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Product liability and protection of EU consumers: is it time for a serious reassessment?

Giorgio Risso*

The European Union (EU) has not enacted a coherent and fully-fledged product liability regime. At the substantive level, the Product Liability Directive – adopted in 1985 – is the only piece of legislation harmonising the laws of the Member States. At the private international law level, the special choice-of-laws provision in the Rome II Regulation coexists with the general rules in the Brussels I-bis Regulation. Cross-border product liability cases are therefore subject to different pieces of legislation containing either “general” or “specific” provisions. In turn, such general and specific provisions do have their own rationales which, simplistically, can be inspired by “pro-consumer”, “pro-producer”, or more “balanced” considerations, or can be completely “indifferent” to consumer protection. This article examines the interactions between the Directive, the Rome II and the Brussels I-bis Regulations in cross-border product liability cases. The aim of this article is to assess whether the piecemeal regime existing at the EU level risks undermining the protection of EU consumers. The analysis demonstrates that the regime is quite effective in guaranteeing an adequate level of consumer protection, but reforms are needed, especially to address liability claims involving non-EU manufacturers or claims otherwise connected to third States, without requiring a complete overhaul of the EU product liability regime.

Keywords: private international law; product liability directive; Rome II regulation; Brussels I-bis regulation

A. Introduction

When it was adopted, more than thirty years ago, the Product Liability Directive¹ (the “Directive”) generated a profound – and largely positive – impact on the position of European consumers. As a maximum harmonisation instrument, it

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¹Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (Product Liability Directive) [1985] OJ L210/29.

provides for a harmonised private enforcement regime concerning liability for defective products.² However, the Directive has not achieved a total unification in this field, leaving some important issues to the national laws of Member States.³ This means that, as far as the aspects not regulated by the Directive are concerned, national laws do play a role. Accordingly, private international rules – especially applicable law rules – remain relevant for intra-EU product liability disputes. The impractical coexistence of harmonised substantive rules and non-harmonised private international rules led the EU legislature to frame, twenty years later, an *ad hoc* applicable law provision for product liability cases in the Rome II Regulation (Article 5).⁴ Conversely, there is no special rule at the jurisdictional level and the general provisions of the Brussels I-*bis* Regulation⁵ – including Article 7(2) on non-contractual liability – apply.⁶

Within the EU, cross-border product liability cases are therefore subject to different pieces of legislation containing either “general” or “specific” rules. At the substantive level, the Directive sets out specific provisions on the liability for defective products. Such provisions need to be complemented by the national laws of Member States.⁷ At the private international law level, the specific choice-of-laws provision contained in the Rome II Regulation applies together with the general rules of the Brussels I-*bis* Regulation. In turn, these general and specific provisions have their own rationales which, simplistically, can be inspired by

²On the distinction between maximum and minimum harmonisation, see A Arena, “The Doctrine of Union Preemption in the EU Single Market: Between Sein and Sollen” (2010) Jean Monnet Working Paper 03/10.

³By way of example: (i) the rights of contribution or recourse in cases of joint liability (Art 5); (ii) non-material damage (Art 9); (iii) the suspension or interruption of the limitation period (Art 10(2)); and (iv) the assessment of damages not dealt with by the Directive. Furthermore, the Directive sets out some optional provisions that can be implemented into national law by Member States, see below § III, and G Palao Moreno, “Product Liability: Jurisdiction and Applicable Law in Cross-border Cases in the European Union” (2010) *ERA Forum* 45.

⁴Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II Regulation) [2007] OJ L199/40.

⁵Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I-*bis* Regulation) [2012] OJ L351/1.

⁶The Brussels I-*bis* Regulation offers the plaintiff several possibilities for suing the defendant in different Member States, namely (i) the defendant’s domicile (Art 4); (ii) the place where the harmful event occurred or may occur (Art 7(2)); (iii) the domicile of one of the defendants in case of joint tortfeasors (Art 8); and/or (iv) the place chosen by parties (Art 25). This article mainly deals with the heads of jurisdiction provided for by Arts 7(2) and 8 (1). For a complete overview on the grounds of jurisdiction see A Saravalle, *Responsabilità del produttore e diritto internazionale privato* (CEDAM, 1991).

⁷As seen above, the role of national laws is limited to some specific aspects of product liability. This article does not deal with cases where the liability *per se* is not imposed under the Directive (eg, liability in relation to products that are not defective, liability of the repairers of products, liability for damages to the product itself).

“pro-consumer”, “pro-producer”, or more “balanced” considerations, or can be completely “indifferent” to consumer protection.

One would expect the rationales and the provisions of the Directive, the Rome II and the Brussels I-*bis* Regulations to have a certain degree of coherence. Private international rules do not “operate in a vacuum”⁸ but against a substantive law background. The non-exhaustive harmonisation provided by the Directive and the inherent international character of product liability cases reinforce this quest for coherence. Yet, the comparison of the abovementioned pieces of legislation leaves much room for improvement. The strong and multiple references to consumer protection contained in the Directive are in sharp contrast to the watered-down mention in the Rome II Regulation and the apparent indifference of the Brussels I-*bis* Regulation.⁹ According to the simplistic classification indicated above, only the Directive could be characterised as “pro-consumer”, the Rome II and Brussels I-*bis* Regulations being “balanced” and “indifferent”, respectively.

This discrepancy is difficult to accept both as a matter of principle and in practice for its potentially distortive effects. First, Article 7 TFEU stipulates that: “The Union shall ensure consistency between its policies and activities, taking all of its objectives into account”. Given that consumer protection is included among the shared competences of the EU¹⁰ and the EU legislature has enacted secondary legislation on this matter, EU private international rules should endeavour to be consistent with this purpose when it comes to product liability too.¹¹ This is further confirmed by Article 12 TFEU, according to which consumer protection requirements shall be taken into account in defining and implementing other EU policies. Secondly, from a practical perspective, the “pro-consumer” substantive liability regime might be seriously impaired if EU consumers are not protected against the risks of: (i) litigating abroad (especially for small claims); and (ii) being subject to the less protective law of a third State. The strong liberalisation of international trade requires one to carefully analyse the cross-border issues

⁸JJ Fawcett “Product Liability in Private International Law: A European Perspective” (1993) 238 *Recueil des cours* 56.

⁹See below §B.

¹⁰Art 4(2)(f) TFEU.

¹¹The EU legislature has promulgated numerous measures aimed at guaranteeing a high and uniform degree of protection to EU consumers. See, for instance, the Council Directive 93/13/EEC on unfair terms in consumer contracts (Unfair Terms Directive) [1993] OJ L95/29; Directive 2005/29/CE of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council; Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive) [2005] OJ L149/22; and Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Consumer Rights Directive) [2011] OJ L304/64.

relating to product liability.¹² In this respect, EU private international rules should take into account that, in the vast majority of instances, EU consumers sustain damage by products manufactured – at least in part – in other Member States or in third States.

This article examines the interactions between the Directive, the Rome II Regulation and the Brussels I-*bis* Regulation in cross-border product liability cases. The aim of this article is to assess whether the piecemeal regime existing at the EU level risks undermining the protection of EU consumers. The article is divided as follows. Part B analyses the rationales behind the Directive and the Regulations as well as their scope of application with a view to provide a preliminary assessment of the coherence of the regime. Parts C, D and E examine, respectively, the regimes set out by the Directive, the Rome II and the Brussels I-*bis* Regulations in order to evaluate the degree of protection they grant to EU consumers. This includes how such measures deal with product liability cases involving producers established outside the EU. Part D focuses mainly on Article 5 of the Rome II Regulation, whereas Part E is dedicated to Articles 7(2) and 8(1) of the Brussels I-*bis* Regulation. The analysis referred to above demonstrates that the piecemeal regime existing at the EU level is nonetheless quite effective in guaranteeing a high level of consumer protection. Reforms are needed though, especially to address liability claims involving non-EU manufacturers or otherwise connected to third States, without requiring a complete overhaul of the EU product liability regime.

