Provisional text

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 12 June 2025 (1)
Case C-77/24 [Wunner] (i)
NM,
OU
v
TE

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))
(Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in civil matters – Law applicable to non-contractual obligations – Civil liability claim brought by a consumer habitually resident in a Member State against directors of an online gambling company registered in another Member State – Claim based on the alleged infringement of the national gambling law of the first Member State – Regulation (EC) No 864/2007 – Scope – Exclusions – Article 1(2)(d) – Non-contractual obligations arising out of the law of companies – Nature of the cause of action – Breach of a duty or prohibition imposed erga omnes – Irrelevance of that exclusion – Determination of the applicable law – Article 4(1) – Country in which the 'damage' occurs – Country from which the player participates in the online games of chance)

I. Introduction

1. The present request for a preliminary ruling, referred by the Oberster Gerichtshof (Supreme Court, Austria), relates to a civil liability claim brought, before the Austrian courts, by a consumer habitually resident in Austria against the former directors of a gambling company registered in Malta (now bankrupt). The consumer alleges that the offer, by that company, of online games of chance in Austria without the requisite licence under the law of that State constitutes a tort (that caused him to sustain significant monetary losses), for which those directors are liable.

2. Having to decide whether Austrian or Maltese law governs that tort, the referring court seeks clarifications on two issues. First, it wishes to know whether Regulation (EC) No 864/2007 (2) ('the Rome II Regulation') is applicable to such a tort. More specifically, that court wonders whether Article 1(2)(d) of that instrument, which excludes non-contractual obligations 'arising out of the law of companies' from its scope, covers that kind of a directors' liability for the acts of the company. Assuming that that is not the case, that court wonders about the interpretation of the general rule laid down in Article 4(1) of that regulation, pursuant to which a non-contractual obligation arising out of a tort is governed by the law of the country in which the 'damage' occurs. In essence, the referring court enquires what the 'damage' is exactly and where it occurred with respect to such a claim.

II. Legal framework

A. The Rome II Regulation

3. Article 1(2)(d) of the Rome II Regulation states that 'non-contractual obligations arising out of the law of companies … regarding matters such as … the personal liability of officers … as such for the obligations of the company …' are excluded from the scope of that regulation.

4. Article 4 of the Rome II Regulation, entitled 'General rule', provides, in its first paragraph, that 'unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur'.

B. Austrian law

5. Paragraph 1301 of the Allgemeines bürgerliches Gesetzbuch (General Civil Code) ('the Austrian General Civil Code') indicates that 'two or more persons can be held liable for damage caused unlawfully in that they contributed to it jointly, directly or indirectly, by inducement, threats, orders, assistance, concealment and the like, or merely by refraining from fulfilling the special obligation to prevent harm.'

6. Paragraph 1311 of that code provides that a 'pure accident affects the person in whose assets or person it occurs. However, if someone has caused the accident by his or her wrongful act, he or she has infringed a law intended to prevent accidental damage … he or she is liable for all harm which would not otherwise have occurred.'

7. Paragraph 3 of the Glücksspielgesetz (Law on Gambling) ('the Austrian Law on Gambling') states that 'unless this Law specifies otherwise, the right to organise games of chance shall be reserved to the Federal State (gaming monopoly).'

III. Facts, national proceedings and the questions referred

8. It is apparent from the order for reference and from the material in the case file that Titanium Brace Marketing Limited ('Titanium'), currently in liquidation, used to offer online games of chance from its registered office in Malta. All the facilities, including the servers, used for that activity were located there. NM and OU were directors of that company at the material time. Titanium directed its activity to several countries, including Austria, through the website www.drueckglueck.com. Consumers could participate, on that website, in the games in question from that country. Titanium held a gaming licence delivered by Maltese authorities, in accordance with Maltese law. However, it did not hold a gaming licence in Austria, under the Austrian Law on Gambling.

9. To participate in the online games of chance, consumers had to create an account ('Player's Account') on Titanium's website, which involved agreement by the consumer to the general terms and conditions of that company (effectively concluding a gambling contract with the latter). They then had to top up that account using one of the methods proposed, such as payment with a credit card or through a bank transfer. When participating in a game of chance, the bets placed were debited to that account. Any winnings would also be credited to it. Customers could claim payment of the balance of their Player's Account from Titanium.

10. As required under Maltese law, Titanium held a bank account ('Player Protection Bank Account'), managed by a bank established in Malta, in which it deposited the amounts corresponding to the accumulated balances of all the Player's Accounts. Those funds were thus kept separate from the rest of the company's assets to guarantee the payment of players' claims in case of bankruptcy.

11. Between 14 November 2019 and 3 April 2020, TE, a consumer habitually residing in Vienna (Austria), participated in online games of chance via Titanium's website. To top up his Player's Account, he transferred money from his personal bank account, managed by a bank established in Austria, to the Player Protection Bank Account in Malta. During that period he incurred a loss totalling EUR 18 547.67 resulting from that activity.

12. TE brought a civil liability claim against NM and OU before the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna, Austria), seeking damages equivalent to his gambling losses, plus interests and costs. TE alleged that the offering, in Austria, of online games of chance, without the licence required under the Austrian Law on Gambling, constituted an infringement of that law. In their capacity as directors of Titanium, NM and OU were responsible for the company's actions. Since the Austrian Law on Gambling has been designed (inter alia) to prevent harm to Austrian consumers, it constituted 'protective provisions' (*Schutzgesetze*) within the meaning of Paragraph 1311 of the Austrian General Civil Code. Under the latter, the infringement of such 'protective provisions' constituted a tort, for which NM and OU were personally liable towards Titanium's clients. TE also submitted that the court seised has international jurisdiction under Article 7(2) of Regulation (EU) No 1215/2012 (3) ('the Brussels I *bis* Regulation').

13. NM and OU replied that the Austrian courts lacked international jurisdiction. In their view, Article 7(2) of the Brussels I *bis* Regulation granted, in reality, jurisdiction to the courts of Malta. They also submitted that TE's claim was governed not by Austrian law, but by Maltese law, which did not recognise such a director's liability.

