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INTRODUCTORY SECTION TO A CUMULATIVE DISSERTATION

I. INTRODUCTION

1.1. Introduction to the Problem and Current State of the Field

International contract law is known to widely adhere to the principle of freedom of choice of law. Therefore, the parties to the contract are generally free to choose the law to govern their contract (Article 3 (1) of Rome I[1]). Nevertheless, Rome I, which regulates the law applicable to contractual obligations, also sets forth certain important limits to party autonomy. These serve mainly to safeguard the fundamental principles of the *forum* country (e.g overall mandatory provisions and public policy clause) as well as to protect the typically weaker parties to international contracts (these include contracts with passengers, consumers, insurance contracts' policy-holders, and employees).[2]

In addition, limitations are foreseen for purely internal contracts.[3] Rome I also provides for an exceptional possibility for the courts to give effect to the overriding mandatory provisions of the law of a foreign country where the contractual obligations have to be or have been performed, in so far as those provisions render the performance of the contract unlawful.[4] Due to their exceptional nature and very limited application to specific situations, these limits are omitted from the scope of this dissertation.

This research aims to tackle some of the issues concerning the protecting mandatory provisions foreseen in Rome I in favour of parties regarded as being weaker in the contractual relationship. Notably, Rome I expressly states the aim that the presumably weaker parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules,[5] and sets forth criteria for the designation of the law applicable to such transnational contracts including a typically weaker party, for example consumers or employees. With regard to consumers, Article 6 (2) of Rome I stipulates that even if the parties have agreed that a particular system of law is to be applied to the contract, such choice may not deprive consumers of the protection afforded to them by the

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1 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (**Rome I**). – OJ L 177, 4.7.2008, pp 6 ff. It replaces the Rome Convention on the law applicable to contractual obligations of June 1980 (**Rome Convention**). The consolidated text of that convention is found in OJ C 334, 30.12.2005, pp 1 ff.

2 See Articles 5, 6, 7, and 8 of Rome I, respectively.

3 Contracts pertaining to situations wherein all elements relevant to the situation are located in one country – See Articles 3 (3) and (4) of Rome I.

4 Article 9 (3) of Rome I.

5 Recital 23 of Rome I.

mandatory provisions of their state of habitual residence. Concerning individual employment contracts, Rome I foresees that a choice of law may not deprive employees of the protection of the mandatory provisions of the country in which or from which they habitually carry out their work (*lex loci laboris*), or of another law applicable to the individual employment contract that is determined under subsidiary objective criteria.[6]

That being said, the criteria to designate the law applicable to such contracts involving a weaker party is further supplemented by specific provisions with conflict-of-law relevance in domains such as consumer contracts and individual employment contracts involving the posting of workers.[7] Various consumer contract law directives oblige the Member States to ensure that the consumer does not lose the protection granted by the specific directive by virtue of a choice of the law of a non-EU-member country as the law applicable to the contract, if the consumer has a close connection with the territory of the relevant Member State.[8] As far as posted workers are concerned, Member States have to ensure that whatever the law otherwise applicable to the employment relationship, the workers posted to their territory are granted certain terms and conditions of employment.[9] It is therefore worth asking, which role do these directives and

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[6] Article 8 of Rome I.

[7] For consumer contracts, see, for instance, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. – OJ L 095, 21.4.1993, pp 29 ff (**Unfair Terms Directive**); Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. – OJ L 271, 9.10.2001, pp 16 ff (**Distance Marketing of Consumer Financial Services Directive**); Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. – OJ L 171, 7.7.1999, pp 12 ff (**Consumer Sales Directive**), which will from 01.01.2022 be replaced by Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods. – OJ L 136, 22.5.2019, pp 28 ff (**new Consumer Sales Directive**); Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC. – OJ L 133, 22.5.2008, pp 66 ff (**Consumer Credit Directive**). For transnational individual employment contracts, see Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. – OJ L 18, 21.1.1997, pp 1 ff (**Posting of Workers Directive**) and its newly adopted amendment Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. – OJ L 173, 9.7.2018, pp 16 ff (**amended Posting of Workers Directive**).