B. The coherence of the EU “product liability regime”

The protection of EU consumers is one of the rationales behind the Directive. Although this rationale coexists with the aim of promoting the proper functioning of the internal market and avoid competition distortion, Recital 1 of the Directive makes clear that the harmonisation of the product liability rules of Member States is necessary because the existing divergences “entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property”.¹³ Other Recitals of the Directive further consider consumer protection in respect of the need to: (i) hold liable all the producers involved in the production process;¹⁴ (ii) frame the notion of “defectiveness” in terms of safety expectations;¹⁵ (iii) maintain the liability of the producer even where

¹²C Coglianese, AM Finkel and D Zaring, “Consumer Protection in an Era of Globalization” (2010) University of Pennsylvania Law School ILE, Research Paper N. 11-10.

¹³Recital 1 of the Product Liability Directive states that the harmonisation of the laws of Member States is necessary because “the existing divergences may distort competition and affect the movement of goods within the common market”.

¹⁴*Ibid*, Recital 4.

¹⁵*Ibid*, Recital 6.

others contribute to the loss;¹⁶ and (iv) set out a comprehensive notion of compensable damage.¹⁷

Despite the scepticism of some authors about the practical impact of the Directive,¹⁸ it is evident that – at least from a theoretical perspective – this instrument is a remarkable piece of EU consumer protection policy.¹⁹ This is even more true if one considers the historical moment when, and the legal basis under which, the Directive was adopted.

In 1985, before the Single European Act and the Maastricht Treaty entered into force, consumers were incidentally taken into account by only five treaty provisions on common agricultural policy, competition and state aid.²⁰ None of these provisions, however, represented an attempt to develop a fully-fledged consumer protection strategy.²¹ When the Directive was adopted, the sole explicit reference to consumer protection was contained in a soft law measure, namely the 1975 Council Resolution “on a preliminary programme of the European Economic Community for a consumer protection and information policy”, which set forth five basic consumer rights, including the right to protection of health and safety, and the right of redress.²² The establishment of consumer protection as a formal EU competence occurred in 1993 on the entry into force of the Maastricht Treaty.²³ The legal basis of the Directive is Article 100 EC (now Article 115 TFEU) on the approximation of laws and regulations directly affecting the establishment and functioning of the internal market, which does not contain any reference whatsoever to consumers. Despite the fragility of its constitutional basis,²⁴ the pro-consumer character of the Directive – as emerging from its rationale and rules²⁵ – cannot be put into question.

¹⁶*Ibid*, Recital 8.

¹⁷*Ibid*, Recital 9.

¹⁸See N Reich, “Product Safety and Product Liability” (1986) *Journal of Consumer Policy* 133.

¹⁹S Weatherill, *European Consumer Law and Policy* (Edward Elgar, 2nd edn, 2013), 172.

²⁰See Arts 33(1)(e) EC (now Art 39 TFEU), Art 34(2) EC (now Art 40(2) TFEU), Art 81(3) EC (now Art 101(3) TFEU), and Art 82 EC (now Art 102 TFEU).

²¹Weatherill, *supra* n 19, 4.

²²Council resolution on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92/1. The other basic rights listed by the Resolution are: (i) the right to protection of economic interests; (ii) the right to information and education; and (iii) the right of representation; see Weatherill, *supra* n 19, 6.

²³The Maastricht Treaty introduced Art 129a, now Art 169 TFEU. On the evolution of consumer law see S Weatherill, “Consumer Policy”, in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2nd edn, 2011), ch 27; H-W Micklitz and S Weatherill, “Consumer Policy in the European Community: Before and After Maastricht” (1993) *Journal of Consumer Policy* 285.

²⁴Such fragility is common with other EU pieces of legislation on consumer protection, including another directive adopted before the entry into force of the Maastricht Treaty, namely Directive 85/577 on Door to Door selling (now incorporated in Directive 2011/83 on Consumer Rights).

²⁵See below § C.

As regards the scope of application, the Directive applies to all Member States and covers the liability of producers for damage caused by defective products,²⁶ according to the specific notion of defectiveness contained in Article 6.²⁷ The damage taken into account is that caused: (i) by death or personal injury; and/or (ii) to any item of property other than the defective product itself.²⁸ As anticipated above, the Directive has not reached a complete unification in the field of product liability, though the maximum harmonisation regime prevents Member States from maintaining stricter national rules in areas falling within its scope of application.²⁹

The purpose of consumer protection is far less evident in the Rome II Regulation; Recital 20 of which states:

The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade.

Unlike the Directive, here the economic objective of guaranteeing undistorted competition and the proper functioning of the internal market appears to clash with the one of protecting EU consumers. Striking a balance between consumer protection and trade facilitation, through a fair spread of the relevant risks, is the rationale behind Article 5 of the Rome II Regulation. This shift towards a more "balanced" approach can be explained in two different, but not mutually exclusive, ways. First, the application of Article 5 is not restricted to consumers since this provision refers to "the person sustaining the damage", who can be any person.³⁰ Second, the approach adopted by Article 5 is read within the more general purpose of the Rome II Regulation, namely ensuring legal certainty and justice in individual cases.³¹ This is consistent with the general framework set out by the Rome II Regulation, which does not contain any specific rule aimed at the protection of the so-called "weaker parties".³² However, it would not be correct to infer that consumer protection is completely disregarded by Article 5,

²⁶Product Liability Directive, Art 1.

²⁷See below § C.

²⁸Product Liability Directive, Art 9.

²⁹Product Liability Directive, Art 13 as interpreted in C-183/00, *González Sánchez* EU: C:2002:255.

³⁰R Plender and M Wilderspin, *The European Private International Law of Obligations* (Sweet & Maxwell, 2nd edn, 2009), 19-018.

³¹Rome II Regulation, Recital 14. Pursuant to Recital 6 of the Rome II Regulation, an harmonised system of conflict-of-law rules is necessary to guarantee "predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments".

³²Unlike the Rome I Regulation, see P Pirroddi, *La tutela del contraente debole nel regolamento Roma I* (CEDAM, 2012).

in that the balancing exercise required by the provision at issue necessarily requires taking consumer protection into account.

Unlike for the rationale, the inconsistency existing between the Directive and Article 5 of the Rome II Regulation when it comes to their scope of application is more evident.

First, Article 5 applies to damage caused by a product without requiring the product in question to be defective. This includes, for instance, liability for inherently dangerous products or that which is based on a failure to warn of dangers.³³ Although some authors argue for interpreting Article 5 in light of the notion of defectiveness set forth in the Directive³⁴ – as originally proposed by the Commission³⁵ – the elimination of all references to the Directive in the final version of the Rome II Regulation makes the first approach preferable. Secondly, Article 5 covers all damage possibly caused by a product and not only those indicated in Article 9 of the Directive.³⁶ Third, as anticipated above, given the absence of any specific reference to the terms “consumer” and “producer”, Article 5 is deemed to cover claims brought by a wider class of persons (including the so-called bystanders) against a wider class of persons.³⁷ Finally, it is worth mentioning that the inconsistency also concerns the scope of application *ratione personae* in that, pursuant to Article 28(1) of the Rome II Regulation, Article 5 does not apply to those Member States party to the 1973 Hague Convention on the Law Applicable to Product Liability.³⁸ Although this pertains to the wider issue of the relationship between EU private international law instruments and international conventions on specific matters, it is undeniable that national differences at the applicable law level may promote forum shopping and negatively affect the protection of EU consumers.³⁹

The Commission had initially envisaged a stronger link between Article 5 of the Rome II Regulation and the Directive. Due to the incomplete approximation of

³³A Dickinson, *The Rome II Regulation* (Oxford University Press, 2008), 5.15. See also A Rushworth and A Scott, “Rome II: Choice of Law for Non-contractual Obligations” (2008) *Lloyds Maritime and Commercial Law Quarterly* 274.