14. By decision of 27 April 2023, the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna) dismissed the claim on the ground of lack of international jurisdiction.

15. Upon appeal by TE, by decision of 4 September 2023, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) took the view that Austrian courts had jurisdiction with respect to TE's claim under Article 7(2) of the Brussels I *bis* Regulation. Accordingly, it set aside the relevant part of the first instance decision and ordered the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna) to rule on the merits of the case.

16. Consequently, NM and OU lodged an appeal on a point of law against the decision of the Oberlandesgericht Wien (Higher Regional Court, Vienna) before the Oberster Gerichtshof (Supreme Court), which was declared admissible by the first court.

17. Taking the view that, on the one hand, the jurisdiction of the Austrian courts, under the Brussels I *bis* Regulation, seemed clear but that, on the other hand, the issue of the law governing TE's claim was not, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

Must Article 1(2)(d) of [the Rome II Regulation] be interpreted as meaning that it also applies to claims for damages against an officer of a company which a creditor of the company bases on tortious liability for infringement of protective provisions (such as provisions of legislation on games of chance) by that officer?

If Question 1 is answered in the negative:

Must Article 4(1) of the [Rome II Regulation] be interpreted as meaning that, in the event of an action for damages based on tortious liability in respect of gaming losses suffered which is brought against an officer of a company offering online games of chance in Austria without a licence, the place where the damage occurred is determined by

the place from which the player effects credit transfers from his or her bank account to the player account maintained by the company,

the place where the company maintains the player account in which deposits from the player, winnings, losses and bonuses are entered,

the place from which the player places bets via that player account which ultimately result in a loss,

the player's place of residence as the location of his or her claim to payment of the credit balance in his or her player account,

the location of the player's main assets?'

18. Written observations have been submitted by NM and OU, TE, the Belgian and Maltese Governments and the European Commission. NM and OU, TE, the Austrian, German, Belgian and Maltese Governments as well as the Commission were represented at the hearing that took place on 5 February 2025.

IV. Analysis

19. The background to the present case is games of chance offered online by companies established in Malta. Usually, their respective websites are not only accessible from, but also directed (through the languages used, advertising, and so on) to, other Member States. While those companies operate under licences delivered by the Maltese authorities, in accordance with Maltese law (which purport to cover the provision of gambling services not only *in* Malta, but also *from* Malta), they often do not hold the licences required, under the law of the target Member States, to provide such services therein (or in the case of Austria, are completely barred from doing so, as gambling is subject, as a rule, to a State monopoly).

20. A significant number of consumers in those other Member States participate in those online games of chance. Many of them lose considerable amounts of money as a result. In recent years, such unfortunate gamblers sought to recover their losses by bringing civil proceedings before their local courts against Maltese gambling companies. Typically, they allege that, since the games they played had been offered to them illegally (as the provider in question did not comply with the law of the Member State in which the consumer played), the underlying gambling contract is null and void, which entails the restitution of the benefits exchanged under the latter, including the stakes that the consumer paid. In Austria and Germany, those proceedings have even turned into mass litigation. (4) It appears that, in most cases, Austrian and German courts have treated such claims favourably.

21. The proceedings brought by TE before the Austrian courts fall within that context, as he too participated in the online games of chance offered by a Maltese company (Titanium) and lost a significant amount of money, which he now seeks to recover. Nevertheless, his claim presents some peculiarity. As mentioned in point 12 above, first, it is not directed against the gambling company (Titanium) itself, but against two of its former directors, and, secondly, it is not based on the alleged illegality of the gambling contract and the law of restitution, but on (Austrian) tort law.

22. There appears to be two reasons as to why TE decided to target NM and OU instead of Titanium. The first is rather common: the company went bankrupt. The second is, by contrast, extraordinary: in response to the mass litigation described above, and in view of the financial impact that it could have on Maltese gambling companies, the Maltese legislature adopted, on 12 June 2023, a law, 'Bill 55', that added Article 56A to the Maltese Gaming Act. That new provision provides, in essence, that players' restitution claims are inadmissible before the Maltese courts, but also that any foreign judgment upholding such a claim will not be recognised or enforced in Malta.

23. The issue of which law governs TE's claim, which is the sole subject matter of the questions referred by the Oberster Gerichtshof (Supreme Court), (5) is crucial for the outcome of that claim. As the referring court explains, under Austrian law, as construed in its own case-law, that claim may succeed: pursuant to Paragraphs 1301 and 1311 of the Austrian General Civil Code, directors may indeed be held liable for the infringement of 'protective provisions' (within the meaning of Paragraph 1311) committed by the company, and the relevant parts of the Austrian Law on Gambling qualify as such. By contrast, according to NM and OU's assertions, Maltese law does not recognise such a liability.

24. Following the logical order in which the referring court presented its questions, I will address, in the next points, first, the issue of the *applicability* of the Rome II Regulation to a claim such as the one brought by TE (Section A, first question). Secondly, I will examine the issue of the law governing that claim pursuant to the conflict-of-law rule laid down in Article 4(1) of that regulation (Section B, second question). I will also, thirdly, briefly go beyond those questions and address a matter closely related to the second issue, namely the possibility to displace the law designated by Article 4(1) of the Rome II Regulation on the basis of the 'escape clause' laid down in Article 4(3) of that regulation (Section C).

A. The applicability of the Rome II Regulation (first question)

25. Article 1(1) of the Rome II Regulation defines its substantive scope. Pursuant to that provision, that instrument applies, in 'situations involving a conflict of laws', to 'non-contractual obligations' in 'civil and commercial matters'.

