118] and Art. 1:105(1) of the Draft Common Frame of Reference ("DCFR"), which defines a consumer as a person acting *primarily* for purposes outside of his/her trade or profession, also known as *the predominance test*. It is argued

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[114] Johann Gruber v Bay Wa AG (2005) Case C-464/0, para 34.
[115] Maximilian Schrems v Facebook Ireland Limited (2018) Case C-498/16.
[116] For more information on Art. 6(2) of Rome I, see Section 2.2.
[117] Gruber, para 54.
[118] Mario Giuliano, Paul Lagarde, "Report on the Convention on the law applicable to contractual obligations, EUR-Lex - 31980Y1031(01) - EN", online: *Off J C 282 31101980 P 0001 - 0050* <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31980Y1031(01):EN:HTML>.

that the *negligible business purpose test* was more consistent with legal certainty when compared with the *predominance test*[119], and that the protection of the weaker party argument should not apply when one of the parties, even partly acts with a business purpose, therefore putting him or her on an equal footing with the business party.[120] By adopting the *negligible business purpose test*, the CJEU therefore took a more restrictive approach, ensuring protection only for those whose main purpose in entering into the contract is not contaminated by a more than negligible business purpose.[121] However, Tang criticized CJEU's *negligible business purpose test*, by claiming that the test overlooks a sub-category of dual-purpose contracts, namely, those contracts where the subject matter of the contract is not the direct subject of trade or profession, but a supplementary support for it.[122] Accordingly, although the facts of *Gruber* suggested the former category (direct subject), the CJEU implied an application of the test for the latter (supplementary support) by referring to the "purposes *within* the trade or profession", which would exclude many consumer contracts from the protective category.

With regard to the Terms of Use concluded with an SNS, the use of services as a supplementary support for an individual's business, in the form of advertisement, marketing or public relations, is more commonplace.[123] Had the *negligible business purpose test* been applied to determine the consumer contract nature of certain Terms of Use, the individual then risks losing the protection afforded by law, such as Art. 6 of Rome I with regard to the governing law clauses. This would occur when, for instance, he/she uses his/her SNS account to connect with business contacts, or to open an account/page for the promotion of his/her trade or profession alongside his/her personal account/page. As explained above, the governing law clauses in Terms of Use occasionally differentiates

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[119] Calliess, *supra* note 98 at 169.
[120] Gruber, para 40.
[121] Zheng Sophia Tang, *Electronic consumer contracts in the conflict of laws* (Oxford; Portland, Ore.: Hart, 2009) at 23.
[122] *Ibid*.
[123] This being said, such as in the example of Facebook Business, SNSs also engage in business-to-business ("B2B") contracts with their advertisers and third-party developers. Since data subjects are not a party to these contracts, B2B contracts concluded with SNSs are beyond the scope of this Thesis.

between the cases where the claim is brought by a consumer or a non-consumer. However the categorization of a dual-purpose contract as a consumer contract must be made by the national courts, in any case.[124] Thus, the distinction made in the Terms of Use is not significant with regard to the categorization of the contract as B2C or B2B.

In harmony with the earlier Giuliano-Lagarde Report and the DCFR, whereas in divergence from *Gruber*, Recital 17 of the Consumer Rights Directive of 2011, the most recent general measure of EU consumer law, has clarified the nature of dual-purpose contracts by expressly adopting the *predominance test*:

> "[…] However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade *purpose is so limited as not to be predominant in the overall context of the contract*, that person should also be considered as a consumer." (emphasis added)

This is clearly inconsistent with the previous approach in *Gruber*. While the adoption of the Consumer Rights Directive gave way to an assumption that the *predominance test* would be adopted by the CJEU[125], this assumption was not tested until recently, in *Schrems II*.[126]

2.1.2 THE PREDOMINANCE TEST IN *SCHREMS II*

In *Schrems II*, Mr. Schrems brought a civil lawsuit against Facebook in Austria, claiming several breaches of the Austrian Data Protection Act, the Irish Data Protection Act and Directive 95/46/EC. He based his action on claims arising from contractual

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[124] Loos & Luzak, *supra* note 8 at 67; Christian Twigg-Flesner, *A Cross-Border-Only Regulation for Consumer Transactions in the EU: A Fresh Approach to EU Consumer Law* (Springer Science & Business Media, 2011) at 63.
[125] Loos & Luzak, *supra* note 108 at 67.
[126] The CJEU, while not explicitly dealing with this issue, held in Horațiu Ovidiu Costea v SC Volksbank România SA (2015) Case C-110/14 that the sole fact that a consumer credit was secured by a mortgage on an immovable property used by the consumer in a professional context would not result in the loss of the consumer status. Hence, Costea was interpreted as a leeway for the future adoption of the predominance test for dual-purpose contracts. See; *Ibid*, n 14.

relations between Facebook and seven others who had previously assigned their claims to Mr. Schrems. In *Schrems II*, Mr. Schrems sought guidance from the CJEU on the determination of jurisdiction over consumers contracts in disputes arising from the violation of data protection laws.[127]

Facebook (Ireland), inter alia, objected that the action was inadmissible because international jurisdiction was lacking;[128] whereas Mr. Schrems argued that the court had jurisdiction, on the ground that a claimant who is a consumer may seize the court of the Member State where he/she is a resident. Unlike Facebook's current Terms of Use[129] which allows consumers to refer claims to the competent courts in the State of their habitual residence, at the time Mr. Schrems signed up to Facebook, he had agreed to a jurisdiction clause indicating California courts for both consumers and non-consumers. He stated that he started using Facebook in 2008 for exclusively personal purposes. Starting from 2011, he has opened a Facebook page where he reported to Internet users on his legal proceedings against Facebook, as well as posting his lectures, panels and media appearances while calling for donation for his books and promoting them.[130] Claiming that his activities on Facebook were of commercial nature, the Vienna Regional Court for Civil Matters ruled that Mr. Schrems' claim was inadmissible on grounds of the lack of jurisdiction. The issue was referred to the CJEU as a preliminary question by the Austrian Supreme Court, as follows:

> "Is Article 15 of Regulation … No 44/2001 … *[Brussels I]* to be interpreted as meaning that a "consumer" within the meaning of that provision loses that status if, after the comparatively long use of a private Facebook account, he publishes books in connection with the enforcement of his claims, on occasion also delivers lectures for remuneration, operates websites, collects donations for the enforcement of his claims and has assigned to him the claims of

[127] Nicolas Blanc, "Schrems v Facebook: Jurisdiction Over Consumer Contracts Before the CJEU" (2017) 3 Eur Data Prot Rev 413 at 413.
[128] Schrems II, para 18.
[129] note 13.
[130] Schrems II, para 10.

> numerous consumers on the assurance that he will remit to them any proceeds awarded, after the deduction of legal costs?"[131] *(emphasis added)*

In its judgment of January 2018, the CJEU clarified that a person's status as consumer may change over time, especially when there is a long term SNS contract, Terms of Use, in question.[132] In determining the threshold where the status of the consumer changes to a professional, the CJEU applied *the predominance test*, by explaining:

> "This interpretation implies, in particular, that a user of such services may, in bringing an action, rely on his status as a consumer only if the predominately non-professional use of those services, for which the applicant initially concluded a contract, has not subsequently become predominantly professional."[133]

Hence, the CJEU held that the consumer status should be maintained while the predominance of non-professional use lasts, whereas given that such use evolved into a professional one during the term of the Terms of Use, this would mean that the consumer status will be lost from then onwards.[134] This interpretation of the consumer status is important, since it is indicative of a change in the CJEU's previous approach in *Gruber*. By diverting from *the negligible business purpose test*, the CJEU allows for a broader definition of "consumer", thus expanding the protective scope of the consumer-related provisions of private international law instruments such as Art. 6 of Rome I and Art. 17 of Brussels I (recast).

The decision of the CJEU in *Schrems II* is significant for a number of reasons. First, it relates to a private enforcement claim brought by a data subject residing in the EU, Max Schrems, against Facebook. Within this context, in *Schrems II*, the CJEU discusses the determination of jurisdiction over consumer contracts in cases of breaches of data protection laws. Therefore, the CJEU confirms the possibility of referral to the protection

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[131] Schrems II, para 24.
[132] Schrems II, para 37-38.
[133] Schrems II, para 38.
[134] Lundstedt, *supra* note 25 at 15.

of consumer laws in the realm of data protection laws, in support of the argument brought forward by this Thesis. Unlike in the US[135], data protection laws in the EU are not considered an inherent part of consumer protection.[136] Thus, the sole fact that a data subject is defined as a natural person under Art. 4 of the GDPR, does not mean that the data subject is automatically considered a consumer within the meaning of Rome I and the Terms of Use concluded by the data subject and the data controller, in this case, the relevant SNS, a consumer contract.[137] In *Schrems II*, the CJEU clarifies that in their relationship with SNSs, data subjects also acquire the status of consumers, provided that certain conditions regarding dual-purpose contracts are fulfilled. Secondly, the CJEU diverges from its case-law in *Gruber* and aligns with the Consumer Rights Directive by adopting *the predominance test*, which ultimately gives way to the protection of a larger number of claimants. Thirdly, although the judgment does not relate to the determination of the governing law, broadly defining the status of consumer, thereafter leads to the availability of private international law protections, such as the restrictions on party autonomy in cases of Art. 6(2) of Rome I (with regard to applicable law) or Art. 17 of Brussels I (recast) (with regard to jurisdiction).

For the determination of the applicable law with regard to contractual claims against SNSs arising from the infringement of data protection laws, it is therefore possible to argue that data subjects, as long as they are deemed "consumers" pursuant to *the predominance test*, will be able to claim that the governing law clauses under the Terms of Use are subject to Art. 6(2) and other protective provisions of Rome I. This gives way to increased protection of consumers, solely by the effective application of the protective choice of law provisions of Rome I. However, the fact that Terms of Use pass the "consumer contract" test under Art. 6(1) of Rome I is not sufficient in itself and only leads to more questions

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[135] The protection of privacy in the US is regulated by the FTC, which is authorized to enforce measures against unfair and deceptive practices directed towards consumers under Section 5 of the FTC Act which also authorized FTC to enforce the right to privacy.
[136] M Brkan, "Data protection and European private international law: observing a bull in a China shop" (2015) 5:4 Int Data Priv Law 257 at 267; Lundstedt, *supra* note 25 at 15.
[137] Brkan, *supra* note 136 at 267.

regarding the scope of protection afforded to data subjects under Art. 6(2) of Rome I. For instance, what is the extent of the applicability of Art. 6(2) of Rome I to Terms of Use? Are there other provisions of Rome I, such as Art. 9 regulating overriding mandatory provisions, which can come into play for the protection of data subjects, and be applicable alongside Art. 6(2)?