³⁴P Huber (ed), *Rome II Regulation* (Sellier, 2011) 122.

³⁵COM (2003) 427 final, 13.

³⁶See below § C. This may include, for instance, non-material damage and damage to the product itself; see Dickinson, *supra* n 33, 5.07–5.08.

³⁷Dickinson, *supra* n 33, 5.13, 5.40.

³⁸Convention on the Law Applicable to Products Liability (2 October 1973, see <https://www.hcch.net/en/instruments/conventions/full-text/?cid=84>). The Member States that have ratified the Convention are: Croatia, Finland, France, Luxembourg, Netherlands, Slovenia and Spain, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=84>.

³⁹See C Brière, “Réflexions sur les interactions entre la proposition de règlement «Rome II» et les conventions internationales (2005) *Clunet* 677; G Garriga, “Relationship Between Rome II and Other International Instruments. A Commentary on Article 28 of the Rome II Regulation” (2007) *Yearbook of Private International Law* 143.

the substantive laws of the Member States, the special applicable law rule should correspond “not only to the parties’ expectations but also to the European Union’s more general objectives of a high level of protection of consumer health”.⁴⁰ During the legislative process, however, the references to the substantive regime became fewer and fewer, until completely disappearing in the final version.⁴¹ Having said that, the practical effects arising out of the inconsistency between the scope of application of the Directive and the scope of application of Article 5 are, in terms of consumer protection, almost negligible. In the words of the Commission: “the scope of the special rule in [Article 5] is broader than the scope of Directive 85/374, as it also applies to actions based on purely national provisions governing product liability”.⁴² This means that Article 5 covers all the cases envisaged by the Directive.

As for the Brussels I-bis Regulation, it does not contain any *ad hoc* jurisdiction rule on product liability. Unsurprisingly, therefore, the rationale behind the special heads of jurisdiction provided by Article 7(2) for tortious matters is completely unrelated to consumer protection considerations.⁴³ The purpose of the Brussels I-bis Regulation is to set out jurisdiction rules that are highly predictable and based on a close connection between the court and the action.⁴⁴ In this respect, Recital 16 makes clear that the rationales behind the special grounds of jurisdiction are: (i) guaranteeing the sound administration of justice; and (ii) ensuring legal certainty and, in turn, avoiding “the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen”.⁴⁵ The inconsistency between the Brussels I-bis Regulation, on the one hand, and the Directive and the Rome II Regulation, on the other hand, cannot even be mitigated by “importing” consumer protection considerations into Article 7(2) via Recital 7 of the Rome II Regulation, which refers to the synergy among the EU private international law instruments in civil and commercial matters.⁴⁶ The CJEU explicitly rejected this argument in *Kainz* and stated that:

⁴⁰COM(2003) 427 final, 5, 15.

⁴¹In the amended Proposal presented by the Commission on 21 February 2006, only Recital 12 contained a standard reference to the Directive, see COM(2006) 83 final, 10.

⁴²COM(2003) 427 final, 13.

⁴³On the rationales behind the special heads of jurisdiction of the Brussels I Regulation see P Franzina, *La giurisdizione in materia contrattuale* (CEDAM, 2006).

⁴⁴Brussels I-bis Regulation, Recitals 13 and 16.

⁴⁵These principles have been constantly confirmed by the case law; see C-18/02, *DFDS Torline* EU:C:2004:74; C-167/00, *Henkel* EU:C:2002:555; Case 21-76, *Handelskwekerij G. J. Bier BV v Mines de potasse d’Alsace* EU:C:1976:166. The first product liability case to which these principles have been applied is C-189/08, *Zuid-Chemie* EU:C:2009:475.

⁴⁶See E Lein, “The New Rome I/Rome II/Brussels I Synergy” (2008) *Yearbook of Private International Law* 177. This approach has been adopted by the CJEU with regard to Art 5 (1) of the Brussels Convention and Art 6 of the Rome Convention, see Case 133/81, *Ivenel v Schwab* EU:C:1982:199.

although it is apparent from recital 7 in the preamble to Regulation No 864/2007 that the European Union legislature sought to ensure consistency between Regulation No 44/2001, on the one hand, and the substantive scope and the provisions of Regulation No 864/2007, on the other, that does not mean, however, that the provisions of Regulation No 44/2001 must for that reason be interpreted in the light of the provisions of Regulation No 864/2007. The objective of consistency cannot, in any event, lead to the provisions of Regulation No 44/2001 being interpreted in a manner which is unconnected to the scheme and objectives pursued by that regulation.⁴⁷

In light of the above, it is possible to conclude that the rationale behind Article 7(2) of the Brussels I-bis Regulation is inconsistent with the Directive and Article 5 of the Rome II Regulation. The latter instruments take into account – although in different ways – consumer protection, whereas Article 7(2) can be classified as “indifferent”. These considerations apply also to the other jurisdiction rules that can be relevant in product liability cases, such as Articles 4 (defendant’s domicile), 8 (*forum connexitatis*) and 25 (prorogation of jurisdiction). Part E sheds light on whether the abovementioned inconsistency may, in practical terms, jeopardise the protection of EU consumers.

With regard to the scope of application of Article 7(2), it should be said, first of all, that its applicability to the product liability cases covered by the Directive is undisputable.⁴⁸ This is confirmed by both the 1976 Explanatory Memorandum,⁴⁹ which classifies the claims brought under the Directive as tortious in nature, and the *Kalfelis* judgment, which provided for an extraordinarily wide definition of “matters relating to tort, delict or quasi-delict”.⁵⁰ Moreover, Article 7(2) – as a general rule on non-contractual liability – applies to a wider variety of cases than those regulated by the Directive, namely: (i) claims involving non-defective products; (ii) claims brought by bystanders; and (iii) claims brought against subjects that are not able to be classified as “producers” within the meaning of Article 3 of the Directive.⁵¹ The Brussels I-bis Regulation, however, suffers from the limitations of its scope of application *ratione personae*. Indeed, pursuant to Article 6(1), if the defendant is not domiciled in a Member State domestic private international rules on jurisdiction apply, the only exceptions being Articles

⁴⁷ See C-45/13, *Kainz* EU:C:2014:7, para 20. On this case see C Marengi, “Responsabilità del produttore e giurisdizione nel regolamento «Bruxelles I»: il *forum commissi delicti* tra esigenze di coerenza e limiti all’interpretazione intertestuale alla luce di una recente sentenza della Corte di giustizia” (2014) *Diritto del commercio internazionale* 1107.

⁴⁸ See P Kaye (ed), *European Case Law on the Judgments Convention* (Wiley, 1998) 25; U Magnus and P Mankowski (eds), *Brussels Ibis Regulation* (Otto Schmidt, 2016) 334.

⁴⁹ COM(76) 372 final, para 30.

⁵⁰ Case 189/87, *Kalfelis* EU:C:1988:459: “the term ‘matters relating to tort, delict or quasi-delict’ within the meaning of Article 5(3) of the Convention must be regarded as an independent concept covering all actions which seek to establish the liability of a defendant and which are not related to a ‘contract’ within the meaning of Article 5(1)” (para 18). See also C-26/91, *Handte* EU:C:1992:268.

⁵¹ Similarly to what has been seen above with regard to Art 5 of the Rome II Regulation.

18(1) (jurisdiction over consumer contracts), 21(2) (jurisdiction over individual contracts of employment); 24 (exclusive subject-matter jurisdiction), and 25 (choice of court agreement).⁵² As seen below, this inconsistency may have significant consequences, since consumers will not be able to invoke the EU jurisdiction rules in case of products sold or supplied within the EU (ie when the Directive and the Rome II Regulation are normally applicable) if the subject claimed to be liable is not domiciled in a Member State.