26. Those conditions are fulfilled here. First, the situation underpinning TE's claim involves 'a conflict of laws': the facts are connected to both Austria and Malta, raising the question of whether that claim should be determined under Austrian or Maltese law. Secondly, the alleged obligation on NM and OU to compensate TE, on which the latter's claim rests, is clearly 'non-contractual' within the meaning of the Rome II Regulation: it arises out of a 'tort/delict' (to use the terms of the regulation), (6) allegedly committed by NM and OU, consisting in the infringement of a prohibition imposed by the law on anyone, irrespective of any 'contract' (namely the prohibition to offer unlicensed games of chance to the public in Austria, laid down in the Austrian Law on Gambling). Thirdly, that dispute concerns 'civil and commercial matters', as it arose between private parties, under the ordinary rules of civil law.

27. In principle, the conflict-of-law rules laid down in the Rome II Regulation determine the law applicable to such a 'non-contractual obligation'. Nevertheless, Article 1(2) of that regulation excludes certain matters from its scope. In particular, point (d) thereof provides that that instrument does not apply, by way of exception, to 'non-contractual obligations arising out of the law of companies'. By way of example, that provision specifies that that category includes 'the personal liability of officers … as such for the obligations of the company'.

28. In that context, the referring court wonders, by its first question, whether the exclusion laid down in Article 1(2)(d) of the Rome II Regulation covers a claim such as the one brought by TE against NM and OU, in their capacity as directors of Titanium.

29. Together with TE, the Austrian and Belgian Governments and the Commission, I do not believe it does.

30. To start with, in the absence of a reference to (any) national law in Article 1(2)(d) of the Rome II Regulation, the category of 'non-contractual obligations arising out of the law of companies' must be defined autonomously, for the purposes of that regulation. Particular importance should be attached, in that respect, to the objective pursued by the EU legislature with the exclusion in question.

31. As the Court explained in its judgment in BMA Nederland, (7) in essence, that objective is to ensure that certain matters closely linked to the 'birth' (formation), 'life' (functioning and operation) and 'death' (dissolution) of companies, and which are usually subject, in the laws of the Member States, to specific rules, derogating from the ordinary rules of civil and commercial law, are kept subject to a single body of law, designated as the 'law applicable to the company' (or *lex societatis*).

32. Indeed, if other body of rules (for instance, general tort law) were to interfere with such matters when companies exercise their activities in several States, it would create a significant degree of legal uncertainty for them (and their members, officers and creditors). By contrast, the certainty with respect to the law applicable to a company provided by Article 1(2)(d) of the Rome II Regulation is meant to foster the freedom of companies to establish themselves and provide services across the internal market, under Articles 49 and 56 TFEU. (8)

33. In the light of the objective pursued under Article 1(2)(d) of the Rome II Regulation, and as the Court found in its judgment in BMA Nederland, that exclusion covers liability/'non-contractual obligations' on company officers, including directors, which exist 'for reasons specific to … company law'. (9) That is the case where that liability/'obligation' arises out of the breach of a duty (or prohibition) imposed on such a director *by reason of his or her appointment* (which, by hypothesis, goes beyond the duties that the ordinary rules of civil and commercial law impose on anyone), irrespective of the classification of such a duty in the national *lex fori* or *lex causae*. Indeed, generally speaking, the rights that directors enjoy and the obligations imposed on them by reason of their appointment are inextricably linked to the daily management, functioning, operation and, thus, 'life' of a company. Furthermore, those rights and obligations usually depend on the corporate form employed. Thus, such matters should be kept exclusively under the relevant *lex societatis*. Accordingly, such a liability/'obligation' should be regarded as 'arising out of the law of companies' within the meaning of Article 1(2)(d) of the Rome II Regulation. That is what the legislature had in mind when it mentioned 'the personal liability of officers … as such' in that provision. (10)

34. By contrast, as TE, the Belgian Government and the Commission submit, the exclusion laid down in Article 1(2)(d) of the Rome II Regulation cannot cover liability/'non-contractual obligations' on a company director arising 'for reasons … extraneous to … company law'. (11) While, as the Maltese government submits, it would bring certainty to company directors if *any* liability they may face when acting in that capacity, whatever the underlying reasons, were subject to the single body of law of the *lex societatis*, giving such a wide scope to that exclusion would stretch it beyond its objective, as explained in point 31 above. It would be even more inappropriate given that, as an exception to the scope of that regulation, Article 1(2)(d) must be interpreted strictly. (12)

35. The claim brought by TE (and the corresponding liability/'non-contractual obligation' on NM and OU, on which that claim rests), while directed against company directors acting in that capacity, concerns the second scenario described above. Indeed, the liability/'obligation' on NM and OU arises from the infringement of a prohibition imposed by the law *independently of their appointment* (namely the prohibition on *anyone* to offer unlicensed games of chance to the public in Austria, laid down in the Austrian Law on Gambling). Such a prohibition, and the consequences of an infringement thereof, is not linked to the daily management, functioning, operation and, thus, 'life' of that company. It is imposed for other, 'extraneous' reasons (including the protection of the interests of consumers).

36. Thus, the alleged liability/'non-contractual obligation' on NM and OU cannot be regarded as 'arising out of the law of companies' within the meaning of Article 1(2)(d) of the Rome II Regulation. Accordingly, such a liability/'obligation' falls within the scope of that regulation and is governed by the law designated by the rules laid down therein. Depending on those rules and the facts of the case, that law may very well differ from the *lex societatis* governing the company. The issue of the law applicable to that 'obligation' will be examined in the next section of this Opinion.