2.2 DATA PROTECTION LAWS AND CONSUMER PROTECTION: ART. 6(2) OF ROME I

As explained in Chapter 1, the GDPR regime does not necessarily put an end to conflict of laws issues, while not including a choice of law provision unlike Directive 95/46/EC. In terms of determining the applicable law on a intra-EU basis, it is therefore necessary to address two separate issues. First, one has to answer whether a Member State, therefore EU, legislation is at all applicable. Art. 3 of the GDPR regulating extraterritoriality can shed light on this first question. On the other hand, the second question relates to which Member State law is applicable, in regard to matters where GDPR allows Member States to enact divergent rules. GDPR leaves the second question unanswered.[138]

In the light of the first part of this Chapter, it is understood that the Terms of Use can be considered consumer contracts, and in such case, they are subject to Art. 6 of Rome I. The only restriction imposed is the protective connecting factor offered under Art. 6(2), which preserves the application of the domestic mandatory provisions of the law of the consumer's residence irrespective of any choice of a different governing law, *only if* these are more favorable to the consumer.[139] The provision reads:

> "Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of *the protection afforded to him by provisions that cannot be*

[138] Chen, *supra* note 76 at 320. For further information, see; Section 1.2.
[139] Christopher Bisping, "Mandatorily protected: the consumer in the European conflict of laws" (2014) 22:4 Eur Rev Priv Law 513 at 521.

> *derogated from by agreement* by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1." *(emphasis added)*

The first paragraph designates the law of the habitual residence of the consumer as the governing law in the absence of an express or implied choice of law. Therefore, "*the protection afforded to the consumer by provisions that cannot be derogated from by agreement*" of the law of the habitual residence of the consumer, cannot be contracted out by the governing law clauses of the Terms of Use.

Therefore, firstly, it is important to understand to which extent Art. 6(2) of Rome I applies to Terms of Use and in particular, the governing law clauses. As exemplified above, the majority of SNSs include governing law clauses, and some such as Tumblr[140] or Flickr[141] include the law of non-EU jurisdictions as the applicable law. Although this is not the case for many SNSs, with the understandable exception of Amazon, SNSs do not refer to the consumer's right to enjoy the mandatory provisions of the law of their habitual residence. It is therefore important to understand the extent of the consumer protection afforded under Art. 6(2), which is proved sufficiently substantial insofar that those SNSs which do not refer to it are at the risk of having the governing law clauses of their Terms of Use declared invalid by the courts. This issue will be further analyzed under Section 2.2.1 below. After having laid down the scope of relevance of Art. 6(2) of Rome I for contractual disputes arising out of alleged infringement of data protection laws, as a second point, the interplay between Art. 6(2) and Art. 9 of Rome I and an emerging doctrinal view accepting data protection laws as overriding mandatory provisions will be explained under Section 2.2.2. This view will be contrasted by the definition of "*provisions that cannot be derogated from by agreement*" under private international law and the CJEU's acceptance of data protection laws as conforming with this definition.

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[140] *Supra,* note 17.
[141] *Supra,* note 18.

2.2.1 THE SCOPE OF APPLICABILITY OF ART. 6(2) TO TERMS OF USE

The applicability of Rome I to Terms of Use, in a context of e-commerce rather than SNS activities, was discussed in a recent judgment of the CJEU, namely *VKI v. Amazon*.[142] The judgment was rendered in an action for injunctive relief brought by the Austrian Association for Consumer Information (*Verein fur Konsumenteninformation* – VKI) and held that Amazon's Terms of Use, particularly the provisions relating to the processing of customer personal data and those selecting the governing law as Luxembourg law[143], were not valid. The commercial court decided that the governing law provision was invalid, in reference to Art. 6(2) of Rome I and Art. 6(3) of Austrian Consumer Protection Law.[144] However, the Appellate Court of Vienna, argued that the validity of the governing law clause should be governed by the chosen Luxembourg law. During the appeal proceedings before Austrian Supreme Court, the court decided to refer the question to the CJEU, which gave way to the discussion of the applicability of Art. 6(2) of Rome I to Terms of Use. The CJEU ruled that Art. 6(2) was applicable to the dispute, hence upholding the protective connecting factor stated therein:

> "However, it should be stated that, where in an action for an injunction an assessment is being made of whether a particular contractual term is unfair, it follows from Article 6(2) of the Rome I Regulation that the choice of the applicable law is without prejudice to the application of the mandatory provisions laid down by the law of the country of residence of the consumers whose interests are being defended by means of that action. Those provisions may include the provisions transposing Directive 93/13, provided that they ensure a higher level of protection for the consumer, in accordance with Article 8 of that directive."[145]

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[142] *Verein für Konsumenteninformation v Amazon EU Sàrl*. (2016) Case C-191/15.
[143] For the current and amended version, please see note 21.
[144] Giesela Ruhl, "The Unfairness of Choice-of-Law Clauses, Or: The (Unclear) Relationship of Art. 6 Rome I Regulation and the Unfair Terms in Consumer Contracts Directive: VKI v. Amazon" (2018) 55:1 Common Mark Law Rev 201 at 202.
[145] *VKI v. Amazon*, para. 82.

Consequently, the CJEU ruled that the governing law clause is unfair insofar as it erroneously leads the consumer to the impression that only the law of that Member State applies to the Terms of Use, without informing him/her that under Article 6(2) of Rome I he/she also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term.[146] Amazon has then corrected its Terms of Use accordingly.[147] It should be borne in mind that, the dispute in *VKI v. Amazon* concerned Directive 95/46/EC and not the GDPR. Thus, the conflict of laws provision of the Directive 95/46/EC, Art. 4 was referred to in determination of the law applicable to the personal data processing activities of Amazon.[148] Nonetheless, the significance of *VKI v. Amazon* lies in the fact that it confirms the applicability of Art. 6(2) of Rome I in private enforcement claims brought against SNSs, to the extent that the governing law clauses of Terms of Use are at risk of being declared unfair, thus nullified, unless they make a reference to the protective connecting factor enshrined in Art. 6(2) of Rome I.

This being said, the ruling had been criticized on the grounds that, *inter alia*, (i) Art. 6(2) of Rome I should not apply to assess the existence and validity of governing law clauses because this provision only comes into play when there is a valid governing law clause; (ii) it does not conform to EU legislator's decision to allow choice of law clauses in consumer contracts; indeed, applying the protective connecting factor of Art. 6(2) of Rome I to governing law clauses may invalidate these clauses altogether.[149] Therefore, this criticism supports the position that the validity and existence of the governing law clause should be subject to the law chosen, therefore the mandatory provisions of the consumers habitual residence should not intervene by virtue of Art. 6(2) of Rome I in that assessment. However, this criticism is not persuasive. The effect of Art. 6(2) of Rome I should be extended to cover the existence and legality of governing law clauses in Terms of Use, as it is rightly adopted by the CJEU. Art. 6(2) of Rome I provides that the parties are allowed

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[146] *Ibid*.
[147] *Supra*, note 21.
[148] *VKI v. Amazon*, para. 82.
[149] Ruhl, *supra* note 144 at 210.

to choose an applicable law in a consumer contract, to the extent that it fulfills the requirements laid down in Art. 3 of Rome I. With regard to the existence and validity of the consent of the parties as to the choice of the applicable law, Art. 3(5) makes a reference to Art. 10, which regulates consent and material validity. In line with the doctrine of severability[150], Art. 10(1) of Rome I states that the existence and the validity of a contract shall be determined by the law which would govern the contract if the term was valid, while Art. 10(2) introduces an exception to this rule:

> "Art. 10 – 2. Nevertheless, a party, *in order to establish that he did not consent*, may rely upon the law of the country in which he has his habitual residence *if it appears from the circumstances* that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1." *(emphasis added)*

The prevailing opinion rightly suggests that, with regard to standard from contracts, such as Terms of Use[151], the circumstances allow Art. 10(2) to be used to void the choice so long as the law of the habitual residence of the invoking party allow for such result.[152] Following the line of reference in Rome I, in terms of standard form contracts concluded with consumers, it can be inferred that the requirement in Art. 6(2) which refers to an agreement between the parties made in conformity with Art. 3 is not fulfilled. In this case, the first criticism raised against *VKI v. Amazon* decision is seemingly correct, however in any case, although it requires circumstantial analysis, Art. 10(2) prevents the applicability

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[150] Adrian Briggs, "Agreements on Jurisdiction and Choice of Law (Oxford Private International Law Series)" (2008), para 2.32; Calliess, *supra* note 98 at 89.

[151] Terms of Use are either embedded into a link on the webpages or as a part of the contracting interface, which is referred to as "browse-wrap". Another method is when Terms of Use appear in a pop-up window, inviting the party to scroll through the terms, before having the party to click on a button or a check box which indicates that he/she agrees to Terms of Use, also known as "click-wrap". Either way, Terms of Use are not individually negotiated by the parties and they constitute standard form contracts, which mean that the non-SNS party of the Terms of Use do not have the bargaining power, thus hold the weaker position against SNSs, irrespective of the fact that they are consumers. Outside of the EU, the courts in US and Canada refer to the lack of bargaining power and strong public policy considerations to invalidate jurisdiction and governing law clauses. See; Julia Hornle, "Global social media vs local values: Private international law should protect local consumer rights by using the public policy exception?" (2017) Comput Law Secur Rev at 394.

[152] Calliess, *supra* note 98 at 93.

of the *lex electii* to the existence of consent. Further, Art. 10(2) does not have a function to protect the consumers[153], whereas Art. 6(2) is aimed at consumer protection. Consequently, as *lex specialis*, Art. 6(2) of Rome I is applicable to the existence of governing law clauses. Calliess supports Art. 6(2) being considered *lex specialis*:

> "For consumer law contracts the **special rules** set out in Article 6 will apply (…) In choice-of-law cases the provisions that cannot be derogated from by agreement by virtue of the law that, in absence of choice, would have been applicable (Article 6(2) section 2 and Article 8(1) section 2), *may also concern the existence and validity of a contract* and will take part of the putative applicable law under Article 10. A consumer will be protected against unclear choice-of-law clauses set out in standard terms by the law of his habitual residence."[154] *(emphasis added)*

It is important to note that Calliess refers to "*unclear*" governing law clauses in standard terms, as CJEU's jurisprudence in *VKI v. Amazon* indicates that those clauses which do not sufficiently inform the consumers of the protective connecting factor under Art. 6(2) carry the risk of being nullified by the mandatory provisions of the law of the habitual residence of the consumer. Indeed, contrary to what is suggested by those criticizing *VKI v. Amazon*, the CJEU did not reach a conclusion which would invalidate choice of law in Terms of Use altogether. On the contrary, the most prominent effect of *VKI v. Amazon* is that SNSs will need to include within a choice of law clause a reference to the application of mandatory provisions of the consumer's residence.[155] In this vein, it is reasonable to conclude that, the EU jurisprudence allows governing law clauses in Terms of Use so long as they inform the consumer of the protection afforded in Rome I.