C. The substantive rules governing product liability

As seen above, the Directive is a remarkable measure of consumer protection policy and a powerful instrument of harmonisation of the (very different) Member States' tort laws.⁵³ The previous analysis shows that the rationale behind the Directive is strongly consumer-oriented. It has now to be seen whether this "pro-consumer" character is reflected in its operative provisions. According to Macleod, the main issues relating to product liability are: (i) the burden of proof; (ii) the cost of civil litigation; (iii) the liability for acts of another; and (iv) the international dimension.⁵⁴ Apart from the cost of civil litigation, which mainly concerns the realm of civil procedure and private international law, the aforementioned issues are examined below *vis-à-vis* the rules under the Directive.

Undisputed examples of consumer-friendly provisions are represented in the Directive by Articles 1 (strict liability regime), 2 (definition of product), 3 (definition of producer), 6 (definition of defectiveness), and 12 (limitation or exclusion of liability).

Article 1 of the Directive, which sets out a strict liability regime for damages caused by defective products,⁵⁵ is a "dramatically strong pro-consumer statement of risk allocation".⁵⁶ The idea to create a system based on no-fault liability was already present in the First Proposal adopted by the Commission in 1976.⁵⁷ This in turn reflects a fundamental shift in the allocation of risk between consumers and producers that can be traced back to *Donoghue v. Stevenson*, decided before any specific regulations on product liability were formally adopted.⁵⁸ It is a statement of the obvious that Article 1 is "pro-consumer" in character in that: (i) the consumer must prove solely that the product was defective and that

⁵²See Magnus and Mankowski, *supra* n 48, 115.

⁵³D Fairgrieve (ed), *Product Liability in Comparative Perspective* (Cambridge University Press, 2005).

⁵⁴JK Macleod, *Consumer Sales Law. The Law Relating to Consumer Sales and Financing of Goods* (Routledge, 2002), 516.

⁵⁵Art 1 of the Directive states that: "The producer shall be held liable for damage caused by a defect in his product".

⁵⁶See Weatherill, *supra* n 19, 174.

⁵⁷See COM(1976) 372 final, Art 1.

⁵⁸*Donoghue v Stevenson* [1932] AC 562.

the defect caused the damage; and (ii) the producer cannot invoke the absence of fault to exclude its liability.⁵⁹

Article 2 of the Directive provides for a wide definition of “product”, thereby expanding the scope of the protection granted to EU consumers. In this respect, product means “all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable”. Directive 1999/34 subsequently eliminated the exclusion of agricultural products with a view to restoring consumer confidence in the safety of such products.⁶⁰

Article 3 is one of the most “pro-consumer” provisions of the entire Directive. On the one hand, paragraph 1 extends the notion of “producer” to anyone involved in the production process – namely: (i) the manufacturer of the finished product; (ii) the producer of any raw material; and (iii) the manufacturer of a component part – as well as to those that put their name or trademark on the product, thereby representing themselves as producers. On the other hand, paragraphs 2 and 3 bring the importer of a product into the EU and the supplier within the scope of the Directive for liability purposes. Article 3(2) has a strong pro-consumer purpose since it guarantees that the consumer has at least one defendant in the EU against whom he or she can introduce a claim when products are imported from non-Member States.⁶¹ The same can be said for Article 3(3), according to which the supplier shall be treated as the producer when the producer itself cannot be identified and the supplier fails to disclose its identity within a reasonable period of time.⁶²

Article 6(1) of the Directive links the notion of “defectiveness” of a product with the safety that a “person is entitled to expect”, taking into account several circumstances, among which are: (i) the presentation of the product; (ii) the expected use of the product; and (iii) the time when the product was put into circulation. In other words, the assessment of the defective character of a product is entirely focused on the consumer rather than on the producer and the production process. Such assessment, however, is objective and does not refer to each individual consumer.⁶³ One may legitimately ask whether a more “pro-consumer”

⁵⁹See HJ Dielmann, “The European Economic Community’s Council Directive on Product Liability” (1986) *The International Lawyer* 1391.

⁶⁰Directive 1999/34/EC of the European Parliament and of the Council amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1999] OJ L141/20; See E Vos, “EU Food Safety Regulation in the Aftermath of the BSE Crisis” (2000) *Journal of Consumer Policy* 227.

⁶¹Dielmann, *supra* n 59, 1394. On the private international law implications of this provision, see below §§ D and E.

⁶²See C Hodges, “Product Liability of Suppliers: The Notification Trap” (2002) *European Law Review* 758.

⁶³See L Bergkamp and R Hunter, “Product Liability Litigation in the US and Europe: Diverging Procedure and Damage Awards” (1996) *Maastricht Journal of European & Comparative Law* 399.

outcome could have been reached by taking into account the characteristics of individual consumers, including the particularly vulnerable ones, in conformity with the approach of the CJEU in the area of consumer protection.⁶⁴ The answer to this question is in the negative. On the one hand, a subjective test would promote legal uncertainty,⁶⁵ on the other hand, the needs of specific categories of consumers can be adequately taken into account – most of the time – by reference to the “expected use of the product”, which is one of the circumstances mentioned by Article 6(1) of the Directive.

Finally, Article 12 of the Directive declares void any clause limiting or exempting the producer’s liability. Although this provision has great practical importance for consumer protection, it covers clauses that are already considered void under Directive 93/13/EEC on unfair terms in consumer contracts.⁶⁶

At this stage in the analysis, one could ask whether the foregoing provisions are intended to have overriding effect over the less protective laws of a third country pursuant to Article 16 of the Rome II Regulation.⁶⁷ Article 16 allows the court seised to displace the normally applicable law insofar as it is necessary to take into consideration the overriding mandatory provisions of the forum, including, of course, relevant provisions of EU law contained in either primary or secondary legislation.⁶⁸ To take an example, the consumer injured by a product acquired in a country that requires negligence of the manufacturer to be proven could rely on the strict liability regime imposed by the Directive.

The Directive fails to answer the above-mentioned question since it does not expressly characterise its rules as overriding mandatory provisions. In addition, some authors expressed doubts that rules enacted to protect private parties’ interests can amount to “national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned”.⁶⁹ Yet, at least four elements militate in favour of characterising the pro-consumer rules of the Directive as overriding mandatory provisions. First, it is arguable that such rules are meant to protect the well-being of every potential victim of defective products rather than the single consumer,

⁶⁴See, among others, Case 382/87, *Buet and others* EU:C:1989:198; C-313/94, *Graffione* EU:C:1996:450.

⁶⁵See GG Howells and M Mildred, “Is European Products Liability More Protective Than the Restatement (Third) of Torts: Products Liability” (1997–1998) *Tennessee Law Review* 985.

⁶⁶See EH Hondius, “Unfair Terms in Consumer Contracts: Towards a European Directive” (1988) *European Consumer Law Journal* 180.

⁶⁷According to Art 16 of the Rome II Regulation, nothing in the Regulation “shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation”.

⁶⁸See Dickinson, *supra* n 33, 15.15–15.20 and Huber, *supra* n 34, 353.

⁶⁹C-369/96 and C-376/96, *Arblade* EU:C:1999:575, para 30. See M Wilderspin, “The Rome I Regulation: Communitarisation and modernisation of the Rome Convention” (2008) *ERA Forum* 259.

thereby expressing a strong socio-economic policy.⁷⁰ This is evidenced by the impossibility to contract out of the protective provisions set out in the Directive with the aim of achieving “effective protection of consumers”.⁷¹ Second, in *Ingmar*, the CJEU confirmed the overriding nature of the EU provisions aimed at protecting the private interests of weaker parties (in that case, commercial agents).⁷² Third, the inclusion of consumer protection among the overriding mandatory requirements that could justify an infringement of the EU fundamental freedoms evidences the crucial importance of such an objective for the EU legal order and for the Member States.⁷³ Having said that, absent any express indications, national courts remain competent to ascribe mandatory status to the pro-consumer rules of the Directive. This may result in fragmenting the degree of consumer protection within the EU.

Along with the “pro-consumer” provisions examined above, the Directive also contains “pro-producer” rules, the three most prominent examples being Articles 4 (burden of proof), 7 (producer’s defences) and 16 (limitation of the total liability of a producer).