37. That conclusion is not called into question by NM and OU or the Maltese Government's argument that, since, properly speaking, the person offering the contentious games of chance in Austria was Titanium, and not its directors, only that company could have infringed the prohibition under the Austrian Law on Gambling. The alleged 'non-contractual obligation' arising out of that tort is, in fact, an 'obligation of the company'. Whether a company director can be held 'personally liable' towards the injured third party for such an 'obligation' is, in essence, a matter of 'company law'. Such a liability exists (only) where that director has infringed the duty of care imposed on him or her, by reason of his or her appointment, to ensure that the company complies with its legal obligations. (13)

38. In fact, contrary to what those interveners have argued, first, when a company commits a tort, whether the resulting 'non-contractual obligation' may be imputed to the officers of that company is, by essence, a matter for the law applicable to that tort, as designed under the Rome II Regulation.(14) The civil liability rules of the Member States (like their criminal law rules) often impute the acts of a person to another, under various theories (instigation, vicarious liability, and so on). In particular, torts committed by companies are sometimes imputable to their officers (on the ground that they have ordered the contentious course of action, or had the right, ability or duty to control it, and so on), irrespective of the duties otherwise imposed on those officers under 'company law'. The rationale of such a potential imputability of liability is 'tortious' by nature. It centres on ensuring the respect of rules of conduct in society and due compensation of the victims of breaches thereof. Imputing certain wrongs committed by companies to the officers managing them may contribute to ensure that those rules are duly taken into account by such legal entities and that victims can obtain relief in case of breach. The 'tortious' nature of that issue is confirmed by Article 15(g) of the Rome II Regulation. Indeed, that provision specifies that the law applicable to a 'non-contractual obligation' arising out of a tort governs 'liability for the acts of another person'.

39. Secondly, it may be that, on the facts of the case, *in addition* to the 'tortious' liability/'non-contractual obligation' arising out of the infringement of the Austrian Law on Gambling, NM and OU could *also* face a 'company law' liability/'non-contractual obligation' for infringing a duty of care imposed on them, by reason of their appointment, to ensure that the company complies with its legal obligations. In fact, it is common for a single event to entail, for an company director, such an accumulation of liabilities. (15) Nevertheless, those 'obligations' are *distinct* and classified accordingly, in the light of their respective rationale: they are governed by different laws, determined in the light of various conflict-of-law rules (Rome II Regulation on the one hand, national rules on the other). Here, TE's claim rests, I recall, on the 'tortious' liability of NM and OU, not on any potential, parallel 'company law' liability that may be imposed on them.

40. Having regard to the foregoing considerations, the answer to the first question should be that the exclusion concerning 'non-contractual obligations arising out of the law of companies' laid down in Article 1(2)(d) of the Rome II Regulation does not cover an alleged 'non-contractual obligation' of a company director arising out of the infringement of a duty or prohibition imposed by the law independently of his or her appointment, such as the prohibition on anyone to offer games of chance in a given Member State without a licence granted by the authorities of that State.

B. The country where the 'damage' occurs within the meaning of Article 4(1) of the Rome II Regulation (second question)

41. It follows from the previous section that the Rome II Regulation is applicable to a 'non-contractual obligation' such as the one underpinning TE's claim. I now turn to the issue of the law governing that 'obligation' under that regulation.

42. None of the special rules laid down in Articles 5 to 9 of the Rome II Regulation cover a tort such as the one at issue. Nor did the parties choose, as permitted under Article 14 thereof, the law applicable to the 'non-contractual obligation' arising out of that tort. Accordingly, that law ought to be determined under the general rule laid down in Article 4(1) of that instrument.

43. Under that general rule, the law applicable to a 'non-contractual obligation' arising out of a tort is the law of the country in which the 'damage' occurs, irrespective of the country in which the 'event giving rise to the damage' occurred, and irrespective of the country or countries in which the 'indirect consequences' of that event occur.

44. In that context, the referring court asks, by its second question, in essence, what the 'damage' caused by the (alleged) tort underpinning TE's claim is, and where that 'damage' is deemed to have occurred, for the purposes of Article 4(1) of the Rome II Regulation. That court suggests, in its question, several connecting factors which could be relevant in that regard. Some preliminary explanations are, in my view, required to grasp the complexity of that question.

45. For the purposes of that regulation, Article 2(1) of the Rome II Regulation defines the concept of 'damage' as '*any consequence* arising out of [a] tort …' (emphasis added). Nevertheless, it follows from point 43 above that Article 4(1) of that regulation rests on a more subtle distinction between the *direct* (16) 'damage' caused by the harmful event and the *indirect* 'consequences' of that event. Only the first matters for determining the law governing a tort.

46. In many cases, it is relatively straightforward to distinguish between the direct 'damage' caused by a harmful event and any of its 'indirect consequences'. For instance, in the case of traffic accident, that 'damage' is the victim's *physical* injury and/or *material* damage to his or her car caused by that accident. It occurred where the collision took place. The further economic consequences of that injury (costs of medical treatment, loss of revenue that the injury entailed, and so on) and/or property damage (costs of repair of the car, and so on) are 'indirect consequences' of the accident. (17)

47. By contrast, distinguishing the direct 'damage' caused by the harmful event from its 'indirect consequences' may prove challenging in situations where the loss alleged by the claimant has no *physical manifestation*. That is the case here: the gambling losses claimed by TE consist, essentially, in a reduction of *immaterial*, monetary assets. It belongs to the category of 'purely economic' or 'purely financial' loss. Hence, the second question of the referring court.

48. That being clarified, to answer that question, I would recall that, generally speaking, the 'damage' envisioned in Article 4(1) of the Rome II Regulation, are the direct consequences of a tort on the victim (or, more precisely, on a legally protected interest of the latter, to which the claim relates). This depends on the nature of the (alleged) tort underpinning the claim. (18) Thus, to identify that 'damage', an analysis of the characteristics of that tort is a starting point. Nevertheless, since the search for the 'damage' is carried out for the purposes of determining the applicable law under Article 4(1) of the Rome II Regulation, the objective pursued under that provision must be kept in mind. The EU legislature's choice of the country in which the 'damage' occurs as a connecting factor was meant to guarantee, in most cases, the application of the law with the closest connection to the tort and which is foreseeable for both the victim and the tortfeasor, thus ensuring legal certainty. That connecting factor was also meant to ensure a 'fair balance' between the interests of the parties. (19) The criterion chosen to identify that 'damage' must be convincing from the point of view of those objectives, and may differ from the solution that may exist in that respect in substantive law. (20)