Nonetheless, some suggest that choice of law should not be possible in disputes arising from infringements of data protection laws. These disputes would require an analysis of Art. 6(2) of Rome I, a provision which seemingly is favored by the CJEU in

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[153] *Ibid* at 268.
[154] *Ibid* at 269.
[155] Michael F Müller, "Amazon and Data Protection Law–The End of the Private/Public Divide in EU Conflict of Laws?" (2016) 5:5 J Eur Consum Mark Law 215 at 218.

determining of the law applicable to Terms of Use and Art. 9 of Rome I, regulating overriding mandatory provisions. The discussion is significant, since unlike Directive 95/46/EC, the GDPR does not address the conflict of laws issues between the Member States, as put forward under Chapter 1.

2.2.2 THE INTERPLAY BETWEEN ART. 6(2) AND ART. 9 OF ROME I

The conclusions reached above, in other words, (i) that there is still room for conflict of laws issues between Member States with regard to private privacy enforcement under the GDPR, (ii) that Terms of Use are considered consumer contracts, and (iii) that Art. 6(2) of Rome I is applicable to the determination of governing laws of Terms of Use, lead to another and more significant discussion. How do these conclusions affect the categorization of data protection laws under private international law as regards their mandatory nature? Can data protection laws be classified as overriding mandatory provisions under Art. 9 of Rome I while also being applicable to contractual disputes by virtue of Art. 6(2) of Rome I?

In this vein, Brkan correctly argues that where Member States' data protection laws diverge, Rome I will be the applicable EU legislation which will resolve the conflict of laws issues in contractual claims.[156] However, she further argues that choice of law should not be allowed in the field of data protection and data protection laws must be classified as overriding mandatory provisions within the meaning of Art. 9 of Rome I which defines them as rules "*regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract*".[157] In support of her argument, she asserts that (i) the CJEU's jurisprudence

[156] Brkan, *supra* note 100 at 337.
[157] Pursuant to Art. 9(2) of Rome I, overriding mandatory provisions of the forum apply without regard any choice of law or conflict of laws provision in Rome I. Art. 9(3) stipulate that effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as they the performance of the contract unlawful. In considering whether to give effect to those provisions, their nature and purpose and to the consequences of their application or non-application should be taken into consideration.

in *Ingmar*[158] indicates that provisions of EU law can be classified as overriding mandatory provisions as well as Member States' national laws[159]; (ii) data protection laws serve public interest in ensuring the free movement of personal data[160] and they relate to the protection of fundamental rights.[161] Kuipers agrees that the data protection laws can be characterized as overriding mandatory provisions because these provisions promote the smooth functioning of the internal market by striking a balance between the free circulation of personal data and the protection of the right to private life. He further notes that the field of data protection is the exception to fundamental rights playing a stronger role in relation to the public policy exception rather than the categorization of a rule as an overriding mandatory provision.[162] As the justification of his argument, he states that the higher protection afforded under the law of one jurisdiction is at risk of being nullified, unless the data protection laws are considered overriding mandatory provisions.[163] Therefore, Brkan

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[158] Ingmar GB Ltd v Eaton Leonard Technologies Inc (2000) Case C-381/98. In *Ingmar*, the CJEU ruled that some provisions of the Commercial Agents Directive which protect the agent after the termination of the agency agreement were an example of EU provisions which have an overriding character. The case concerned a company based in UK acting as an agent, and another company based in California, US acting as the principal. Although the parties agreed on Californian law, the agent claimed compensation after the termination under the laws of the UK which implement the Commercial Agents Directive. As a result of the preliminary ruling referred by the UK national court, the CJEU ruled that the Directive carried internationally mandatory character. *Ingmar* is noted as a milestone case where the CJEU paved the way for the norms protecting weaker parties to be deemed as internationally mandatory. See; Calliess, *supra* note 98 at 250.

[159] It must be noted that, with regard to this argument in particular, Brkan refers to Art. 4 of the Directive 95/46/EC, namely the conflict of laws provision, as being considered overriding. However, this does not conform to her overall argument putting forth data protection laws as overriding mandatory provisions.

[160] She further notes that it is not clear whether this argument alone suffices for data protection laws to be considered overriding mandatory provisions. See Brkan, *supra* note 100 at 334. Additionally, Oprea agrees that the free movement objectives of the EU law provisions do not necessarily render a particular norm, especially when it regulates relations between individuals, an overriding norm. See; Elena-Alina Oprea, *Droit de l'Union européenne et lois de police* (Éditions L'Harmattan, 2015), para 94.

[161] In support of the "fundamental rights" argument, she gives the example of Facebook v. Independent Data Protection Authority of Schleswig-Holstein where the German court refused the agreement on applicable law on the grounds of data protection laws being overriding mandatory provisions. Brkan, *supra* note 100 at 335. However, a very important distinction needs to be made that this case concerns a public enforcement of data protection laws, and not private. For further information on this case, see; Carlo Piltz, "Facebook Ireland Ltd./Facebook Inc. v Independent Data Protection Authority of Schleswig-Holstein, Germany—Facebook is not subject to German data protection law" (2013) 3:3 Int Data Priv Law 210.

[162] Jan-Jaap Kuipers, *EU law and private international law: the interrelationship in contractual obligations* (Leiden; Boston: Martinus Nijhoff Publishers, 2012) at 75.

[163] *Ibid*.

and Kuipers, to a large extent, agree in their justifications of classifying data protection laws as overriding mandatory provisions.

Unlike Brkan, Kuipers further adds that Art. 9 should play a residual role to Art. 6 of Rome I, in the matters regarding the protection of the weaker party.[164] However, he adds that Art. 9 should not have this residual function if the parties have agreed on an applicable law.[165] As the explanation of this, Kuipers claims that this "*residual role*" is necessary for those consumers who fall outside the scope of Art. 6, but does not exemplify how this can be the case. He adds that when Art. 6 is applicable, the role of Art. 9 is severely restricted.[166]

The -largely overlapping- positions of Brkan and Kuipers should not prevail for two reasons. First, the data protection laws of Member States do not meet the criteria for qualifying as overriding mandatory provisions,[167] even though they should be considered as domestic mandatory provisions.[168] The definition of overriding mandatory provisions, hence this argument, will be comparatively studied in Chapter 3, below.

Second, it is accepted that "*rules which cannot be derogated from by contract*" refer to domestic (ordinary) mandatory rules and not to overriding mandatory rules. [169]

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[164] *Ibid* at 108.

[165] *Ibid* at 106. In the same direction, see; Laura Maria van Bochove, "Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law" (2014) Erasmus Law Rev at 152.

166 Kuipers, *supra* note 162 at 108.

[167] Jürgen Basedow et al, *Encyclopedia of private international law* (2017) at 1335; Christopher Bisping, "Consumer protection and overriding mandatory rules in the new Rome I regulation" in James Devenney & Mel Kenny, eds, *Eur Consum Prot Theory Pract Eur* (Cambridge: Cambridge Univ. Pr., 2011) at 257.

[168] Calliess, *supra* note 98 at 251; H L E Verhagen, "The Tension between Party Autonomy and European Union Law: Some Observations on Ingmar GB Ltd v Eaton Leonard Technologies Inc" (2002) 51:1 Int Comp Law Q 135 at 144. Further, the mere fact that a norm relates to a fundamental right does not suffice for its classification as overriding, although it may provide a basis for the ordre public exception. This exception is regulated under Art. 21 of Rome I and provides that if a foreign rule can have no effect in the domestic legal system if they are deemed contrary to that system's public order. In applying this rule, the forum does not reject the content of the foreign law as such, however denies the consequences emanating from the application of that particular foreign law. See; Basedow et al, *supra* note 167 at 1453. One of the general indicators of incompatibility of the foreign rule with ordre public is the rule being in violation of a fundamental right. See; Wilderspin & Plender, *supra* note 104 at 12–072. For detailed discussion on this matter, see; Chapter 3.

[169] Calliess, *supra* note 98 at 156; Wilderspin & Plender, *supra* note 104, paras 9–057; McParland, *supra* note 112, para 12.185; Stone, *supra* note 99 at 348; Basedow et al, *supra* note 167 at 1331; Christopher Bisping, "Consumer protection and overriding mandatory rules in the new Rome I regulation" (2011) at 243; Michael Hellner, "Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?" (2015) 5:3 J Priv Int Law J Priv Int Law 447 at 455; Kuipers, *supra* note 162 at 64.

Moreover, although the issue is disputed, Art. 6(2) should be considered *lex specialis* to Art. 9 of Rome I, which regulates overriding mandatory provisions; thus where Art. 6(2) is applicable, recourse to Art. 9 should not be possible.[170] In other words, the CJEU's jurisprudence indirectly classifies data protection laws enacted by Member States as domestic mandatory provisions, by treating them under Art. 6(2) of Rome I.

Also referred to as "*non-derogable rules*", domestic mandatory rules must be differentiated from overriding mandatory provisions.[171] In principle, the governing law of Terms of Use also determine the *lex causea* of the contractual claims arising out of data protection laws violations, to the extent permitted by law.[172] Art. 6(2) does not make it mandatory for these rules to be specifically identified as consumer protection rules.[173] Calliess further explains that the *ratio* of norm shall be the decisive element, by stating:

> "[…] it is not necessary that these rules are explicitly concerned with consumer protection. Protection is afforded to a consumer by any mandatory norm of the law of the consumer-country which is applicable in the individual case, *irrespective of question if such norm is limited in scope to consumers or if it would apply as well in a general context*. Sometimes the legislator explicitly rules that a norm shall have this effect, but frequently this is not the case and the question has to be decided with regard to the *ratio* of the norm."[174] *(emphasis added)*

Thus, when the status of consumer and data subject overlap, the data protection laws, including the national laws of Member States enacted in compliance with the GDPR and other national laws which relate to the contractual claims brought on the basis of Art. 81 of the GDPR, to the extent that they qualify as domestic mandatory rules, should protect the consumer/data subject by virtue of Art. 6(2) of Rome I. This position is in conformity

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[170] Stone, *supra* note 99 at 349; Bisping, *supra* note 167 at 255.
[171] Jonathan Harris, "Mandatory rules and public policy under the Rome I Regulation" (2009) Rome Regul Law Appl Contract Oblig Eur 269 at 293.
[172] Maja Brkan, "Data protection and conflict-of-laws: a challenging relationship" (2016) 2:3 Eur Data Prot Law Rev 324 at 337.
[173] McParland, *supra* note 112, para 12.185.
[174] Calliess, *supra* note 98 at 189.

with the CJEU's ruling in *VKI v. Amazon* allowing governing law clauses in Terms of Use, while providing sufficient protection to consumers/data subjects.