[8] See, for example, Article 6 (2) of the Unfair Terms Directive, Article 12 (2) of the Distance Marketing of Consumer Financial Services Directive, Article 7 (2) of the Consumer Sales Directive, Article 22 (4) of the Consumer Credit Directive.

[9] Article 3 (1) of the Posting of Workers Directive stipulates that Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings guarantee workers posted to their territory the terms and conditions of employment covering the following matters: (a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; (d) the

their national implementing measures play in relation to the protective rules already provided for in Rome I.

A further facet in this context lies is the need to clarify the interface of the provisions protecting the weaker party and the two more general limitations to party autonomy foreseen in Rome I. These two general instruments with the purpose of safeguarding the fundamental principles of the *forum* country include first, the overall mandatory provisions of the law of the *forum* state[10] and second, the general public policy exception.[11] In that respect, the Preamble to Rome I points out that considerations of public interest justify giving the courts of the Member States the possibility to apply exceptions based on public policy and overriding mandatory provisions.[12] However, it must be emphasised that whilst serving a similar purpose, these instruments operate in a different manner.

As long as the overriding mandatory provisions are concerned, it stands out that they protect the *forum* state's public interests in a 'positive' way, inasmuch as these provisions are to be applied regardless of the content of the law otherwise applicable to the contract.[13] On the other hand, the public policy clause allows the courts of the Member States the possibility to refuse to apply a certain provision of a foreign law if the result of its application is manifestly incompatible with the public policy of the *forum*. It thereby performs a 'negative' function as it counteracts certain provisions of foreign law by excluding their application, and thus not substituting or supplementing these itself.[14]

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conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination. The amended Posting of Workers Directive stipulates that, from 30.7.2020, the measures that have to be applied to posted workers include, instead of the minimum rates of pay as currently set forth in Article 3 (1) (c), remuneration, including overtime rates. In addition, the conditions of workers' accommodation where provided by the employer to workers away from their regular place of work (Article 3 (1) (h)) and allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons (Article 3 (1) (i)), have been added to the list of the core working conditions.

[10] Provisions of the *forum* state that are to be applied to the contract irrespective of the law otherwise applicable to the contract. – See Articles 9 (1) and (2) of Rome I.

[11] Article 21 of Rome I. In this compendium as well as in the publications it is based upon, the notions of public policy and *ordre public* are used in parallel in denotation of the public policy clause of Article 21 of Rome I.

[12] Recital 37 of Rome I.

[13] See also, R. Piir. Eingreifen oder nicht eingreifen, das ist hier die Frage. Die Problematik der Bestimmung und des Anwendungsbereichs der Eingriffsnormen im internationalen Privatrecht. – *Juridica International* 2010/XVII, pp 199 ff, pp 200–202; and R. Piir. Application of the Public Policy Exception in the Context of International Contracts – The Rome I Regulation Approach. – *Juridica International* 2015/23, pp 26 ff, p 26.

[14] R. Piir (2015), p 27. More on the distinction between positive and negative functions can be found in such works as R. Hausmann – U. Magnus (ed.). *J. von Staudingers Kommentar*

Therefore, these two general instruments allow the courts of the Member States to either refuse to apply certain provisions of foreign law altogether or to guarantee the application of their own provisions that have internationally mandatory character.[15] It has also been noted in legal writing that Rome I thus pursues a triple approach, as it first modifies the rules on the applicable law, then introduces mandatory rules to be applied next to the applicable law and last, relies on the traditional public policy.[16] However, the foregoing justifies asking how these two general limitations interact to the system of the specific provisions foreseen in Rome I in favour of parties regarded as being weaker, as well as the directive-based protective provisions, in particular provisions established in favour of consumers and posted workers.