49. In that context, the case-law of the Court concerning Article 7(2) of the Brussels I *bis* Regulation should also be taken into account. I recall that that provision contains a rule of special jurisdiction for 'matters relating to tort', which designates the courts for the 'place where the harmful event occurred'. In the judgment in *Bier*, (21) the Court held that this covers both (i) the place where the 'damage' occurred and (ii) the place of the event that gives rise to it (so that the claimant may choose where to bring proceedings when those two places do not coincide). With respect to the first criterion, the Court ruled, in the judgment in *Marinari*, (22) that it is limited to the place where the 'initial damage' occurred, and does not cover any place where the victim claims to have suffered further, 'indirect consequences' of the harmful event. Since Article 7(2) of the Brussels I *bis* Regulation and Article 4(1) of the Rome II Regulation rest on the same distinctions and pursue similar objectives (at least with

respect to close connection with the tort, foreseeability and legal certainty), (23) a consistent interpretation of the two should be ensured. (24)

50. In the light of the facts summarised in points 8 to 11 above, the interveners put forward radically different views as to what should be regarded, in the present case, as the direct 'damage' caused by the (alleged) tort underpinning TE's claim and where that 'damage' occurred within the meaning of Article 4(1) of the Rome II Regulation.

51. On the one hand, NM and OU, the Maltese Government and the Commission submit that that 'damage' consists in the gambling losses that TE sustained when he placed bets on Titanium's website. The direct consequence of those losses was the reduction, and eventually the complete loss, of a specific asset of TE, distinguishable from the rest of his *patrimoine*, namely the sum of money he had willingly transferred to the Player Protection Bank Account in order to top up his (virtual) Player's Account. (25) That 'damage' occurred where that bank account is situated which, in turn, is deemed to be at the place of the establishment that held it. (26) Because that bank is established in Malta, the 'damage' occurred in that country, and Maltese law therefore governs TE's claim under Article 4(1) of the Rome II Regulation. By contrast, the financial effects that that loss had on TE's assets as a whole are mere 'indirect consequences' of the alleged tort. Thus, even if one were to accept that TE felt those effects at the place of his habitual residence in Austria (under the fiction that the 'centre of his assets' was situated there), that is irrelevant under that provision.

52. On the other hand, TE and the Austrian, German and Belgian Governments take the view, in essence, that the 'damage' within the meaning of Article 4(1) of the Rome II Regulation is the initial transfer of money in favour of Titanium that TE made in order to top up his (virtual) Player's Account and place bets. That 'damage' is deemed to have occurred in Austria given a combination of factors, namely the fact that Titanium's activity was directed to Austria, that TE participated in the contentious games of chance from that country, that he transferred that money from his Austrian bank account, that his habitual residence and the 'centre of his assets' are situated there, and that his claim rests on the alleged infringement of the Austrian Law on Gambling. (27) Thus, Austrian law would govern that tort pursuant to Article 4(1) of the Rome II Regulation.

53. Admittedly, the choice between the two solutions is not an easy one. Nevertheless, after careful consideration, I concur, in essence, with the second view.

54. The solution suggested by NM and OU, the Maltese Government and the Commission essentially rests on an analogy with the judgment in Kronhofer, (28) which concerns the jurisdiction rule for 'matters relating to tort' now laid down in Article 7(2) of the Brussels I *bis* Regulation. In that case, a consumer domiciled in Austria (Mr Kronhofer) had concluded a contract with an investment firm in Germany. As a result, he transferred funds to an investment account with the company in Germany, which were then used to subscribe to financial instruments. Those instruments lost value, resulting in the loss of part of the funds invested.

55. One can infer from that judgement that, in the Court's view, the direct 'damage' was the loss of part of the funds deposited in the investment account. That 'damage' occurred in Germany, in the place where the establishment that held the account was located. (29) By contrast, the financial effects that that loss had on Mr Kronhofer's assets as a whole are mere 'indirect consequences' of the harmful event. Even assuming that Mr Kronhofer felt those effects in the place of his domicile in Austria (under the fiction that the victim's 'centre of assets' was situated there), (30) that could not justify granting jurisdiction to the courts of that place. (31)

56. The solution deriving from the judgment in Kronhofer is, in my view, well suited for cases in which a person (i) instructs another (typically a bank or an investment firm) to manage a certain asset of his or hers; (ii) to that effect, willingly segregates that asset from the rest of his or her *patrimoine* by depositing it into a specific account, in agreement with the instructed person; and (iii) that instructed person subsequently commits a tort related to the mismanagement of the asset in question (negligent investment, embezzlement, churning, and so on). In such a case, the direct 'damage', for the purposes of Article 4(1) of the Rome II Regulation, may convincingly be regarded as the diminution or loss of that particular asset (since the protection of that financial interest of the claimant is at the crux of the tort in question) and placed in the country where it was deposited. The law of that country has the closest connection with the tort and, as the parties had agreed on the destination of the asset, they both could foresee that that law would apply.

57. However, the (alleged) tort underpinning TE's claim is quite different from those described above. As TE and the Austrian, German and Belgian Governments underline, that tort does not relate to any mismanagement by Titanium of the sum of money that TE transferred to the Player Protection Bank Account in order to top up his (virtual) Player's Account. Rather, the alleged wrong consists, I recall, in Titanium having offered those games of chance to TE even though it did not hold the licence required under the Austrian Law on Gambling.