Further, classifying data protection laws enacted by Member States as domestic mandatory provisions, is also compatible with the reference to "*the result of depriving the consumer of the protection afforded to him by the rules which cannot be derogated from by contract"* and the CJEU's jurisprudence in *Schrems II*. Accordingly, the CJEU's position in *Schrems II* interprets data protection laws as including rights that the consumers enjoy, by explicitly stating:

> "Indeed, an interpretation of the notion of 'consumer' which excluded such activities would have the effect of *preventing an effective defence of the rights that consumers enjoy* in relation to their contractual partners who are traders or professionals, *including those rights which relate to the protection of their personal data*. Such an interpretation would disregard the objective set out in Article 169(1) TFEU of promoting the right of consumers to organise themselves in order to safeguard their interests."[175] (emphasis added)

This point is important to note, because the proposal of Rome I initially suggested a prohibition on choice of law in consumer contracts, which was met with fierce criticism.[176] Accordingly, a prohibition on choice of law would create too much of a burden on companies and would undermine party autonomy, which would do more harm than good.[177] In conformity with this view, Art. 6(2) of Rome I was designed not to invalidate choice of law, but to moderate its consequences.[178] The protective connecting factor therefore finds a balance between party autonomy and protection of the weaker party.[179]

Although *Schrems II* related to the determination of jurisdiction, and not the applicable law, it is significant that the CJEU classifies data protection laws as "*rights that consumers enjoy*" which resembles the wording in Art. 6(2) of Rome I. In consequence,

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[175] *Schrems II*, para 40.
[176] Jan-Jaap Kuipers, "Bridging the Gap: The Impact of the EU on the Law Applicable to Contractual Obligations" (2012) H. 3 Rabels Z Für Ausländisches Int Priv Rabel J Comp Int Priv Law 562 at 567.
[177] *Ibid* at 568.
[178] *Ibid* at 567.
[179] van Bochove, *supra* note 165 at 152.

data protection laws enacted by the Member State of the consumer/data subject's habitual residence, insofar as they constitute domestic mandatory provisions, should be applicable to private privacy enforcement claims raised against SNSs.

This result is desirable for both the consumers and SNSs. From the viewpoint of the consumer/data subject, this means that the applicable law clauses in the Terms of Use remain applicable -to the extent that they follow the criteria set forth in *VKI v. Amazon*, as it is generally the case with consumer contracts.[180] Nonetheless, the consumer/data subject can still enjoy the higher protection afforded by the law of his/her residence, by virtue of Art. 6(2) of Rome I. For SNSs, this consequence is more beneficial for legal certainty. For instance, with regard to a user residing in Spain, Youtube, which has Irish law chosen in its Terms of Use, will be under the obligation to solely comply with the Spanish data protection laws to the extent that they provide a higher protection than Irish data protection laws, which is the chosen law. Provided that Irish data protection laws confer the highest level of protection to data subjects among other Member States, it will be sufficient for Youtube to conform to those. If data protection laws are also considered overriding mandatory provisions, the forum will be deemed to have an interest n having its data protection laws enforced.[181] Therefore the law which Youtube is expected to abide by will differ depending on where the private enforcement action has been brought.

While this argument fulfills a positive criterion, classifying data protection laws enacted by Member States as domestic mandatory provisions, there is also a negative one, which will be discussed in Chapter 3,according to which data protection laws enacted by Member States do not qualify as overriding mandatory provisions. However, as the scope of the definition of overriding mandatory provisions is contentious between the French and German approaches, a comparative analysis is needed before reaching a definitive conclusion.

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[180] Bisping, *supra* note 167 at 242.
[181] Wilderspin & Plender, *supra* note 104 at 12–003.

2.3 INTERIM CONCLUSION

In conclusion, the Terms of Use qualify as consumer contracts, hence, the protective connecting factor Art. 6(2) of Rome I applies to Terms of Use and in particular, to governing law clauses. Accordingly, the law of the habitual residence of the consumer provides the minimum protection to the consumer, and this protection cannot be contracted out by the governing law clauses of the Terms of Use. Moreover, the CJEU ruled in *VKI v. Amazon* that the validity of these governing clauses depends on these clauses informing the consumer of this protective connecting factor under Art. 6(2) of Rome I. In other words, the CJEU ruled that the governing law clause is unfair insofar as it erroneously leads the consumer to the impression that only the law of that Member State applies to the Terms of Use, without informing him/her that under Article 6(2) of Rome I he/she also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term. This being said, some scholars claim that data protection laws should qualify as overriding mandatory provisions within the meaning of Art. 9 of Rome I. However, it is submitted that Art. 6(2) of Rome I acts as *lex specialis* to Art. 9 of Rome I. Therefore when Art. 6(2) is applicable, Art. 9 is not. Additionally, this Thesis argues that the definition of overriding mandatory provisions should not be broadly interpreted to include the provisions which protect weaker parties, such as data protection laws. This argument will be comparatively studied under Chapter 3.

3 OVERRIDING MANDATORY PROVISIONS IN THE CONTEXT OF TERMS OF USE

Overriding mandatory provisions (*internationally mandatory norms*, *lois de police, règles d'application immédiate, Eingriff snormen, voorrangsregels*) are strictly positive and imperative rules in private international law which relate to the essential policies of the state and therefore cannot be displaced by any foreign law.[182] The concept can be traced back to von Savigny who put forth a system of private international law in which there are inevitable spheres of exceptions, one of which being "*laws of strictly positive, imperative nature, which are consequently inconsistent with that freedom of application which pays no regard to the limits of particular states*".[183] While designing a conflict of laws system where legal relationships may be allocated to a legal system of a foreign state, Savigny determined a limited exception for unilateralism under which the application of overriding mandatory norms of *lex fori* is allowed.[184] Although he argued that this exception would eventually disappear[185], it certainly has not, as evident in Art. 9 of Rome I which reads:

> "Art. 9 - 1. Overriding mandatory provisions are *provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization*, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
> 2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

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[182] Michael Martinek, "The Seven Pillars of Wisdom in Private International Law——the German and the Swiss Experience with the Codification of Conflicts of Law Rules" (2001) 4 Chin Yearb Priv Int Law Comp Law, s 7.

[183] Friedrich Karl von Savigny, *Private international law. A treatise on the conflict of laws: and the limits of their operation in respect of place and time*, translated by William Guthrie (Edinburgh: T. & T. Clark, 1869) at 34. For deliberations, see Oprea, *supra* note 160 at 21; J-J Kuipers & S Migliorini, "Qu'est-ce que sont les `lois de police'? - Une querelle franco-allemande apres la communautarisation de la Convention de Rome" (2011) 19:2 Eur Rev Priv Law 187 at 187; Michal Wojewoda, "Mandatory Rules in Private International Law: With Special Reference to the Mandatory System under the Rome Convention on the Law Applicable to Contractual Obligations" (2000) 7:2 Maastricht J Eur Comp Law 183 at 185.

[184] van Bochove, *supra* note 165 at 148.

[185] Savigny & Guthrie, *supra* note 187. On the contrary, as the legal relations between private individuals gradually ceased to solely concern private matters, the concept of overriding mandatory provisions increasingly became of interest to legal scholars, see; Hans Jurgen Sonnenberger, "Overriding Mandatory Provisions" in Stefan Leible, ed, *Gen Princ Eur Priv Int Law*, European Monograph Series 95 (Netherlands: Wolters Kluwer, 2016) at 118.

> 3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.[186]" *(emphasis added)*

This definition is loosely inspired by the CJEU's judgment in *Arblade*[187] and more closely resembles the definition introduced by Francescakis.[188] Although the definition provided under Rome I stresses those rules which are "*regarded as crucial by a country for safeguarding its public interest*", further historical and comparative analysis is needed in order to correctly identify which rules fall under this somewhat ambiguous categorization. The challenge in such identification lies in the fact that these norms do not usually set out the express intention of the lawmaker as to their overriding status. Thus, the identification depends on the interpretation of courts.[189]

Overriding mandatory norms "*allow no opt out*" and "*ought to be applied whatever the governing law is*". However their effect does not yield further insight as to the

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[186] It has to be clarified that Art. 9(3) merely gives a discretion and does not impose an obligation to the forum to give effect to the overriding mandatory norms of foreign states. As a result, it creates an ambiguity as to when it will be applied. Although it provides the discretion, the criteria for this discretion to be in question is quite strict. Foremost, the rules of the country of performance must make the performance unlawful, the fact that the rules are merely overriding does not suffice to render Art. 9(3) applicable. Further, Art. 9(3) solely applies if the obligations make the contract unlawful are to be or have been performed in the country whose legislation is sought to be given effect. It does not apply if the obligation can be performed in another country. See; Basedow et al, *supra* note 167 at 1332.

[187] Jean-Claude Arblade and Arblade & Fils SARL (1999) Case C-369/96 and Bernard Leloup, Serge Leloup and Sofrage SARL (1999) Case C-376/96. In these joined cases, the CJEU was referred the question of whether the EC Treaty could render inoperative the first paragraph of Article 3 of the Civil Code relating to Belgian public-order legislation. Hence, the CJEU first needed to clarify what is understood by Belgian public-order legislation. In doing so, the CJEU clarified that the overriding reasons included those which carry "*public interest*" however did not provide a full definition of overriding mandatory provisions, see; Arblade, para. 39.

[188] His definition reads: "Quelles sont ces lois? Ce sont les lois de « police » au sens originaire du terme, c'est-à-dire en dernière analyse les lois dont l'observation est nécessaire pour la sauvegarde de l'organisation politique, sociale et économique du pays." See; Phocion Francescakis, "Y a-t-il du nouveau en matière d'ordre public ?" (1970) 27:1966 Trav Com Fr Droit Int Privé 149 at 165.

[189] Ines Medic, *Lex Contractus and Overriding Mandatory Rules. What can we learn from the CJEU case law?* (Split, 2016) at 44.

conditions they have to meet to be classified as such.[190] Initially, these strictly positive norms emerged in relation to rules governing foreign currencies restrictions, and later evolved to include the law of cartels and restrictive trade practices.[191] Some suggest that what distinguishes the "*negative*" ordre public under Art. 21 of Rome I, which grants the courts the option to refuse the application of a specific provision of the law of a country which is manifestly incompatible with the ordre public of the forum, from the "*positive*" application of ordre public under Art. 9 of Rome I is that the latter relates more to economic matters which are regulated by the state.[192] This being said, the significant distinction between two concepts is explained more commonly as follows[193]: when overriding mandatory norms are at stake, the application of the foreign law is not as relevant, the decisive element is the state's interest in ensuring that its own law is applied. Hence, while the negative effect of ordre public protects the public interests of the forum, overriding mandatory provisions protect the policies of the *state*.[194]

Therefore, the common interpretation of overriding mandatory provisions suggest that these norms require unilateral application due to the state's interest therein. This criterion is essential in identifying which types of regulations merit the elevated level of guaranteed application under Art. 9 of Rome I. In consequence, the norms which fall under this category need to be identified with due care and consideration of how much they relate to ensuring state interests. Recital 37 of Rome I sheds some light on their exceptional nature:

> "Considerations 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. The concept of

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[190] Wojewoda, *supra* note 187 at 188.
[191] Martinek, *supra* note 186, s 7.1.
[192] Jean-Baptiste Racine, "Droit économique et lois de police" (2010) 1:1 Rev Int Droit Économique 61 at 63.
[193] Consequently, during the course of the case, the overriding mandatory provisions are considered prior to ordre public exception, because they need to be established in order to determine the applicable law. See; Kuipers, *supra* note 162 at 66; Paul Torremans, "Exclusion of Foreign Law" in Paul Torremans & J J Fawcett, eds, *Ches North Fawcett Priv Int Law* (2017) at 143.
[194] Kuipers, *supra* note 162 at 65.