Several considerations have therefore brought about this research. On the one hand, EU legislation on contractual as well as non-contractual obligations (general regulations Rome I and Rome II[17]) has clearly demonstrated the trend to head towards harmonisation of rules on determining the applicable law. On the other hand, the regulations take off the concern for the weaker party. Another important matter lies in the existence of the specific directives, which also provide for measures for the protection of parties regarded as being weaker, such as consumers and posted workers. However, these directives require transposition into national laws. This research will thus also tackle the issues of the conformity and interaction of such directive-based provisions to the rules foreseen in Rome I in favour of parties regarded as being weaker, as well as to the general clauses of overall mandatory provisions and public policy.

There is voluminous legal writing and commentaries pertaining to Rome I in general and overriding mandatory provisions and public policy in particular. What is more, the prior extensive scholarship on the Rome Convention provides guidance as to the interpretation of specific matters of Rome I. In addition, the various consumer contract law directives and the Posting of Workers Directive have been reviewed in legal writing and commentaries. Nonetheless, much attention has not been paid to the interaction of the provisions of Rome I to the specific directive-based rules protecting the consumers and posted workers.

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zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Einführungsgesetz zum BGB/IPR. Art 11-29 Rom I-VO; Art 46b, c EGBGB (Internationales Vertragsrecht 2). Berlin: Sellier 2011, Art. 21 Rom I Rn 2; D. Martiny – J. von Hein (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 10. Internationales Privatrecht I. Europäisches Kollisionsrecht. Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 1–24)*. Munich: C. H. Beck 2015, Art. 21 Rom I Rn 7.

[15] See also, R. Piir (2010), p 199. However, the concept of overriding mandatory provisions should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively. – See also Recital 37 of Rome I.

[16] See V. Behr. Rome I Regulation. A – mostly – unified private international law of contractual relationships within – most – of the European Union. – *Journal of Law and Commerce* 2011/29, pp 233 ff, p 256.

[17] 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**). – OJ L 199, 31.7.2007, pp 40 ff.

Furthermore, in many cases it may remain difficult to evaluate when and how to apply the specific rules stemming from the aforementioned consumer contract law directives and the Posting of Workers Directive.

Similarly, the topic has not been thoroughly analysed in Estonian scholarship and in the context of Estonian law and jurisprudence, apart from the author's own prior research in articles that comprise this compendium. Although Estonian legal writing has touched upon the subject of the law applicable to contractual obligations as well as the mandatory rules and the public policy clause, the previous works have been either rather general in nature, have not taken account of the EU private international law regulations that have been adopted in recent years, or have been excessively sector-based.[18] Given that the questions addressed in this compendium have been discussed by other authors only to a limited extent, the research undertaken for this dissertation has thus been designed to complement the existing Estonian scholarship.

The addition of the present dissertation to the existing legal scholarship can therefore be seen first, in the aspects dealing specifically with Estonian law and jurisprudence and second, in the analysis of the recently adopted amended Posting of Workers Directive as well as the provisions of the newer consumer directives.

1.2. Objective of the Research and Research Questions

The aim of this research is to address the essence and employment of the general and specific restrictions to party autonomy provided for in Rome I, concentrating on cases of consumer contracts and individual employment contracts involving the posting of workers. The dissertation aims to delve into their interrelationship with other community level instruments, mainly the specific