Article 4 of the Directive simply stipulates that the injured person “shall be required to prove the damage, the defect and the causal relationship between defect and damage”. The burden of proof under Article 4 is particularly onerous, especially with regard to the proof of the defect, which often involves complex technical issues and costly expert witness.⁷⁴ However, after several attempts to modify Article 4, the Commission recommended against amending

⁷⁰See Fawcett, *supra* n 8, 216. A similar argument, albeit concerning Art 5 of the Rome II Regulation, has been made by TM de Boer, “The Purpose of Uniform Choice-of-Law Rules: The Rome II Regulation” (2009) *Netherlands International Law Review* 295, 320.

⁷¹Product Liability Directive, Recital 12. Of course, not all mandatory rules are so crucial that they override the foreign law applicable pursuant to the relevant conflict of laws rules; see G Cordero-Moss, *International Commercial Contracts* (Cambridge University Press, 2014) 191.

⁷²Yet, in *Ingmar*, the CJEU pointed out the several rationales behind the EU legislation at hand: “[t]he purpose of the regime established in Articles 17 to 19 of the Directive is thus to protect, for all commercial agents, freedom of establishment and the operation of undistorted competition in the internal market. Those provisions must therefore be observed throughout the Community if those Treaty objectives are to be attained” (C-381/98, *Ingmar GB* EU:C:2000:605, para 24. See also C-135/15, *Nikiforidis* EU:C:2016:774). It is argued that the internal market argument made by the CJEU in *Ingmar* can be extended to the Directive since, as seen at § B above, the consumer protection rationale coexists with the aim to promote the proper functioning of the internal market and avoid competition distortion (see Directive, Recital 1).

⁷³See Case 4/75, *Cassis de Dijon* EU:C:1975:98; Case 382/87, *Buet and others* EU:C:1989:198; C-441/04, *A-Punkt Schmuckhandels* EU:C:2006:141. See also C Barnard, *The Substantive Law of the EU* (Cambridge University Press, 5th edn, 2016), 174–76.

⁷⁴L Sterren, “Product Liability: Advancements in European Union Product Liability Law and a Comparison Between the EU and U.S. Regime” (2015) *Michigan State International Law Review* 885.

this provision because, in general, “national administrations know of no practical problems due to the rules on burden of proof”.⁷⁵

The issue of the burden of proof has been indirectly addressed by a recent judgment of the CJEU concerning implantable medical devices (pacemakers and cardioverter defibrillators) belonging to the same product series of other medical devices that were found to be defective.⁷⁶ In a nutshell, the Court expanded the notion of “defectiveness” in Article 6(1) holding that in the case of products forming part of the same group or series of products having a potential defect, “it is possible to classify as defective all the products in that group or series, without there being any need to show that the product in question is defective”.⁷⁷ The Court has introduced some subjective elements to the test under Article 6(1) by including “the specific requirements of the group of users for whom the product is intended” in the list to determine the defective character of a product.⁷⁸ Although this judgment does not imply that every potential defect means that a product is defective, its impact in terms of burden of proof is relevant. In cases involving complex technical issues and fundamental values, such as the protection of health, the Court is expected to consider the burden of proof under Article 4 met if the consumer demonstrates that the product at issue is potentially defective.⁷⁹

Article 7 of the Directive sets out a list of circumstances that can be proven by the producer in order to exclude liability. Despite their “pro-producer” character, almost all the defences listed in Article 7 are reasonable in that they involve objective situations where: (i) the defect did not exist when the product was put into circulation; (ii) the product was not manufactured for sale or distribution for economic reasons; or (iii) the defect was due to compliance of the product with mandatory regulations. More problematic is the so-called “development risk defence” in Article 7(e), according to which a producer is able to escape liability if he proves that “the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered”.⁸⁰ The emphasis on the (subjective) knowledge of the producer appears to be in contrast with the objective character of the product liability

⁷⁵The Commission added that “This conclusion concerns also the situation of foodstuffs or pharmaceuticals which is recognised as being specific”, see COM(2000) 893 final, 15–16.
⁷⁶C-503 and 504/13, *Boston Scientific Medizintechnik* EU:C:2015:148.

⁷⁷*Ibid*, para 40.

⁷⁸*Ibid*, para 38. The Court further held that: “With regard to medical devices such as the pacemakers and implantable cardioverter defibrillators at issue in the main proceedings, it is clear that, in the light of their function and the particularly vulnerable situation of patients using such devices, the safety requirements for those devices which such patients are entitled to expect are particularly high” (para 39).

⁷⁹For a complete analysis of the judgment see L Bergkamp, “Is There a Defect in the European Court’s Defect Test? Musing about Acceptable Risk” (2015) *European Journal of Risk Regulation* 309.

⁸⁰See C Newdick, “Risk, Uncertainty and Knowledge in the Development Risks Defence” (1991) *Anglo-American Law Review* 309.

regime reaffirmed, first and foremost, in Article 1 of the Directive.⁸¹ However, a closer analysis of the development risk defence leads to the conclusion that it does not jeopardise consumer protection. First, the very same rationale for this defence, namely striking a balance between manufacturer innovation and consumer access to redress, indirectly benefits European consumers by encouraging technological development.⁸² Second, the CJEU has attempted – albeit without much success – to clarify that the defence under Article 7(e) is based on the objective state of scientific and technical knowledge at the time when the product was put into circulation.⁸³ Third, pursuant to the option set forth in Article 15(1)(b) of the Directive, Member States may set aside the development risk defence thereby enhancing the degree of consumer protection.⁸⁴

Finally, Article 16 of the Directive provides Member States with the ability to limit a producer's total liability for damage caused by identical items with the same defect to an amount not less than Euro 70 million. The rationale behind Article 16 (which was introduced for insurance reasons), its optional character, and the high monetary threshold set out by the Directive, make this “producer-friendly” provision absolutely reasonable and minimises its detrimental impact on consumer protection.

In light of the above, there is no doubt that the Directive is, also from a practical perspective, a strong consumer protective measure. The liability for acts of another and the international dimension – two of the main issues outlined by Macleod⁸⁵ – are effectively addressed by Articles 1 and 3. The case law of the CJEU has partially softened the burden of proof rule set out in Article 4. The “pro-producer” provisions of the Directive (Articles 7 and 16) are reasonable and their effects in terms of consumer protection are almost negligible.

The effectiveness of the EU product liability regime may be confirmed by the steady increase in the number of civil claims brought in some Member States as well as by the increase in out-of-court settlements for compensation between consumers and producers.⁸⁶ Nonetheless, it has been pointed out that some issues remain in respect of the need to address the aspects arising out of cross-border claims.⁸⁷

⁸¹Weatherill, *supra* n 19, 177.

⁸²See COM(2006) 496 final, 7–9; Sterren, *supra* n 74, 89; WK Viscusi, “Does Product Liability Law Make Us Safer?” in F Buckley (ed), *The American Illness* (Yale University Press, 2013), 137.

⁸³C-300/95, *Commission v United Kingdom* EU:C:1997:255, para 29.

⁸⁴This possibility, however, contributes to fragmenting the uniform application of the Directive. Today, only two Member States, namely Luxembourg and Finland, have set aside the development risk defence. In other States, such as France and Spain, this defence does not apply to certain products and/or under certain circumstances; see COM(2011) 547 final, 8–9.

⁸⁵See Macleod, *supra* n 54.

⁸⁶COM(2011) 547 final, 11.

⁸⁷The cost of civil actions is particularly high in some specific Member States, particularly the United Kingdom, see COM(2011) 547 final, 4, 10; P Shears, “The EU Product Liability Directive: Twenty Years on” (2007) *Journal of Business Law* 884.