> 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and *should be construed more restrictively*." *(emphasis added)*

In addition, the involvement of state interest in identifying overriding mandatory norms is stressed by many scholars:

> "The gist of the matter lies in the statement that the control over particular spheres of relations can be *so crucial for the State* that it will insist on applying some of its mandatory regulations even if accepting in principle that a different law is to govern the situation."[195] *(emphasis added)*

> "A prerequisite of the "immediate application" is, of course, that the norm itself demands for an application independently from the applicable substantive law and that *the intervening state has a respectable interest* in the application."[196] *(emphasis added)*

> "Telle est l'offensive que j'appelais — encore une fois en donnant à ce terme un sens exclusivement descriptif — nationaliste, ou si l'on veut, « *étatiste* »."[197] *(emphasis added)*

> *"*The involvement of *state interests* justifies the priority that is attached to the rules protecting such interests, provided that there is a strong connection with the state which has enacted these rules."[198] *(emphasis added)*

In light of the above, some classical examples of fields whose regulations are more likely to be classified as overriding are as follows: anti-trust and competition law, price control regulations, currency control and trade restriction, restrictions on interest taking, criminal law, financial market legislation, investor-protective provisions, insurance law, licensing law, real estate law, etc.[199] This being said, these examples all reflect a particular interpretation of overriding mandatory provisions which is mostly supported by the

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[195] Wojewoda, *supra* note 187 at 190.
[196] Martinek, *supra* note 186, s 7.1.
[197] Berthold Goldman, "Règles de conflit, règles d'application immédiate et règles matérielles dans l'arbitrage commercial international" (1970) 27:1966 Trav Com Francais Droit Int Prive 119 at 121.
[198] Verhagen, *supra* note 168 at 144.
[199] Calliess, *supra* note 98 at 253.

German doctrine and jurisprudence.[200] Accordingly, the strict definition of overriding mandatory provisions requires that the rule in question must *primarily* be for the protection of a state's interest.

Following this approach, German courts have traditionally observed the rules protecting the economic interests of the state, such as import and export regulations, as primary examples of overriding mandatory provisions.[201] However, the onset of the welfare state and the emergence of the EU internal market, has led to an understanding, predominantly in France, that the criteria for overriding mandatory provisions are modified to non-cumulatively include the protection of weaker parties.[202] The proponents of this approach argue that the rules concerning social policies, such as protection of workers or consumer, should be regarded as overriding, since the contrary would threaten society as a whole.[203] Accordingly, in addition to the above examples, the provisions ensuring the protection of consumers, employees or insurance policy holders, were classified as overriding.[204]

In this vein, the argument that data protection laws protect data subjects referred to under Section 2.2.2, and therefore should be classified as overriding mandatory provisions, draws inspiration from the approach dominant in France, particularly because the argument is supported by the CJEU's judgement in *Ingmar*.[205] Nevertheless, some scholarship rightly refrains from such a blanket classification:

> "Data protection legislation will typically contain provisions of a public law nature, relating to an authority and its duties and decisions. *But the law will also often include civil law provisions, typically on liability for data protection violations. The provisions of data protection legislation may therefore have to*

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[200] Wilderspin & Plender, *supra* note 104, paras 12–025.
[201] *Ibid*.
[202] McParland, *supra* note 112, para 15.05; Calliess, *supra* note 98 at 252.
[203] Fausto Pocar, *La protection de la partie faible en droit international privé* (Martinus Nijhoff, 1984) at 392.
[204] Wilderspin & Plender, *supra* note 104, paras 12–026.
[205] *Ingmar* is noted as a paradigm case where the provisions of Commercial Agents Directive, which is a private law regulation protecting specific individual interests of agents as weaker parties, are deemed as overriding by the CJEU. See; fn. 158 and Section 3.3.

> *be qualified as belonging to different areas of law, to which different relevant connection criteria are assigned*."[206]

This Thesis argues that the protection of the weaker party, as aimed at by Art. 6(2) of Rome I, should not be a concern for Art. 9, where the aim is to protect the interests of the state. Therefore, the threshold for which a rule is classified as an overriding mandatory provision is a high one. This is consistent when considered with the protective connecting factor of Art. 6(2) being *lex specialis*[207]; as an opposite solution would lead to a situation under which the aim is to provide unbalanced leverage to the consumer/data subject.[208] Some commentators argue in the same direction about the special protection afforded to weaker parties:

> "In Articles 5 and 6 of the Rome Convention[209], however, special 'protective' conflict rules have been formulated for these categories of market participants, *making [overriding mandatory rules][210] (largely) obsolete* for the protection of structurally weaker parties."[211] *(emphasis added)*

> "Now that the Rome Regulation has entered into force, *these disputes have lost much of their relevance*, as most consumer-protective provisions will either fall under Art. 6 as *lex specialis* or will be covered by specific conflicts rules of secondary EU law."[212] *(emphasis added)*

As explained above in Section 2.2.2, the disproportional application of the concept of overriding mandatory rules does not necessarily lead to the utmost protection of the consumer, either; whereas when a narrow scope of overriding mandatory provisions is adopted, the rights of the consumer/data subject are effectively protected by the application

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[206] Jon Bing, *Data protection, jurisdiction and the choice of law* (Hong Kong: Privacy Law & Policy Reporter, 1999).
[207] Calliess, *supra* note 98 at 253.
[208] Calliess, *supra* note 49 at 190.
[209] These provisions correspond, respectively, to Art. 6 (Consumer Contracts) and Art. 8 (Individual Employment Contracts) of Rome I.
[210] This provision corresponding to Art. 9 of Rome I in the Rome Convention was Art. 7.
[211] Verhagen, *supra* note 168 at 145.
[212] Calliess, *supra* note 98 at 253.

of Art. 6(2) of Rome I. Overriding mandatory provisions and the differing approaches for their definition under German and French law will be further explained in the next two sections.

3.1 GERMANY – PROTECTING THE STATE INTEREST

While the modern private international law in Germany still takes inspiration from the works of Savigny[213], the first comprehensive analysis conducted by German academics on the mandatory provisions relates to a practical issue. Because of the strict exchange control regulations enforced in 1931 in Germany, German borrowers were unable to service bonds issued in the US. Consequently, appearing before US domestic courts, the German issuers argued that these exchange control regulations of German law should be considered, even though German law was not applicable to the dispute. However, the US courts did not uphold this defence and ruled against German issuers through application of the *lex fori*. Nonetheless, the efforts of these German issuers led to the introduction of the special laws theory[214] (*Sonderstatut*) in 1940s by Wengler and Zweigert, which then influenced other European scholars such as Francescakis in France and de Winter and Deleen in the Netherlands.[215]

Following the spirit of the works of Savigny, the conflict of laws system in Germany is still based on a rigid divide between public and private law.[216] Additionally, recognition

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[213] Kuipers, *supra* note 162 at 136.

[214] Wilderspin & Plender, *supra* note 104 at 12–030. Although Art. 9(3) of Rome I still allows for the effect to be given to the overriding mandatory norms of foreign states, it has to be noted that this was allowed more broadly under the predecessor of this provision, Art. 7(1) of Rome Convention, which had its origins in the special laws theory. For further information of this theory, see; F A Mann, "Contracts: Effect of Mandatory Rules" (1978) W K Lipstein Red Harmon Priv Int Law EEC Londyn Inst Adv Leg Stud Univ Lond at 32.

[215] Wojewoda, *supra* note 187 at 186.

[216] Nevertheless, this rigidity of this divide has been softened as the private international law was modernized by Kegel, who saw the quest for justice as the end goal for private international law. Although his division did not find much support, Kegel had introduced a categorization of interests underlying private international law which does not primarily concern that of the state. Accordingly, there are three types of norms: *Parteiinteressen*, *Verkehrsinteressen* and *Ordnungsinteressen*. *Parteiinteressen* refers to the interests of the individuals who prefer that a law to which they are familiar to be applicable. *Verkehrsinteressen* refers to the interests of the market players in achieving a simple private international law system, and lastly, *Ordnungsinteressen* are the societal interests in having coherent laws. Kegel found that state interests (*Staatinteressen*) can solely be relevant in exceptional cases where the negative effect of ordre public or

of the freedom to choose the applicable law between private parties in Germany predates the implementation of the Rome Convention in the German Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*, "EGBGB") in 1986. Indeed, German courts only referred to the connecting factors under EGBGB if the agreement between the parties did not include an explicit or implicit determination of a governing law, that is, when the *Parteiwille*, the will of the parties, could not be established.[217]

The result of this public-private divide and the liberal choice of law approach was the bilateral private international law system, which often refused application of semi-public laws of foreign states on grounds of the ordre public exception. However, in 1970s, academics realized that the bilateral choice of law rules were inadequate in explaining the increasing state intervention in private international law.[218] The conceptualization that the parties can freely determine the applicable law with regard to the whole of private law was questioned in the face of the increased interplay between the state and private parties. The theory which responded to this shift, namely the special connection theory[219] (*Sonderanknüpfung*), was predominantly aimed at explaining the impact of state interests that tried to pursue their own socio-economic goals.[220] This being said, although the reference to the socio-economic state interests resemble the wording of Art. 9 of Rome I or even the definition given by Francescakis[221], the special connection theory did not solely relate to overriding mandatory provisions, but as Kuipers argues, also to the protective connecting factors such as Art. 6(2) of Rome I.[222]

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overriding mandatory provisions are in question. However, this interest-based division introduced by Kegel was not accepted universally by the scholarship. For further information, see; Kuipers, *supra* note 162 at 137.

[217] Nils Jansen & Ralf Michaels, "Private Law and the State - Comparative Perceptions and Historical Observations" (2007) 71:2 Rabels Z Für Ausländisches Int Priv 345 at 345. As an additional note, after the implementation of Rome Convention until the entry into force of Rome I, Art. 27(1) of the EGBGB provided for a choice of law when the agreement had a connecting with a foreign state, in other words, a foreign element. See; Kuipers, *supra* note 162 at 138.

[218] *Ibid* at 139.

[219] Kuipers & Migliorini, *supra* note 187 at 190.

[220] Kuipers, *supra* note 162 at 139.

[221] Francescakis, *supra* note 192 at 165.

[222] Kuipers, *supra* note 162 at 139. Although he correctly explains that the common element of these provisions is their ability to override the parties' will, the distinction between these provisions is the fact that

In the midst of this theoretical development, prior to the entry into force of Rome I, Art. 34 EGBGB was the German implementation of Art. 7 of Rome Convention, which read:

> "Nothing in this subsection shall restrict the application of those provisions of German law, which govern the subject matter irrespective of the law otherwise applicable to the contract."