[18] See, for example, R. Jankelevitš. Avalik kord ja imperatiivsed sätted rahvusvahelises eraõiguses (Public Policy and Imperative Norms in Private International Law). – *Juridica* 2002/7, pp 479 ff; Euroopa Liidus liikuvate isikute töösuhtele kohaldatavast õigusest (About the Law Applicable to the Employment Relationship of Persons Moving within the EU). – *Juridica* 2002/8, pp 557 ff; K. Sein, M. Torga – B. Verschraegen, R. Blanpain, F. Hendrickx (eds.). *International Encyclopaedia of Private International Law*. National Monographs/ Estonia. Kluwer Encyclopaedia 2014, Suppl. 42. Kluwer Law International BV, Netherlands; M. Torga. Välisriigi kohtulahendite ja muude täitedokumentide tunnustamine, täidetavaks tunnistamine ja täitmine Eestis (Recognition, enforceability and enforcement of foreign judicial decisions and other enforceable titles). – *Juridica* 2015/1, pp 55 ff; M. Fornasier, M. Torga. Estonian Supreme Court 3-2-1-179-12 16.01.2013 Judgement. The posting of workers: the perspective of the sending state. *Europäische Zeitschrift für Arbeitsrecht*, 2013/3, pp 356 ff; M. Piirman. *Inimese pluripotentsete tüvirakkudega seotud leiutiste patentimise piirangud vastuolu tõttu avaliku korra ja moraaliga (Eesti patendiõiguse näitel). (Exceptions to patentability of inventions related to human pluripotent stem cells due to conflict with public order and morality (on the example of Estonian patent law))*. University of Tartu Press 2018; I. Kull. Section 36. – P. Varul, I. Kull (eds.). *Võlaõigusseadus I. Üldosa (§§ 1–207)*. Kommenteeritud väljaanne. 2nd edition. Juura 2016, Nr 4.2.1.

domain based-directives. In order to achieve the objective, the dissertation clarifies the application of the directive-based provisions and analyses the possibilities of their classification as overriding mandatory provisions from the viewpoint of the theory of overriding mandatory provisions.

This research has been limited to the provisions concerning consumer contracts and individual employment contracts involving posted workers. The reasons for this are twofold. On the one hand, while the first of those areas has been extensively regulated on EU level through specific consumer contract law directives, it remains subject to ongoing discussions in private international law debate as to the need for such rules abreast Rome I.[19] On the other hand, the long-awaited[20] and newly adopted amended Posting of Workers Directive as well as its implementing provisions need investigation in the context of determining the law applicable to posted workers alongside the rules of Rome I. Given the legislative developments in the areas as well as the multiplicity of the regulations, the research will therefore be concentrated on the examples of consumer contracts and the specific cases of individual employment contracts involving the posting of workers.

In order to achieve the set objective, the dissertation studies the interaction of the directive-based national provisions with a conflict-of-law relevance to the rules entailed in Rome I for the protection of the weaker party (Articles 6 and 8 of Rome I). Furthermore, the dissertation tackles the issue of their relationship to the more general rules of Rome I aiming to safeguard public interests (Articles 9 and 21 of Rome I). In doing so, the articles compiling this compendium also examine two empirical case-studies, concerning hypothetical cases of first consumer and second employment contracts involving posted workers.

To achieve the objective of the research, the dissertation is built upon the following research questions:

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[19] See, S. Leible. Article 6 Rome I and conflict of laws in EU Directives. – *Journal of European Consumer and Market Law* 2015/4, Issue 1–2, pp 39 ff, p 39. It must be noted that the newer consumer contract law directives such as the new Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. – OJ L 136, 22.5.2019, pp 1 ff (**Digital Content Directive**) and the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. – OJ L 304, 22.11.2011, pp 64 ff (**Consumer Rights Directive**) no longer contain such provisions.

[20] E.g. S. Evju. Cross-border services, posting of workers, and jurisdictional alternation. – *European Labour Law Journal* 2010/1(1), pp 89 ff, p 98, who calls for an amendment of the Posting of Workers Directive to ensure harmonisation and uniformity it is intended to provide.

1. How do the rules with conflict-of-law relevance stemming from the various consumer contract law directives relate to Articles 6 and 9 of Rome I?
2. What is the importance of the conflict-of-law provisions of the Estonian Law of Obligations Act[21] implementing the consumer contract law directives, and have the directives been transposed correctly?
3. What is the interface of Articles 8 and 9 of Rome I and the provisions implementing the Posting of Workers Directive?
4. How is the interaction reflected in Estonian jurisprudence concerning the implementing provisions of the Posting of Workers Directive and is it in line with the directive?
5. Are the directive-based conflict-of-law provisions alongside Rome I necessary for protecting consumers and posted workers? What role does the public policy exemption retain in private international law of contractual obligations abreast the rules protecting the weaker parties?