58. In the light of the characteristics of that tort, it seems to me that TE seeks, with his claim, to defend consumer interests, protected under the Austrian Law on Gambling, associated with not being offered games of chance, save for the regulated, licenced ones (avoiding gambling addiction and its social and financial consequences, fraud, and so on). (32) An interference with those interests and, thus, the 'damage' caused by the tort could only have happened when TE participated in such unlicensed games of chance, specifically by placing bets therein (whereas, if the law had been respected, he would never have been able to do so). (33)

59. In that context, the creation by TE of a Player's Account on Titanium's website and the payment of money to Titanium to top up that account are, in my view, mere preparatory acts leading to that 'damage'. It follows, in particular, that the bank account (or associated credit card) used by the player to that effect is irrelevant for the purposes of Article 4(1) of the Rome II Regulation. Besides, considering the location of that account as a connecting factor would hardly be consistent with the objectives of close connection, foreseeability and legal certainty pursued by that provision. A player could happen to have bank accounts in several countries and use any of those to top up their Player's Account. Therefore, such a factor could lead to the application of a law with no connection with the tort and which would be unforeseeable for the tortfeasor. (34)

60. Similarly, the further adverse financial consequences resulting from the placing of bets (35) (such as the impossibility to claim any money back from the gambling company because there is no credit left on the Player's Account) are, in my view, 'indirect consequences' of the tort, which are irrelevant for the purposes of determining the applicable law under Article 4(1) of the Rome II Regulation. Besides, the location of those consequences would be a poor choice of connecting factor. Considering that they occur in the country in which the gambling company keeps the players' funds (in the present case, where the Player Protection Bank Account was held) would not be appropriate. Such a country would not necessarily be foreseeable for the player. (36) The 'entrustment' (so to speak) of those funds to Titanium is an incidental aspect of the participation in the games of chance (37) and the applicable law should not depend on such an arrangement. As stated above, a bank account can be opened anywhere nowadays; such a factor could even be manipulated by gambling companies for choice-of-law purposes. Accordingly, the law of the country where that account is situated may not have a particularly close connection with the tort. Locating those financial consequences, alternatively, in the 'centre of assets' of the player, would be too far-fetched a fiction.

61. Since the 'damage', in the sense of adverse consequences on the protected interests claimed, happened when the consumer participated in unlicensed games of chance, that 'damage' is to have occurred where those games took place. In my view, the choice of that connecting factor for determining where the direct 'damage' occurred for the purposes of Article 4(1) of the Rome II Regulation accords with the current trend of the Court's case-law, under Article 7(2) of the Brussels I *bis* Regulation, with respect to financial losses caused by transactions that, save for the actions of the tortfeasor, the victims would not have made (or at least not under the same conditions). (38)

62. Under that connecting factor, placing the direct 'damage' where a person participated in unlicensed games of chance in a physical location (an illegal casino, for instance) is easy. That 'damage' occurred in that location. The difficulty in the present case is that TE participated in such games online, on Titanium's website.

63. NM and OU and the Maltese Government suggest, in essence, to adopt a legal fiction pursuant to which the contentious games of chance took place in Malta, invoking the argument that all the facilities and infrastructures, including the servers, used by Titanium to offer those games and process the bets were located in that country, that the website and the (virtual) Player's Accounts were managed by Titanium's staff there, and that all the decisions taken by Titanium's directors with respect to its activity were also taken there.

64. In my view, there is no doubt that all the decisions and actions of Titanium and of NM and OU that led to the (alleged) adverse interference with TE's interests took place in Malta. However, that makes Malta, first and foremost, the 'country in which the event giving rise to the damage occurred' within the meaning of Article 4(1) of the Rome II Regulation. As indicated in point 43 above, that connecting factor was rejected by the EU legislature with respect to the law applicable to torts, inter alia, because it did not ensure a 'fair balance' between the interests of the parties (39) (since, in my understanding, it would often lead to the designation of the law of the country where the tortfeasor is established or is habitually resident).

65. In the present case, to consider that the direct 'damage' also occurred in Malta, under the fiction that the contentious games of chance took place in that country, would disregard, in my view, that legislative intent. Conversely, it is appropriate in the present case to adopt, rather, the fiction that those games took place in Austria, as TE and the Austrian, German and Belgian Governments submit in essence, leading to the application of Austrian law under Article 4(1) of the Rome II Regulation.

66. Contrary to what NM and OU have argued, that fiction is not justified solely by the fact that Titanium's website was accessible in Austria. In fact, it is undisputed that Titanium *directed* its activity towards (inter alia) Austrian consumers such as TE. The website in question had a title in German (*www.drueckglueck.com*) and used that language, employed a neutral top-level domain '.com' (instead of the Maltese '.mt'), and was apparently advertised in Austria. That makes it reasonable, in my view, to regard the fact that TE placed bets on that website from Austria as decisive. (40) That fiction is, furthermore, coherent with the roots of TE's claim: since the scope of the Austrian Law on Gambling, as a piece of public law adopted by the Austrian State, is limited to the Austrian territory, the consumer interests protected under that law can only be infringed where a consumer participates in unlicensed games of chance in Austria.

67. NM and OU object, with respect to such a fiction, that, in reality, TE could have accessed Titanium's website from anywhere, including outside Austria, using a smartphone for example. In fact, it is not clear where TE was exactly when he accessed the website. Furthermore, the tort does not concern a single bet but a series of bets, which may have been placed from various places, in Austria and beyond.

68. Obviously, the applicable law should not vary for every bet placed, depending on where TE was at the time. Not only could the exact locations from which the bets were placed be hard to prove, but that approach could also lead to fragmentation of the applicable law and the designation of a law (or laws) with little or no connection with the tort and that could be entirely unforeseeable for the tortfeasor. (41)

69. Nevertheless, to avoid those issues, (all) the bets should be deemed to have been placed at TE's habitual residence in Austria at the material time, disregarding his actual location each time he played a game of chance.

70. In my view, this interpretation leads to the designation of a law (here, Austrian law) closely connected with the alleged tort (which, I recall, rests precisely on the fact that the games of chance were illegal under the Austrian Law on Gambling). It also meets the objective of legal certainty and predictability: plainly, as TE and the Austrian, German and Belgian Governments underline, a Maltese gambling company which directs its activity to a certain Member State can reasonably expect that the law of that State could apply to torts related to that activity. (42)

71. In the light of the foregoing, the answer to the second question should be that where a consumer alleges to have sustained gambling losses as a result of participating, from the Member State where he or she is habitually resident, in the online games of chance offered to him or her by a provider established in another Member State without a licence granted by the authorities of the first State, the 'damage' within the meaning of Article 4(1) of the Rome II Regulation occurred in that first State, as the country from which the bets were placed.

C. Should the law designated under Article 4(1) of the Rome II Regulation be displaced under Article 4(3) of that instrument?