The provision therefore set forth the defining result of an overriding norm, but without providing without a definition. Hence the novelty of Art. 9(1) of Rome I. In spite of this lack of definition, the jurisprudence tried to offer certain criteria to shed light on this ambiguity. In the same direction, the German Federal Court of Justice, (Bundesgerichtshof, "BGH") held that the rules concerning consumer credit law were not of overriding character.223 The facts of the case concerned a German consumer who took a loan of 100.000 Swiss Francs from a bank based in Switzerland; in order to acquire a house. The repayment was due in ten years, but the contract, which included a provision designating Swiss law as the governing law, could be extended for another five years. Additionally, the contract stated that the bank had the right to alter the terms of the contract after the expiry of the initial ten years. After the expiry of this period, the bank proposed renewal of contract, but with a higher interest rate. The consumer challenged the raise of the interest rate. Thereafter, the bank claimed repayment. During the subsequent proceedings, the German consumer invoked certain provisions of German consumer credit law, arguing that the obligation of repayment was null due to the overriding character of these provisions. The response of the BGH to this argument is noteworthy:

> "The provisions of the Consumer Credit Law are however not mandatory within the meaning of art. 34 *[EGBGB]*, because they *primarily protect the individual interests* of the consumer, while the protection of public interests on the international plane step into the background." *(emphasis added)*

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the overriding mandatory provisions protect the state interest while protective connecting factors aim to level the playing field between stronger and weaker parties of a contract.

[223] BGH XI ZR (2005) Case 82/05.

Although Art. 9 of Rome I does provide more insight as to the definition of overriding mandatory provisions in comparison to Art. 34 of EGBGB, Rome I still leaves the discretion to classify a certain provision as overriding to the Member States.[224] Hence, German courts need to decide what is crucial for the functioning of the German state. To this end, they can require a certain provision to be primarily directed at protecting state interests rather than that of individuals. In this vein, the German courts have ruled that the rules concerning the protection of consumers or the protection of employees[225], such as reduction of working hours for temporary employees[226], a law on the employee rights in the event of a business transfer[227], and a law on unfair dismissal entitlements[228] do not constitute overriding mandatory provisions.[229]

A consequence of the German approach which differentiates between the state interests and individual interests in identifying overriding mandatory provisions, resulted in an opinion that went beyond the mere definition of these norms, but also determined how they interacted with conflict of laws rules. Accordingly, Germany did not allow the rules protecting weaker parties, such as Art. 6(2) of Rome I, to be categorized under Art. 34 EGBGB, implementing Art. 7 of Rome Convention (Art. 9 of Rome I). Particularly supported by Bar and Mankowski[230], as well as Kropholler[231], this view argues that the relationship between the protective connecting factors and overriding mandatory provisions are mutually exclusive; a provision either primarily protects the state interests, or an individual interest of the weaker party, but not both at the same time.[232] This view also received the explicit support of BGH. In *Gran Canaria*[233], the German court considered whether the provisions of German law which allow a consumer to withdraw

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[224] Kuipers, *supra* note 162 at 145.
[225] Bundesarbeitsgericht ("BAG") 9 AZR (2007) Case 135/07.
[226] BAG 9 AZR (2007) Case 135/07.
[227] BAG 2 AZR (1992) Case 267/92.
[228] BAG 2 AZR (1989) Case 3/89.
[229] Wilderspin & Plender, *supra* note 104, paras 12–025.
[230] Christian von Bar & Peter Mankowski, "Internationales Privatrecht Band I" 2 Allg Lehren at 269.
[231] Jan Kropholler, "Internationales Privatrecht–einschlie\s slich der Grundbegriffe des Internationalen Zivilverfahrensrechts. 6" (2006) Aufl Mohr Siebeck Tüb at 493.
[232] Kuipers, *supra* note 162 at 143.
[233] BGH VIII ZR (1997) Case 316/96.

from a contract, applied to a contract governed by the laws of the Isle of Man, on the basis that they constituted overriding mandatory rules of the forum. The contract was not concluded in the circumstances required by Art. 5 of Rome Convention (Art. 6 of Rome I), since it was not concluded in the seller's country and consumers were not previously targeted. BGH ruled that, since Art. 5 of Rome Convention, as *lex specialis*, ousted the application of Art. 7(2) of Rome Convention (Art. 9(2) of Rome I), if the circumstances of the consumer contract did not allow Art. 5 of Rome Convention to apply, it was not possible for the forum to apply the same mandatory rule disguised as an overriding mandatory rule of the forum.[234]

How might this analysis apply to the categorization of data protection laws under private international law? Although data protection laws cannot be classified as wholly belonging to either the private or public sphere, data protection laws in the EU have their roots in a variety of legal fields, but most prominently in internal market law[235], human rights law[236] and consumer protection law.[237] Among all of these fields, the German approach described above provides the clearest examples of rules protecting consumers,

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[234] Wilderspin & Plender, *supra* note 104 at 12–050.

[235] Internal market law connects to the arguments of those offering to classify data protection laws as overriding mandatory provisions. According to this argument (See fn. 160), the fact that the data protection laws ensure the free movement of personal data qualify them as fulfilling the "*public interest*" criterion under Art. 9(1) of Rome I. Without regard to the comparative nature of this Section, it should be mentioned that the fact that a norm relates to free movement rights should not suffice for its classification as overriding. In the same direction, Oprea states: "Vu les distinctions établies par la Cour de justice dans sa jurisprudence à propos de l'effet direct horizontal des dispositions du Traité instituant les libertés de circulation, il est un peu rapide d'affirmer que les libertés de circulation interviendraient toutes comme des lois de police. Dans la plupart de cas, lorsqu'elles sont invoquées par des particuliers, ces libertés agissent contre les lois restrictives des États membres ou d'autres collectivités ayant un pouvoir normatif ; mais en ces situations, le fondement de leur application réside dans les principes de la hiérarchie des normes, de la primauté du droit de l'Union sur le droit national et ce n'est pas un mécanisme de droit international privé qui est mis en œuvre." See; Oprea, *supra* note 160, para 94.

[236] In addition to internal market law, scholars who classify data protection laws as overriding norms also refer to data protection laws constituting fundamental rights as one of the grounds for their classification (See; fn. 161, fn. 162). Independently from the discussions of this Section regarding German law, it needs to be submitted that incompatibility with fundamental rights typically result in ordre public exception and does not necessarily render the norm overriding. See; Wilderspin & Plender, *supra* note 104 at 12–076. Reaffirming this point, Bing and Kuner both argue that the close proximity of data protection laws to consumer laws and human rights laws may trigger ordre public exception to be applicable, if necessitated by the circumstances of the case. See; Bing, *supra* note 210; Kuner, *supra* note 68 at 182.

[237] Kuner, *supra* note 68 at 182.

mostly through the jurisprudence of BGH. The above deliberations on the nature of Terms of Use as consumer contracts reveal that the private enforcement of data protection laws indeed give way to the application of Art. 6(2) of Rome I, as exemplified in *Schrems II* and *VKI v. Amazon*. Following the views prevalent in Germany, the rules protecting weaker parties, whether consumers or data subjects, need to be applied as part of the protective connecting factor and not as overriding mandatory provisions. The application of protective connecting factors in civil claims arising out of infringements of data protection laws, reveals that these data protection laws are deemed to be *primarily* related to individual interests. Further explained below, the prevailing opinion in France sits at the opposite corner, attributing an overriding status to norms protecting weaker parties.

3.2 FRANCE – LOIS DE POLICE IN WEAKER PARTY PROTECTION

In France, the concept of overriding mandatory provisions is closely associated with the works of Francescakis. Influenced by von Savigny's determination of rules of exceptional nature which apply regardless of the conflict rules, Francescakis undertook an analysis of the French courts' decisions.[238] Thereafter, he modeled a special application of French private international law which he initially called "*lois d'application immédiate*", subsequently switching to using "*lois de police*" which he defined as "*laws, the application of which is necessary to safeguard the political, social and economic organization of the country*".[239]

The term *loi de police* is used in the Civil Code (*Code Civil,* "CC") and Civil Procedural Code (*Code de Procedure Civil,* "CPC") in France, which were the main sources of French private international law in primary legislation as the private international law in France has never been comprehensively codified.[240] The prominent driving force behind the development of French private international law was the jurisprudence of the Court of

[238] McParland, *supra* note 112, para 15.04.
[239] Phocion Francescakis, *La théorie du renvoi et les conflits de systèmes en droit international privé: publié avec le concours du CNRS* (Sirey, 1958).
[240] Kuipers, *supra* note 162 at 126.

Cassation (*Cour de Cassation*), which interpreted this provision of Code Civil regarding overriding mandatory norms:

> "Art. 3(1) - Les lois de police et de sûreté obligent tous ceux qui habitent le territoire."

Some of the numerous interpretations made by the Court of Cassation were based on the works of Batiffol.[241] Accordingly, essential elements of determining in establishing the governing law may be divided into several categories: whether the case at hand concerns the status of a person, the property subject to dispute, or the source of the juridical rights. The latter, a legal situation relating to the source of juridical rights, can be further divided into: (i) juridical facts where *lex loci delicti* is generally applied, the juridical acts are governed by *lex locus regit actum*, in other words when the place governs the act; (ii) when the content of juridical acts that are governed by the law determined by the will of the parties, *loi d'autonomie,* either explicitly or implicitly.[242] This being said, prior to the entry into force of the Rome Convention, the French Court of Cassation upheld the determination of governing law by the parties not on the grounds of loi d'autonomie, but on the basis of the binding force of contracts laid down under Art. 1134 CC.[243]

Developed by the works of Batiffol, the concept of loi d'autonomie did not carry the traditional characteristics of a choice of law by the parties. Such a choice of law was merely one of the elements to be taken into account by the court in determining the applicable law to a dispute. The forum judge, in theory, was able to decide to apply a different law, given that certain objective criteria needed to be respected. This method of determination of applicable law, in other words, the combined assessment of an existing choice of law with

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[241] Henri Batiffol, *Traité élémentaire de droit international privé* (Librairie générale de droit et de jurisprudence, 1959) at 287; Marie-Ange Moreau-Bourlès, *Structure du rattachement et conflits de lois en matière de responsabilité civile délictuelle* (Atelier national de reproduction des thèses de l'Université de Lille III, 1985).

[242] Henri Batiffol, *Les conflits de lois en matière de contrats. Étude de droit international privé comparé.* (Paris: Recueil Sirey, 1938) at 8.

[243] B Ancel, "Destinées de l'article 3 du Code civil" (2005) Droit Int Privé Esprit Méthodes Mélanges En L'honneur Paul Lagarde 1 at 18.

the objective criteria is referred to as monism.[244] The entry into force of the Rome Convention put an end to this monistic method, as it was not compatible with the freedom of choice of law, one of the principles under that Convention, which does not require any objective connections. Pursuant to this principle, the forum only refers to the objective criteria if the parties did not duly agree on a governing law. This system is also referred to as dualism, and is currently prevalent in French private international law.[245]

It is important to contrast the liberal approach in EGBGB which favored the *Parteiwille* in the private law sphere with the monistic system that prevailed in France prior to the entry into force of the Rome Convention. Although the conflict of laws provisions for contractual claims of both jurisdictions are currently harmonized by Rome I, the effects of this divergence can still be observed in the fact that the concept of overriding mandatory provisions is restrictively interpreted in Germany; whereas in France, particularly with regard to norms protecting weaker parties, the tendency is towards broadening the interpretation, which introduces further limitations on the will of the parties. Another contrast between Germany and France relates to the function of overriding mandatory provisions, and how they emerged in each system.