D. Applicable law rules

The current formulation of Article 5 of the Rome II Regulation (applicable law in product liability claims) is the outcome of a long and complex process that passed through three different proposals and the attempt, by the European Parliament, to delete this special rule from the future regulation.⁸⁸ The difficulties behind this process are mainly due to the profound differences existing among Member States in relation to private international rules for product liability cases.⁸⁹ Despite such difficulties, the need for an *ad hoc* applicable law provision is justified by the incomplete harmonisation of substantive laws and the multi-local character of product liability cases, which is linked to the development of international distribution and international commerce.⁹⁰

As seen above, Recital 20 of the Rome II Regulation suggests that the rationale for the special rule on product liability is less consumer-oriented than the Directive as a whole. This shift towards a more “balanced” approach is also evident from the analysis of Article 5, which pays more attention to the needs of producers and, in some instances, risks undermining consumer protection.

Article 5(1) of the Rome II Regulation provides for a cascade of connecting factors to be applied in successive order: (a) the country of the consumer’s habitual residence; (b) the country in which the product was acquired; and (c) the country in which the injury occurred.⁹¹ On the one hand, these connecting factors do not impede the application of the *lex domicilii communis partium* if the claimant and the tortfeasor have their habitual residence in the same country, on the other hand the law of the countries indicated by Article 5(1)(a)-(c) is applicable insofar as the product causing the damage was marketed in those countries.

The connecting factors established by Article 5(1)(a)-(c) have a “pro-consumer” purpose, especially those of the consumer’s habitual residence and the

⁸⁸See COM(2003) 427 final; COM (2006) 83 final; P6-TA (2005) 284; Palao Moreno, *supra* n 3, 54.

⁸⁹See T Kadner Graziano, “The Law Applicable to Product Liability: The Present State of the Law in Europe and Current Proposals for Reform” (2005) *International & Comparative Law Quarterly* 475.

⁹⁰*Ibid*, 476.

⁹¹On Art 5 of the Rome II Regulation see GP Callies (ed), *Rome Regulations. Commentary on the European Rules of the Conflict of Laws* (Wolters Kluwer, 2011); P Stone, “Product Liability under the Rome II Regulation” in J Ahern and W Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-Contractual Obligations* (Martinus Nijhoff, 2009), 175; L De Lima Pinheiro, “Choice of Law on Non-contractual Obligations Between Communitarization and Globalization: A First Assessment of EC Regulation Rome II (2008) *Rivista di diritto internazionale privato e processuale* 5; TC Hartley, “Choice of Law for Non-contractual Liability: Selected Problems under the Rome II Regulation” (2008) *International & Comparative Law Quarterly* 899; Dickinson, *supra* n 33; Plender and Wilderspin, *supra* n 30, 4th edn, 2014); P Beaumont and P McEleavy, *Anton’s Private International Law* (SULI, 3rd edn, 2011), 650–61; and L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet and Maxwell, 15th edn, 2012).

place where the product was acquired; given their proximity with the person sustaining the damage. This does not mean, however, that such rules have the exclusive aim of protecting the consumer, since it is plausible that those countries have one or more additional connections with the tort.⁹² After all, Article 5(1)(a) makes clear that the significant connecting factor is the victim's habitual residence *when the damage occurred*, thereby requiring, in case of damage caused over a period of time, the identification of the applicable law on a distributive basis in accordance with the mosaic principle.⁹³

The "pro-consumer" character of Article 5(1)(c) is less clear because identifying the place where the injury occurred is often problematic. It appears that such a place may be localised taking into account the jurisprudence of the CJEU on Article 7(2) of the Brussels I-*bis* Regulation as both legal instruments are inspired by the need to ensure predictability and the sound administration of justice. This view is buttressed by both Article 4(1), which excludes indirect damage from the realm of the *lex loci delicti commissi*, and Recital 17 of the Rome II Regulation, which stipulates that "in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively". Accordingly, there is no risk to interpret Article 5 "in a manner which is unconnected to the scheme and objectives pursued by that regulation".⁹⁴ In accordance with the interpretation of the CJEU in *Zuid Chemie*, the *locus damni* designates the country where the initial damage occurred as a result of the normal use of the product for the purpose for which it was intended. This, in practice, usually leads to the application of the law of the country of the habitual residence of the plaintiff so that the legitimate expectations of the consumers are (indirectly) met.⁹⁵

The application of the connecting factors enshrined in subparagraphs (a), (b) and (c) is subject to the proviso that the product was "marketed in that country". As regards the notion of "product", it seems that the EU legislature's intention was to cover not only the specific product that caused the damage but also identical products.⁹⁶ The meaning of "marketed" is more difficult to ascertain, since it does not correspond to the notion of "acquired" used in Article 5(1)(b). A producer-friendly interpretation would make reference to the concept of "put into circulation" contained in Article 11 of the Directive, which is interpreted by the

⁹²S Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity" (2008) *American Journal of Comparative Law* 173.

⁹³Dickinson, *supra* n 33, 5.32; see also A Mills, "The Application of Multiple Laws Under the Rome II Regulation", in J Ahern and W Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-contractual Obligations* (Martinus Nijhoff, 2009), 133.

⁹⁴Kainz, *supra* n 47, para 20. See also Recital 6 to the Rome II Regulation and Recitals 15 and 16 to the Brussels I-*bis* Regulation.

⁹⁵See FJ Garcimartin Alf  rez, "The Rome II Regulation: On the way towards a European Private International Law Code" (2007) *The European Legal Forum* 77.

⁹⁶Dickinson, *supra* n 33, 5.21.

CJEU as the moment when the product leaves the production process and enters a marketing process in the form in which it is offered to the public.⁹⁷ Legal scholars, however, appear to prefer a more consumer-friendly interpretation, identifying the place of marketing as the country where the consumer is directly affected by the marketing process.⁹⁸ In this way, the “product marketed” proviso guarantees the predictability of the applicable law for the producer without unduly undermining consumer protection. As seen below, however, the fairness of this balance is only apparent.

The final sentence of Article 5(1) gives producers the ability to avoid the application of the laws indicated in subparagraphs (a) to (c) if the person claimed to be liable could not reasonably have foreseen the marketing of the product in each of those three classes of country. In such instances, the law of the country in which the producer is habitually resident applies. The foreseeability clause is biased towards producers and problematic in many respects.⁹⁹ First, the clause is based on the subjective element of the “foreseeability” rather than on the objective element of the marketing. This element, coupled with the fact that the foreseeability clause needs to be invoked by the defendant, provides the producer with an unjustified control over the law applicable to the tort. Second, the clause points to the law of the country where the subject claimed to be liable is habitually resident. The notion of habitual residence adopted by Article 23(1) of the Rome II Regulation for legal persons is the place of central administration, which has been preferred over the place of incorporation and the principal place of business. This connecting factor, primarily based on the place where the meetings of the board of directors are held, is easily exploitable by producers and detrimental to consumer protection.¹⁰⁰ Third, the rule contained in the first sentence of Article 5(1) final sentence is deemed to be applied also when the product is not actually marketed in any of the countries indicated in subparagraphs (a) to (c), irrespective of the foreseeability requirement. Since Article 5(1) does not expressly provide for a subsidiary connecting factor where the “product marketed” proviso is not met, the extension of the scope of the foreseeability clause – with its detrimental effects to consumer protection – seems to be the only viable solution.¹⁰¹

⁹⁷C-127/04, *O’Byrne* EU:C:2006:93.

⁹⁸This interpretation of the marketing requirement corresponds to the one in Art 17(1)(c) of the Brussels I-bis Regulation, see Dickinson, *supra* n 33, 5.23; Marengi, *supra* n 47, 1116; and Palao Moreno, *supra* n 3, 58.

⁹⁹Symeonides, *supra* n 92, 207.

¹⁰⁰Stone, *supra* n 91, 186.