72. Before the Court, NM and OU and the Maltese Government submit that, should the law of Austria be designated, contrary to what they suggest, as applicable to the tort underpinning TE's claim, under Article 4(1) of the Rome II Regulation, that law should be displaced on the basis of the 'escape clause' laid down in Article 4(3) of that instrument. In their view, it is 'clear from all the circumstances of the case that the [tort] [was] manifestly more closely connected with [another country]', as envisioned in Article 4(3), namely Malta. Thus, pursuant to that provision, Maltese law should apply instead. Since that matter is related to the second question, I will address it briefly.

73. I should underline at the outset that, while the 'escape clause' laid down in Article 4(3) of the Rome II Regulation is meant to counterbalance the 'rigid' general rule laid down in Article 4(1) of that instrument by providing the court seised with a degree of flexibility to ensure, in every case, that the applicable law is the one that is actually most closely connected with the tort, (43) the displacement of the law designated under Article 4(1) should be *exceptional*, to ensure the foreseeability and legal certainty sought by the Rome II Regulation. As it follows from the wording of Article 4(3), that 'escape clause' should be used only where, under an overall analysis of the circumstances of the case, the tort is *manifestly* more closely connected with a different country than the one in which the 'damage' had occurred. That is a high standard to meet.

74. As TE and the Austrian, German and Belgian Governments submit, that is not the case here. While the tort undeniably features connections with Malta, those are not *manifestly* more significant than the ones with Austria for choice-of-law purposes.

75. Indeed, while the seat and facilities of Titanium were situated in Malta, the contentious games of chance were directed to Austria, the country in which TE habitually resided and from which he participated in those games. While NM and OU may have exercised their duties from Malta under Maltese company law, I recall that TE's claim rests on an alleged breach of Austrian gambling rules. The location of the Player Protection Bank Account in Malta is not, as I have explained in the previous section, material for the tort at issue (nor is, conversely, the location of TE's personal bank account in Austria). Finally, with respect to the argument put forward by NM and OU and the Maltese Government that the gambling contract between TE and Titanium was governed by Maltese law, it is true that Article 4(3) of the Rome II Regulation specifies that a manifestly closer connection with another country '*might* be based in particular on a pre-existing [contract] between the parties, … that is closely connected with the [tort] in question' (emphasis added). Nevertheless, first, I am not convinced the contract in question is material to the alleged tort. Secondly, it is far from clear that Maltese law governed that contract. Since it had been concluded between a consumer and a professional which directed its activity to the former, it was rather governed by the law of the country in which that consumer was habitually resident (in other words, Austrian law), pursuant to Article 6(1) of Regulation (EC) No 593/2008 on the law applicable to contractual obligations. (44)

76. I wish to make a last remark about the present case. This Opinion has been entirely about the law governing the tort underpinning TE's claim. Whether that claim has merits is a different matter. Whether, for instance, TE should be entitled to compensation for the losses he sustained or whether such compensation should be denied on the ground that he contributed to those losses or committed himself a wrong by choosing to participate in the games of chance offered by Titanium is an issue of *substance* to be decided in the light of Austrian tort law. Similarly, a significant part of the debate before the Court concerned the issue of whether obliging gambling companies established in Malta and operating under Maltese licences to comply with the Austrian Law on Gambling (and imposing tortious liability on those companies and their directors when they do not) is compatible with the freedom to provide services guaranteed in Article 56 TFEU. That is also an issue of substance to be determined by the court seised when assessing the merits. Clearly, if the relevant provisions of the Austrian Law on Gambling entailed an unjustified restriction of that freedom, no such liability could be imputed to NM and OU and TE's claim would accordingly fail. Conversely, if that law were compatible with the freedom in question, it would also be compatible with that freedom to hold those directors liable for the wrong committed by Titanium.

V. Conclusion

77. In the light of all of the foregoing considerations, I propose that the Court of Justice answer the questions referred by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

Article 1(2)(d) of 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 II)

must be interpreted as meaning that the exclusion concerning 'non-contractual obligations arising out of the law of companies' laid down in that provision does not cover an alleged 'non-contractual obligation' of a company director arising out of the infringement of a duty or prohibition imposed by the law independently of his or her appointment, such as the prohibition on anyone to offer games of chance in a given Member State without a licence granted by the authorities of that State.

Article 4(1) of Regulation No 864/2007

must be interpreted as meaning that, where a consumer alleges to have sustained gambling losses as a result of participating, from the Member State in which he or she is habitually resident, in the online games of chance offered to him or her by a provider established in another Member State without a licence granted by the authorities of the first State, the 'damage' within the meaning of Article 4(1) of that regulation occurred in that first State, as the country from which the bets were placed.

Original language: English.

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i The name of the present case is a fictitious name. It does not correspond to the real name of any party to the proceedings.

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2 Regulation of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40).

3 Regulation 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 (OJ 2012 L 351, p. 1).

4 See Pena, P., Schumann, H. and Peigné, M., 'EU citizens lose out as Malta regulatory "sledgehammer" protects gambling giants', *Investigate Europe*, 6 March 2025.

5 Accordingly, I will *not* address the issue of the compatibility with EU law of Article 56A of the Maltese Gaming Act in the present Opinion.

6 See, for that definition, Article 2 of the Rome II Regulation.

7 Judgment of 10 March 2022, BMA Nederland (C-498/20, 'the judgment in BMA Nederland', EU:C:2022:173, paragraph 54).

8 As such, that exclusion contributes to the objectives of foreseeability and legal certainty with respect to the law applicable to 'non-contractual obligations' and the proper functioning of the internal market pursued by the Rome II Regulation (see recital 6 therein). However, that certainty is only partially achieved. In the absence of an EU regulation on the law applicable to companies, the (single) *lex societatis* governing a company is determined, in every dispute, in the light of the (national) conflict-of-law rules of the court seised. There are traditional differences in the private international law of the Member States in that regard: some apply the law of the country of incorporation, whereas others apply the law of the country in which the 'real seat' of the company is located. Thus, while only one law should govern a company, it is not necessarily the same in every jurisdiction.