Art. 3(1) CC emphasizes a strong connection between the concept of territoriality and overriding mandatory provisions in France. Furthermore, overriding mandatory provisions did not develop as a correction of the party autonomy principle in the case of application of semi-public laws, as it was the case for Germany. Instead, some rules were classified as *clauses spéciales d'ordre public positif*.[246] The reference to ordre public is noteworthy, as it was interpreted as giving lois de police a broader definition.[247]

The contrast between two jurisdictions in this regard is further emphasized by the fact that overriding mandatory provisions are not taken into account *ex officio* by the French

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[244] Kuipers, *supra* note 162 at 127.
[245] *Ibid*.
[246] Adeline Jeauneau, *L'ordre public en droit national et en droit de l'Union européenne: essai de systématisation* (PhD Thesis, Université Panthéon-Sorbonne-Paris I, 2015) [unpublished] at 92.
[247] Kuipers, *supra* note 162 at 128.

judge.[248] Serving as an example for the striking difference, this makes it transparent that French overriding norms are not necessarily regarded as protecting core state interests.

The Court of Cassation's judgement in *Agintis*[249] provides a recent example of how norms protecting weaker parties are classified as overriding in France.[250] Basell, a French undertaking, entered into a contract with German SAB for the construction of real estate located in France. SAB then subcontracted the construction works to a French company, namely, Agintis. That agreement was governed by German law. After the completion of the works, Agintis sued SAB for overdue payments, which was judged in favor of Agintis for a sum of € 1.6 million. However, SAB failed to pay the amount, which then led to Agintis seeking payment from Basell as the master of the works. As per French law, it was allowed for the subcontractor to seek payment from the master in case the main contractor was in default. Basell then refused payment on the grounds that both the agreement between itself and SAB, and the agreement between SAB and Agintis were governed by German law; and that German law did not allow for such recourse. However, the Court of Cassation ruled that the French norm in question was mandatory by virtue of Art. 3(1) CC and Art. 7 of the sRome Convention. Advocate General ("AG") Guérin, in his opinion, argued that the French provision was aimed at ensuring equal competition for all subcontractors in the French market. Thus, smaller companies are protected against the bargaining power of larger ones, and evasion of French law would result in placing the French companies at a competitive disadvantage. It must be added that the norm in question, unlike rules protecting consumers, workers or in the same vein, data subjects, ensures the protection of a legal entity and not a natural person. In this perspective, it can be concluded that in France, not only the concept of overriding mandatory provisions, but also the concept of "*weaker party*" is subject to a broad definition, which in turn even more disproportionately stretches the boundaries of overriding norms.

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[248] Kuipers, *supra* note 162 at 132. Also see; Cour de Cassation, Chambre sociale (2007) Case 05-43949.
[249] *Société Agintis et autre* v. *Société Basell production France* (2007) Case 06-14006. For further analysis on the case, see; Paola Piroddi, "The French Plumber, Subcontracting and the Internal Market" (2008) 10 Yearb Priv Int Law 593.
[250] Kuipers, *supra* note 162 at 131.

Some other examples of overriding norms include, the requirement for companies with branches in France to have a central committee, the worker's right to have a contract in French when working in France, the rules on representation of employees and defense of their rights, the rules on redundancy, a consumer protection law conferring jurisdiction to French courts on certain consumer contracts, and a copyright law on disclosure of works.[251] Although the issue has yet to be elaborated by the Court of Cassation, it is likely that French data protection laws will fall in this category. Nonetheless, it must be borne in mind that the CJEU's judgement in *VKI v. Amazon* allows for determination of an applicable law in Terms of Use, provided that the consumers/data subjects are informed of the protective connecting factor in Art. 6(2) of Rome I. Although not explicitly stated in the judgment, this Thesis argued above that the judgement implicitly categorized data protection laws as domestic mandatory provisions, and not overriding mandatory provisions.[252] Furthermore, it has been noted that adoption of the definition of Francescakis in Rome I does not mean that the CJEU will follow the French tradition; on the contrary, the inclusion of "*public interest*" in Art. 9(1) closely mirrors the German tradition.[253] It can thus be useful to analyze which other norms have recently been defined as overriding by the CJEU, as well as the CJEU's criteria in defining them as such.

3.3 THE CJEU'S APPROACH AND OUTLOOK

In addition to *Arblade*[254], which only contributed to the discussion by providing a very loose definition of overriding mandatory provisions, the most disputed judgments of the CJEU on defining their nature are *Ingmar*[255] and *Unamar*[256]. In *Ingmar*, an agent, namely Ingmar GB Ltd. which is a company established in the UK, and its principal, Eaton Leaonard Technologies Inc., established in California, concluded a contract which

[251] Wilderspin & Plender, *supra* note 104 at 12–026.
[252] See; Section 2.2.2.
[253] Kuipers, *supra* note 162 at 78.
[254] See; fn. 187.
[255] See; fn. 158.
[256] United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare (2013) Case C-184/12.

appointed Ingmar as the Eaton's commercial agent in the UK. The contract included California law as the governing law, which does not provide for an indemnity or a compensation following the termination of a commercial agency contract. In 1996, after the contract between the parties had terminated, Ingmar sought compensation for its damages suffered for the termination of its relations with Eaton before the High Court of Justice of England and Wales, by invoking Art. 17 of Commercial Agents Directive. The UK court held that the aforementioned provision did not apply as the contract between the parties was governed by California law. Ingmar appealed the ruling to the Court of Appeal which requested a preliminary ruling from the CJEU, on the territorial scope of application of the Commercial Agents Directive, which seeks to harmonize the Member States' rules concerning relations between commercial agents and principals. The CJEU ruled that Art. 17 and Art. 18 of Commercial Agents Directive must be applied in a situation where an agent is performing its duties on the territory of a Member State, even though the principal was established in a non-Member State and the parties agreed on a non-Member State law to govern the contract between them. Accordingly, the implementation of Art. 17 and Art. 18 of the Commercial Agents Directive by the UK has a mandatory nature.[257] This mandatory nature of the right to compensation after the termination of agency contract is confirmed by the fact that, as per Art. 19 of the Commercial Agents Directive, the parties may not derogate from provisions of the Commercial Agents Directive to the detriment of the commercial agent. The purpose of these provisions is to ensure the minimum requirement in the harmonized EU acquis, and "*to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market*".[258] Further, the CJEU specified that it is essential for the EU legal order that a principal established in a non-Member State, whose agent is active in a Member State, to not be able to circumvent the Commercial Agents Directive by virtue of a simple choice of law clause. Consequently, it was found that the purpose served by the provisions in

[257] Ingmar, para. 22.
[258] Ingmar, para. 24. The resemblance between the justification provided by the French Court of Cassation in Agintis and that of the CJEU in Ingmar must be noted.

question required that they be applied where the situation is closely connected with the EU, irrespective of the choice of law clause in the agency contract.[259] As indicated in the Opinion of AG Léger[260], the agreement was not subject to the Rome Convention. Therefore the concept of overriding mandatory provisions was not interpreted in light of the Convention. Nonetheless it took inspiration from the Rome Convention.

Many commentators criticized the ruling harshly, claiming that it did not sufficiently prove the direct and strong connection between protection of the individual interest of commercial agents and broader internal market objectives.[261] Following the German tradition, others voiced the opinion that an individual claim for compensation, *per se*, cannot create concerns for market objectives such as uniformity of conditions for competition, the security of commercial transactions and freedom of establishment:

> "Ingmar GB does not concern any common interest, even though the ECJ [CJEU] *creates a fake public interest* by echoing an entirely stereotypical phrase out of the directive relating to self-employed commercial agents: (…) This may be correct as far as regulating the activities of a commercial agent as a market participant is concerned. But it remains the ECJ's secret how to achieve this via an individual claim for compensation after the termination of a contractual relationship. It seems rather strange to deem the rules providing for such a claim overriding mandatory provisions within the meaning of Article 9(1) of Rome Regulation."[262] *(emphasis added)*

Further, Verhagen notes that the focus on the needs of the internal market in establishing public interest, would create the risk of characterization of all EU acquis as overriding mandatory provisions, with sweeping implications:

> "The Court of Justice's *[CJEU]* decision is the expression of an inward-looking approach, which focuses on the needs of the internal market. It is to be expected that the EU legislator will increasingly occupy itself with contractual matters. These directives will have been issued with a view to the needs of the internal

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[259] Ingmar, para. 25.
[260] Opinion of Mr. AG Léger (2000) Case C-381/98, para. 64.
[261] Medic, *supra* note 193 at 47.
[262] Sonnenberger, *supra* note 189 at 121.

> market, such as fair competition, the free movement of persons, goods and capital, the freedom to provide services and the freedom of establishment. As in the Ingmar case, *this could constitute a reason for the Court of Justice to characterize all these future mandatory rules as directly applicable rules in the sense of Article 7 of the Rome Convention*."[263] *(emphasis added)*

Bisping argues in the same direction:

> "The misconception behind Article 3(4) *[Rome I]* is similar to the one behind Article 9(2) in that too much weight is placed on the law of the forum. This is at the expense of legal certainty and predictability. The situation is aggravated by the fear that, in line with the Ingmar decision, the ECJ *[CJEU]* might take a very generous view and *regard most consumer protection provisions originating in EU law as having an overriding mandatory character*."[264] *(emphasis added)*

The CJEU's decision in *Ingmar* broadened the definition of overriding mandatory provisions by creating a basket term out of internal market objectives as serving public interest. This view is compatible with those arguments categorizing data protection laws as overriding mandatory provisions on the basis of their facilitating of free movement of data[265], while being incompatible with the view prevalent in Germany which requires a state interest in the strict sense.