¹⁰¹In this respect, “if the law of the habitual residence of the person claimed to be liable applies whenever that person could not reasonably have foreseen marketing in the relevant country identified by lit. a to c, this must be hold true, *a fortiori*, in a case where the product was not even marketed in the relevant country at all”, see P Huber and M Illmer, “International Product Liability. A Commentary on Article 5 of the Rome II Regulation” (2007) *Yearbook of Private International Law* 38. See also A Schwartze, “A European Regime on International Product Liability: Article 5 Rome II Regulation” (2008)

As seen above, Article 5 of the Rome II Regulation is not specifically aimed at the protection of weaker parties. Thus, it does not contain any mechanism to screen the degree of protection granted to consumers by the applicable substantive laws.¹⁰² This is true with regard to both the connecting factors in Article 5(1), and the escape clause in Article 5(2), which is based exclusively on a manifestly closer connection to another country inferable, for instance, from a pre-existing relationship between the parties.¹⁰³ Given the universal character of the choice-of-laws rules in the Regulation,¹⁰⁴ the lack of a screening mechanism of this kind may be problematic whenever the law of a third State designated by Article 5 is less protective than the Directive. In such cases, it is strongly arguable that the national laws implementing the Directive will be considered as overriding mandatory provisions pursuant to Article 16 of the Rome II Regulation when (i) the product is produced or supplied within the EU; and/or (ii) the damage is caused in a Member State.¹⁰⁵ Furthermore, Article 17 enables one to take into account, as a matter of fact, the rules of safety and conduct of the place where the event giving rise to the damage occurred.¹⁰⁶

In light of the foregoing, it is possible to conclude that several aspects of Article 5 of the Rome II Regulation ought to be reviewed to adequately take into consideration the protection of EU consumers. This is not to change the rationale behind this rule, but to reaffirm that striking the proper balance between trade facilitation and consumer protection requires focusing on both the elements of the equation. The current structure of Article 5 is biased towards producers in that: (i) the foreseeability clause is unduly generous in both its prerequisite and its connecting factor; (ii) Article 5(1) *de facto* extends the scope of such clauses when the “product marketed” proviso is not satisfied; and (iii) the issues relating to the level of consumer protection in the law of third States *vis-à-vis* the Directive are left to the discretionary application of Article 16 of the Rome II Regulation.

Netherlands Internationaal Privaatrecht 430. Conversely, Hartley, *supra* n 91, 904–905, submits that the correct solution is the application of Art 4 of the Rome II Regulation, albeit admitting that such solution has strange and illogical consequences.

¹⁰²With regard to the claimant’s domicile see Symeonides, *supra* n 92, 208–209.

¹⁰³See R Fentiman, “The Significance of Close Connection”, in J Ahern and W Binchy (eds), *The Rome II Regulation on the Law Applicable to Non-contractual Obligations* (Martinus Nijhoff, 2009), 85.

¹⁰⁴Pursuant to Art 3 of the Rome II Regulation: “Any law specified by this Regulation shall be applied whether or not it is the law of a Member State”.

¹⁰⁵See § C above. See also Dickinson, *supra* n 33, 5.48.

¹⁰⁶Art 17 of the Rome II Regulation stipulates that: “In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability”.

E. Rules on jurisdiction

Although the Brussels I-bis Regulation has special jurisdiction rules for insurance, consumer, and employment contracts,¹⁰⁷ it does not set out any special rule for product liability cases. Therefore, absent any choice of court agreement, the consumer will have the option to sue the tortfeasor under Articles 4 (defendant's domicile), 7(2) (place of the harmful event) or 8 (*forum connexitatis*) of the Brussels I-bis Regulation. As seen above, all these rules are inspired by the connection between the court and the dispute, their main purpose being the sound administration of justice.¹⁰⁸ Nonetheless, in the context of product liability, Articles 7 (2) and 8 provide the plaintiff with a choice of grounds for jurisdiction that may indirectly serve the objective of consumer protection.

Article 7(2) of the Brussels I-bis Regulation uses the place where the harmful event occurred or may occur as a head of jurisdiction in tortious matters.¹⁰⁹ In the leading case *Mines de Potasse d'Alsace*, the CJEU held that Article 7(2) encompasses two separate heads of jurisdiction: (i) the place where the wrongful conduct took place (*locus actus*); and (ii) the place where the damage occurred (*locus damni*).¹¹⁰ The choice between these two places is left to the plaintiff, who has the opportunity to sue the defendant in the country where he or she sustained the damage, this being the initial injury, whereas consequential losses are not considered for jurisdictional purposes.¹¹¹ Generally speaking, granting such a choice among competing jurisdictions is particularly advantageous for the plaintiff, especially because the *locus damni* is frequently close to his or her domicile.¹¹² Yet, the inherent complexity of international product liability cases makes it difficult to localise the place of the harmful event, since products are usually designed, manufactured, assembled and distributed in different countries, which, in turn, may not correspond to the country where the initial injury is sustained by the consumer. In principle, several places could be considered as the *locus damni*, including those where the product is put into circulation, delivered to or acquired by the consumer. In *Zuid Chemie*, the CJEU has made clear that the *locus damni* "is the place where the event which gave rise to the damage produces its harmful effects, that is to say, the place where the damage caused by the defective product actually manifests itself".¹¹³ It has also stated that such a place must not be confused with

¹⁰⁷Brussels I-bis Regulation, Sections 3, 4 and 5.

¹⁰⁸Brussels I-bis Regulation, Recitals 13 and 16.

¹⁰⁹See Magnus and Mankowski, *supra* n 48, 262.

¹¹⁰Case 21/76, *Handelskwekerij G. J. Bier v Mines de potasse d'Alsace* EU:C:1976:166 . See also C-68/93, *Shevill* EU:C:1995:61.

¹¹¹C-220/88, *Dumez* EU:C:1990:8; C-364/93, *Marinari* EU:C:1995:289. See also A Briggs and P Rees (eds), *Civil Jurisdiction and Judgments* (LLP, 4th edn, 2005).

¹¹²However, this can also promote jurisdictional uncertainty and favour forum shopping, see C McLachlan, "Transnational Tort Litigation: An Overview", in C McLachlan and P Nygh (eds), *Transnational Tort Litigation: Jurisdictional Principles* (Clarendon, 1996), 1.

¹¹³*Zuid Chemie*, *supra* n 45, para 27.

the place where the event that damaged the product occurred, that being the *locus actus*.¹¹⁴ Pursuant to this decision, in product liability cases, the place of the harmful event will – in the majority of instances – be the place where the plaintiff is domiciled. This is consistent with the *Dumez* and *Marinari* case law, insofar as only the initial damage is taken into account.¹¹⁵

As regards the *locus actus* under Article 7(2), in *Kainz* the CJEU has held that this is the place where the product is manufactured,¹¹⁶ thereby displacing the other solutions proposed by legal scholars, such as the manufacturer's domicile or the country where the product is put into circulation (or marketed).¹¹⁷ Such interpretation is justified, once again, by the need to promote the efficacious conduct of proceedings and the sound administration of justice.¹¹⁸

The special head of jurisdiction set out in Article 8(1) of the Brussels I-bis Regulation is not based on the subject-matter of the dispute, rather on the connection between existing claims.¹¹⁹ Article 8(1) permits connected claims to be brought against multiple co-defendants ("additional defendants") before the court where one of the co-defendants ("anchor defendant") is domiciled, thereby favouring the centralisation of parallel lawsuits. The only conditions for this provision to apply are that "the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". Both these conditions have been interpreted extensively by the CJEU. The requirement of the close connection has been interpreted as encompassing both factual and legal connections, without requiring that the two causes of action have the same legal basis.¹²⁰ The requirement of the risk of irreconcilable judgments has been extended to the risk of contradictory decisions, albeit not mutually exclusive.¹²¹

Although Article 8(1) applies exclusively when the anchor defendant is sued in the court of his or her domicile, whereas it cannot be used when other heads of jurisdiction (including those of Article 7(2)) come into play, it can be a useful tool for consumers in product liability cases.¹²² As seen above, indeed, Article 3 of the Directive extends the notion of "producer" for liability purposes to the:

¹¹⁴*Ibid*; Magnus and Mankowski, *supra* n 48, 335.