9 The judgment in BMA Nederland (paragraph 54).

10 See, to that effect, the judgment in BMA Nederland (paragraph 55); European Commission, Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('Rome II') (COM(2003) 427 final), Explanatory Memorandum, p. 9.

11 The judgment in BMA Nederland (paragraph 54).

12 See, by analogy, judgment of 6 June 2019, Weil (C-361/18, EU:C:2019:473, paragraph 43 and the case-law cited).

13 See, in Maltese company law, Article 136A(3) of the Maltese Companies Act.

14 See Calliess, G.-P. and Renner, M., *Rome Regulations: Commentary*, 3rd edition, Kluwer Law International, 2020, pp. 478 and 479, paragraph 52.

15 See judgment of 10 September 2015, Holterman Ferho Exploitatie and Others (C-47/14, EU:C:2015:574, paragraph 19).

16 See, for that term, recital 16 of the Rome II Regulation.

17 See, to that effect, recital 17 of the Rome II Regulation.

18 See, by analogy, Opinion of Advocate General Bobek in Löber (C-304/17, EU:C:2018:310, points 69 and 70 and references).

19 See recitals 6, 14 and 16 of the Rome II Regulation.

20 See judgment of 10 December 2015, Lazar (C-350/14, EU:C:2015:802, paragraph 21).

21 Judgment of 30 November 1976 (21/76, EU:C:1976:166, paragraphs 24 and 25).

22 Judgment of 19 September 1995 (C-364/93, EU:C:1995:289, paragraph 15).

23 See judgment of 17 October 2017, Bolagsupplysningen and Ilsjan (C-194/16, EU:C:2017:766, paragraphs 26 and 28 and the case-law cited).

24 See recital 7 of the Rome II Regulation and the judgment in BMA Nederland (paragraph 60).

25 On the ground that (i) bets were placed with the funds credited to the (virtual) Player's Account and any losses would affect the balance of that virtual account, and (ii) since the Player Protection Bank Account contained funds corresponding to the credit balance of all the Player's Accounts, gambling losses would ultimately entail a deduction of the funds credited to that bank account.

26 This corresponds to point (b) of the second question.

27 That approach combines points (a), (c), (d) and (e) of the second question.

28 Judgment of 10 June 2004 (C-168/02, 'the judgment in Kronhofer', EU:C:2004:364).

29 Book money is not a tangible asset. It is, in essence, a claim of the holder of the account against the bank that manages it, under the account agreement. The location of book money has to be determined through legal fiction, that is, the use of the place of the establishment managing the account (or the country code of the IBAN of the account, which is normally the same) (see Lehmann, M., 'Where does economic loss occur?', *Journal of Private International Law*, Vol. 7, 2011, pp. 527 to 550, in particular pp. 532, 534 and 535).

30 There is no such thing as the 'centre of assets' of a person. That 'centre', and its potential location in the habitual residence of that person, are legal fictions.

31 See, to that effect, the judgment in Kronhofer (paragraphs 17 to 21).

32 Where a State bans or regulates gambling offers, it is (inter alia) in its residents' own interests, given the risks of gambling in terms of addiction, and so on.

33 Obviously, TE contributed to that 'damage' by choosing to participate in the games of chance. It may also have been illegal, in Austria, for him to do so. Nevertheless, those are issues of substance (see point 76 below).

34 See, by analogy, judgment of 16 June 2016, Universal Music International Holding (C-12/15, EU:C:2016:449, paragraph 38).

35 Obviously, if the player did not actually loose the bets he or she had placed then, despite the potential interference with his or her protected interests resulting from the sole fact of playing unlicensed games of chance, he or she would hardly be able to show compensable loss. However, that is again an issue of substance.

36 Admittedly, as NM and OU underline, where players paid through bank transfer they were given the IBAN of the Player Protection Bank Account and, thus, necessarily learnt about it at that moment. Nevertheless, where players used their credit card to add funds to their Player's Account, they did not necessarily receive that information. NM and OU retort that the Player Protection Bank Account was described in the general terms and conditions of Titanium. Nevertheless, as TE submits, people rarely pay great attention to those terms and conditions.

37 Such a system exists, as the Belgian government underlines, solely for practical reasons: it would be tedious for the player to have to make a payment (for instance, with his credit card) to the gambling company each time he/she places a bet.

38 See judgments of 9 July 2020, Verein für Konsumenteninformation (C-343/19, EU:C:2020:534, paragraphs 29 to 40), and of 15 July 2021, Volvo and Others (C-30/20, EU:C:2021:604, paragraphs 39 and 40). See, also, for a decision that can be understood in the same way, judgment of 12 May 2021, Vereniging van Effectenbezitters (C-709/19, EU:C:2021:377, paragraph 35).

39 See, to that effect, recitals 15 and 16 of the Rome II Regulation.

40 This corresponds to point (c) of the second question. See, by analogy, judgments of 3 October 2019, Verein für Konsumenteninformation (C-272/18, EU:C:2019:827, paragraph 53), and of 28 November 2024, VariusSystems digital solutions (C-526/23, EU:C:2024:985, paragraph 22).

41 Such an approach would be even more problematic under Article 7(2) of the Brussels I *bis* Regulation. Indeed, locating multiple places of 'damage' would lead to the local jurisdiction of as many courts in Austria, and even potentially beyond.

42 See, by analogy, judgment of 15 July 2021, Volvo and Others (C-30/20, EU:C:2021:604, paragraph 42), and Opinion of Advocate General Campos Sánchez-Bordona in *Stichting Right to Consumer Justice and Stichting App Stores Claims* (C-34/24, EU:C:2025:212, points 81 to 86).

43 See recital 14 of the Rome II Regulation.

44 Regulation of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 6). Even if that contract contained a choice-of-law term designating Maltese law, the consumer could still have availed himself of the protection afforded to him by the mandatory provisions of Austrian law, under Article 6(2) of the Rome I Regulation.