Despite the subsequent criticisms, the CJEU's judgment in *Unamar* failed to address these concerns. In 2005, Unamar, a Belgian company, and NMB, a company headquartered in Bulgaria, entered into a commercial agency agreement for the operation of NMB's container liner shipping service. As per the contract governed by Bulgarian law, Unamar would act as an agent for NMB. The contract also included an arbitration clause stipulating that any potential dispute was to be resolved by the arbitration chamber of the Chamber of Commerce and Industry in Sofia. In 2008, NMB terminated the agreement due to financial difficulties. Thereafter, Unamar held that the commercial agency agreement was

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[263] Verhagen, *supra* note 169 at 153.
[264] Bisping, *supra* note 167 at 254.
[265] See; fn. 160.

unlawfully terminated and took legal action against NMB before the Antwerpen Commercial Court, invoking Commercial Agents Directive and the implementing Belgian law. In response, NMB raised a plea of inadmissibility on the basis of the arbitration clause, but this defense was not upheld by the court. In the proceedings, the Belgian court applied the Belgian law implementing the Commercial Agents Directive as the overriding mandatory norm. During the appeal, the Antwerpen Court of Appeal took the opposite view and ruled that the arbitration clause was valid and that the Belgian law implementing the Commercial Agents Directive did not constitute an overriding mandatory norm. The Court of Appeal noted that since Bulgaria had also implemented the Commercial Agents Directive, and that although the protection afforded by Bulgarian law was less than that of Belgian law, Unamar was sufficiently protected by the chosen law. Unamar's appeal to the Court of Cassation resulted in a preliminary ruling being requested from the CJEU on how to interpret the Rome Convention, asking whether the more protective Belgian provisions may be applied as overriding mandatory provisions of the forum, even if the law applicable was the law of another Member State which had implemented the provisions of the Commercial Agents Directive. The CJEU ruled that national courts, as a matter of principle, were allowed to apply the law of the forum instead of the law of a Member State chosen by the parties, even if that Member State had correctly implemented the minimum protection standard of the Commercial Agents Directive.[266] However, according to the CJEU, such an application of the law of the forum instead of the chosen law requires that the national court finds, on the basis of a detailed assessment, that, in the course of the transposition of the Commercial Agents Directive, the legislature of the forum held it to be crucial, in the legal order concerned, to grant the commercial agent protection going beyond that provided therein.[267]

The judgment received similar criticism as its predecessor, *Ingmar*. In the literature, some claim that *Unamar* opened the floodgates for weaker party protective national provisions to be classified as overriding:

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[266] Unamar, para. 53.
[267] Ibid.

> "In effect, the CJEU opened the door for EU member states to define weaker-party protective provisions as "essential" and thus make them overriding mandatory provisions. *But this will certainly trigger conflicts with the need to narrowly interpret Article 9 in intra-Union cases*."[268] *(emphasis added)*
> "The outlook for the future is, hence, rather grim. Chances are that national courts will take the Unamar decision as *a carte blanche to apply the law of the forum instead of the chosen or the otherwise applicable law*."[269] *(emphasis added)*

It is significant to note that in *Unamar*, the CJEU rightly leaves the classification of national provisions as overriding mandatory provisions to the national courts. However, as rightly pointed out by the above commentators, the importance of these decisions lies in the tendency of the CJEU to suggest that EU law does not require Member States to be as strict as Germany in classifying overriding mandatory provisions.[270] This is particularly important for classification of weaker party protective rules, such as consumer protection. When considered with the fact that in *Schrems II*, the CJEU classified data protection laws as "*rules protecting the consumers*"[271], the need for an urgent clarification of this issue becomes apparent. In the light of *Ingmar* and *Unamar*, it is likely that a future classification of data protection laws as overriding mandatory provisions by the national courts will not be considered problematic by the CJEU. This is because the CJEU consistently upheld the national courts' determination of what constitutes "*public interest*" in the meaning of Art. 9(1) of Rome I.

Consequently, if national courts follow the French tradition that their data protection laws are overriding, there is a risk that the future of private privacy enforcement in the EU will be driven by Art. 9 of Rome I rather than Art. 6(2). As explained above[272] and rightly

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[268] Calliess, *supra* note 98 at 252.
[269] Giesela Ruhl, "Commercial agents, minimum harmonization and overriding mandatory provisions in the European Union: Unamar" (2016) 53:1 Common Mark Law Rev 209 at 224.
[270] Basedow et al, *supra* note 167 at 1332.
[271] See; fn. 175.
[272] See; Section 2.2.1.

argued by Bisping[273], this would be at the expense of legal certainty and predictability. From the perspective of SNSs, it leads to the risk of being exposed to national data protection laws as overriding mandatory provisions, without regard to whether they are more protective for the consumer.

3.4 INTERIM CONCLUSION

In conclusion, the proponents of the argument that data protection laws should be considered as overriding mandatory provisions overlook the fact that there is a significant difference between German and French definitions thereof. The former, exemplified by the classic examples of overriding mandatory provisions such as anti-trust and competition law, price control, currency control and trade restriction, criminal law, financial market legislation, etc. reflect a view according to which only laws that protect the interests of the state can have an overriding status. This strict definition of overriding mandatory provisions requires that the rule in question must *primarily* be for the protection of a state's interest. However, the onset of the welfare state and the emergence of the EU internal market has led to an understanding, in France, that the criteria for overriding mandatory provisions are modified to non-cumulatively include the protection of weaker parties. Accordingly, the rules protecting workers or consumer should be regarded as overriding, since the contrary would threaten society as a whole. The CJEU, in *Ingmar* and *Unamar*, have followed the French tradition and given the agency protective measures an overriding status. Met with fierce criticism from some commentators who pointed at possible sweeping implications, these judgements mean that the CJEU does not require Member States to be as strict as Germany in classifying overriding mandatory provisions. Assuming that the CJEU adopts a similar approach with regard to data protection laws as consumer protective provisions, which seems to be likely, this will be at the expense of legal certainty and predictability.

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[273] Bisping, *supra* note 180 at 254.

CONCLUSION

The impact of the novelties introduced by social networking is not limited to their domain. From a legal perspective, many fields of law have to be rethought and reconstrued with these impacts in mind. Among these fields, some occupy the spotlight with their overt relation to social networking, such as data privacy. On the other hand, other fields receive less attention, such as private international law. However, this does not mean that they remain untouched, as the proliferation of social networking has immensely increased the possibility of a dispute including a foreign element. In this vein, data privacy and private international law, although indirectly linked, need to be considered under one umbrella to effectively establish applicable law and jurisdiction to claims raised against SNSs.

The main issue which led to the drafting of this Thesis is a direct result of the EU legislator's failure to consider these two fields together. As explained in Chapter 1, while the GDPR aims at maximum harmonization of data protection laws, it allows for a total of 37 instances where the Member States can adopt divergent data protection laws. Moreover, the Member States are allowed to adopt data protection laws on issues where the GDPR refrained from regulating, only adding to this number. Therefore, during the course of the implementation of the GDPR, which started to be applicable in May 2018, the Member States are expected to adopt their own data protection laws.

Furthermore, similar to its predecessor, the GDPR provides for private privacy enforcement, in other words, the enforcement of data protection laws by courts as a result of actions brought by data subjects. Nonetheless, unlike its predecessor, the GDPR does not provide for a conflict of laws regime to determine which State's data protection laws apply to private enforcement disputes. When considered together, these two characteristics of the GDPR make it necessary that a private international law instrument should come into play to resolve the conflict of laws issues which will necessarily arise.

As the scope of this Thesis is limited to the claims raised against SNSs by their users, the relevant private international law instrument in the EU is Rome I. Chapter 2 conceptualizes the private enforcement of data protection laws against SNSs, whose Terms

of Use often include a governing law clause, within the framework of Rome I. Such Terms of Use are rightly classified as consumer contracts by the CJEU. As such, disputes arising from these contracts are subject to those special provisions of Rome I which set forth the law of the consumer's habitual residence as a protective connecting factor. Accordingly, under Art. 6(2) of Rome I, even though choice of law is allowed in consumers contracts, the consumer continues to enjoy the minimum protection afforded by the domestic mandatory provisions of the law of his/her habitual residence, also referred to as the protective connecting factor.

In its jurisprudence in *VKI v. Amazon*, the CJEU confirmed the validity of the governing law clauses in online consumer contracts, but ruled that they are invalid if they do not mention the protective connecting factor under Art. 6(2) of Rome I. Moreover, in *Schrems II*, the CJEU held that, not only rules which solely concern consumer protection, but also data protection laws qualify as the domestic mandatory rules, although without referring to Art. 6(2) in particular. Pursuant to this case-law of the CJEU, this Thesis argues that the data protection laws should explicitly be considered within the scope of Art. 6(2) of Rome I. Therefore, going forward, SNSs should respect the criteria set forth in *VKI v. Amazon* and refer to the protective connecting factor in their governing law clauses. To the extent that they follow this criterion, their governing law clauses should be upheld. This solution will provide some legal certainty for SNSs, while still not depriving the consumers of the protection he/she is afforded by the law of their habitual residence.

Chapter 2 also provides an introduction to an argument raised in the scholarship concerning the status of data protection laws under private international law. Accordingly, some argue that data protection laws should be considered overriding mandatory provisions and be treated under Art. 9 of Rome I, such that the choice of law should not be allowed. This view is supported by the CJEU's jurisprudence in *Ingmar* and the fact that data protection laws concern fundamental rights. Before elaborating further on the notion of overriding mandatory provisions, Chapter 2 concludes that Art. 6(2) should be considered *lex specialis* to Art. 9; therefore, when resort to Art. 6(2) is possible, Art. 9 should not be taken into account.

This being said, the argument that data protection laws should be considered overriding mandatory provisions requires a comparative study, as the French and German views thereon differ significantly. Chapter 3 tackles this subject. This Thesis argues that the classification of data protection laws as overriding mandatory provisions reflects the French approach, which accepts consumer protective rules as overriding. On the other hand, in Germany, the criteria is far more strict. In order for the will of the parties to be set aside, the overriding rule must concern an interest of the state, and not an individual interest. Hence, rules which primarily concern protection of a weaker party, such as consumer law or labor law, consistently are not considered to be overriding in Germany, while being deemed so in France. Unfortunately, to the surprise of some commentators, the CJEU's latest tendency is to stretch the boundaries of the concept of overriding mandatory provisions. In *Ingmar* and *Unamar*, the CJEU has granted the rules which protect commercial agents an overriding status, and consequently was faced with fierce criticism from some scholars who argue that this broad interpretation of Art. 9 of Rome I will result in a great number of laws being considered as overriding. In the absence of a conflict of laws provision in the GDPR, or a privacy-specific conflict of laws provision in Rome Regulations, the CJEU should indeed take into consideration the broader implications of the floodgates it opens with *Ingmar* and *Unamar*. , Indeed, the criticisms raised against the CJEU's broad interpretation of overriding mandatory provisions are meritorious specifically from the perspective of data protection laws.

The CJEU should indeed reconsider its position which broadly interprets Art. 9 of Rome I. Although national courts have the ultimate authority to decide which rules fall within the scope of Art. 9, the CJEU must be cautious in not encouraging an unduly broad interpretation. The current examples of overriding rules as confirmed by the CJEU, such as rules protecting commercial agents, are to the expense of legal certainty and the principle of party autonomy. In short, this Thesis argues that the German approach should prevail and that Member States' data protection laws should not be classified as overriding mandatory provisions. Instead, the protection of the consumer should be ensured through the effective and consistent implementation of the protective connecting factor in Art. 6(2)

of Rome I. Hence, SNSs should be allowed to designate which Member States' DPLs are applicable, subject to the criteria put forward by the CJEU in *VKI v. Amazon*. An opposite solution, while rendering the protective connecting factor futile, will also deprive SNSs of legal certainty, which is valuable to all parties to the relationship.

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