¹¹⁵*Dumez*, *supra* n 111; *Marinari*, *supra* n 111; Palao Moreno, *supra* n 3, 53.

¹¹⁶*Kainz*, *supra* n 47, para 29.

¹¹⁷See Palao Moreno, *supra* n 3, 52; A Saravalle, "Evento dannoso e sue conseguenze patrimoniali: giurisprudenza italiana e comunitaria a confronto" (1996) *Foro italiano* 341.

¹¹⁸*Kainz*, *supra* n 47, para 27.

¹¹⁹See Magnus and Mankowski, *supra* n 48, 372; B Hess, "The Proposed Recast of the Brussels Regulation: Rules on Jurisdiction", in F Pocar, I Viarengo and FC Villata (eds), *Recasting Brussels I* (CEDAM, 2012) 91.

¹²⁰See C-98/06, *Freeport* EU:C:2007:595; C-145/10, *Painer* EU:C:2011:798.

¹²¹See C-406/92, *The "Tatry"* EU:C:1994:400.

¹²²See R Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd edn, 2015), 349–53; H Gaudemet-Tallon, *Compétence et exécution des jugements en Europe* (LGDJ, 4th edn, 2010), 254–59.

(i) manufacturer of the finished product; (ii) producer of any raw material; (iii) manufacturer of a component part; (iv) subject putting his name or trademark on the product; (v) importer of a product within the EU; and (vi) supplier.¹²³ Since these economic operators are normally domiciled in different countries, the possibility of consolidating parallel claims against them in one Member State would increase the possibility for the consumer to recover the entire compensation without starting multiple proceedings.

Albeit not inspired by the need to promote consumer protection, Articles 7(2) and 8(1) set out special grounds of jurisdiction that, indirectly, benefit EU consumers in international product liability cases. This advantage, however, risks being wiped out when producers from third States are involved, due to the limited scope of application *ratione personae* of the general and special grounds of jurisdiction set forth in the Brussels I-*bis* Regulation.

As outlined above, Article 6(1) of the Brussels I-*bis* Regulation stipulates that the common rules on jurisdiction apply only when the defendant is domiciled in a Member State.¹²⁴ The exceptions to the general criterion of the defendant's domicile are limited to consumer and employment contracts, choice of court agreements and exclusive jurisdiction. This means that in the case of producers domiciled outside the EU, neither Article 7(2), nor Article 8(1) would apply.¹²⁵ Domestic private international rules on jurisdiction may be less advantageous than the EU ones and force the consumer to litigate abroad.¹²⁶ For instance, Finland, Greece and Poland lack any special ground of jurisdiction for tort-related matters, whereas Austria, Cyprus and the Czech Republic take into account solely the *locus actus*.¹²⁷ The obligation to sue a non-EU defendant abroad creates an additional burden for consumers and risks depriving them of the protection granted by the EU legislation.¹²⁸ Furthermore, in the likely event that some defendants are domiciled within the EU and others are domiciled outside the EU, domestic courts will have to apply the Brussels I-*bis* Regulation to the defendants domiciled in the EU and domestic private international rules

¹²³See above § III.

¹²⁴The Brussels I-*bis* Regulation did not follow the Commission's Proposal with regard to the worldwide extension of the EU jurisdiction rules, see P Hay, "Notes on the European Union's Brussels-I 'Recast' Regulation: An American Perspective" (2013) *European Legal Forum* 1; PA Nielsen, "The New Brussels I Regulation" (2013) *Common Market Law Review* 503.

¹²⁵Pursuant to Art 63 of the Brussels I-*bis* Regulation, a legal person is to be considered domiciled in the place where it has its: (i) statutory seat; or (ii) central administration; or (iii) principal place of business.

¹²⁶Yet, it might be the case that domestic private international rules setting forth "exorbitant" heads of jurisdiction are more advantageous for consumers than the EU rules.

¹²⁷See A Nuyts, "Study on Residual Jurisdiction" (2007), http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

¹²⁸SEC (2010) 1547 final, 21.

to the defendants domiciled outside the EU.¹²⁹ This circumstance may force consumers to start separate proceedings. For example, Denmark, Germany, Greece, Finland, Malta, Sweden and Poland do not allow for the consolidation of claims brought against multiple defendants unless national courts have jurisdiction over each of the co-defendants under domestic private international rules.¹³⁰

Although Article 3 of the Directive provides for at least one subject deemed to be liable within the EU, modern business practices can easily frustrate the protective aim of the Directive.¹³¹ Manufacturing subsidiaries with inadequate assets can be set up in the EU by foreign companies thereby frustrating the provision in Article 3(1). Similarly, empty-shell companies can be easily set up in almost all the Member States to import products from outside the EU, so that the liability extension in Article 3(2) would be practically meaningless.

The above analysis indicates that the jurisdiction rules in the Brussels I-*bis* Regulation – with specific regard to Articles 7(2) and 8(1) – guarantee an adequate level of consumer protection in international product liability cases, though the rationale for these provisions is completely unrelated to consumer protection. However, the inapplicability of the Brussels-I *bis* Regulation to non-EU defendants is potentially detrimental to the position of EU consumers, especially in a society characterised by the steady development of international trade.

F. Conclusions

The EU has not enacted a coherent and fully-fledged product liability regime. At the substantive level, the Directive – adopted thirty-three years ago – is the only piece of legislation harmonising the laws of the Member States. At the private international law level, the special applicable law provision in the Rome II Regulation coexists with the general rules in the Brussels I-*bis* Regulation. The analysis has demonstrated that, notwithstanding the existence of a piecemeal regime inspired by partially different objectives, the aforementioned measures guarantee a satisfactory level of consumer protection. Yet, some specific reforms are needed, albeit not in the form of revolution of the EU product liability regime.

As regards the Directive, the scope of the development risk defence ought to be clarified. In this respect, it should be pointed out that the defence is exclusively based on the objective state of scientific and technical knowledge at the time when the product was put into circulation, without any reference to the subjective knowledge of the producer. In other words, producers should be prevented from using the development risk defence as a shield if the relevant knowledge was accessible using the necessary professional diligence. It is questionable whether further harmonisation in this area would be beneficial, or even feasible. On the

¹²⁹Fawcett, *supra* n 8, 60.

¹³⁰Nuyts, *supra* n 127, 51–53.

¹³¹Fawcett, *supra* n 8, 59.

one hand, the opt-out clause in Article 15(1)(b) was vital in resolving the disagreement over the development risk defence, on the other hand, just a few Member States extended the liability regime to cases covered by the defence. The same can be said for the liability limitation in Article 16.

On a different level, the overriding mandatory character of the product liability rules set out in the Directive should be made explicit in order to deal with the less protective laws of third States more effectively.

Article 5 of the Rome II Regulation should be reviewed in order to strike a fairer balance between consumers and producers' needs. First, it is necessary to provide an explicit alternative to the connecting factors in subparagraphs (a) to (c) when the product marketed proviso is not met. Second, the foreseeability clause ought to be deleted as the escape clause in Article 5(2) gives national courts the power to take into account situations where the producer could not reasonably foresee the marketing of the product in the countries indicated by Article 5(1).

The special heads of jurisdiction in Articles 7(2) and 8(1) of the Brussels I-*bis* Regulation lack effectiveness when manufacturers established outside the EU are involved. Since the general extension of the Brussels regime to non-EU defendants has been rejected because of the absence of political consensus, other solutions might be adopted to enhance consumer protection. Among the options proposed by Nuyts in his Study on Residual Jurisdiction, are: (i) the extension of the EU jurisdiction rules to cases falling within the geographical scope of the law of internal market; or (ii) the definition of *ad hoc* jurisdiction rules for claims against non-EU defendants.¹³² Although both such options might effectively address the issue outlined above, they would add an additional layer of complexity to the Brussels I-*bis* Regulation.

Disclosure statement

No potential conflict of interest was reported by the author.

¹³²Nuyts, *supra* n 127, 110, 113.