The main body of argument of the dissertation is developed in four articles. These explore first, aspects relating to the law applicable to consumer contracts (**Article III**,[22] co-authored with Prof. Karin Sein) and then, to the individual employment contracts involving the posting of workers (**Article IV**).[23] Next, Articles III and IV concentrate on the question of the necessity of the specific rules abreast the provisions of Rome I. On the final leg, **Article II**[24] examines the need for a general public policy exemption in matters of contractual obligations. **Article I**[25] is intended to serve as an introductory article in order to give a general overview and a better understanding of the concept of overriding mandatory provisions.

The author of the dissertation is the sole author of Articles I, II and IV. In Article III, the author of the dissertation contributed to formulating the research question and structuring the research results, and was fully responsible for producing analysis, writing the paper and drawing results as the main author.

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[21] Võlaõigusseadus. – RT I, 20.2.2019, 8. Available (in English) https://www.riigiteataja.ee/en/eli/507032019001/consolide (01.09.2019).

[22] R. Piir, K. Sein. Law applicable to consumer contracts: Interaction of the Rome I Regulation and EU-directive-based rules on conflicts of laws. – *Juridica International* 2016/24, pp 63 ff.

[23] R. Piir. Safeguarding the Posted Worker. A Private International Law Perspective. – *European Labour Law Journal* 2019, Volume 10, Issue 2, pp 101 ff.

[24] R. Piir. Application of the Public Policy Exception in the Context of International Contracts – The Rome I Regulation Approach. – *Juridica International* 2015/23, pp 26 ff.

[25] R. Piir. Eingreifen oder nicht eingreifen, das ist hier die Frage. Die Problematik der Bestimmung und des Anwendungsbereichs der Eingriffsnormen im internationalen Privatrecht. – *Juridica International* 2010/XVII, pp 199 ff.

1.3. Structure of the Research

The research questions are addressed and the analytical compendium is structured as follows.

1.3.1. Relationship of Articles 6 and 9 of Rome I and the national provisions implementing the various consumer-related directives

Article III first aims to clarify the interface of the implementing provisions of the consumer directives to Article 6 of Rome I. Thereat, it concentrates on the question of which provision should prevail in an effort to determine the applicable law. In so doing, the article proposes two conceivable approaches. The first would be to give precedence to the implementing national provisions over the rules of Rome I, whereas the second would mean considering the national rules subordinately to Rome I and only in cases where the prerequisites of Article 6 (1) of Rome I have not been met and the protection afforded by Article 6 (2) of Rome I proves inadequate.

In presenting analysis of the two approaches, Article III explains that according to the first approach, the prevalence of the national implementing provisions via Article 23 of Rome I could be justified only if these faithfully reproduce the content of the provisions of the directives. It will be argued that if the rules have been excessively implemented into national laws, these should not be considered Community rules, since the aim of the European legislator was not to rule out the choice of the law of another Member State.[26] Article III also brings forth the view that the conflict-of-law rules set forth in the consumer contract law directives should only be transposed into national laws inasmuch they exceed the level of protection already afforded to the consumer by Article 6 of Rome I[27] and takes a position on the issue.

Article III then proceeds to investigate the interaction of the rules stemming from the consumer contract law directives to Article 9 of Rome I.[28] In this respect, the article poses the question whether the directive-based national rules could be classified and therefore applied as overriding mandatory provisions of the national law.

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[26] See also O. Remien. Variationen zum Thema Eingriffsnormen nach Art. 9 Rom I-VO und nach Art. 16 Rom II-VO unter Berücksichtigung neuerer Rechtsprechung zu Art. 7 Römer Übereinkommen. – *Grenzen überwinden – Prinzipien bewahren. Festschrift für Berndt von Hoffmann*. Bielefeld, Germany: Verlag Ernst und Werner Gieseking 2011, p 340.

[27] B. Heiderhoff. Art 6 Rom I-VO. – T. Rauscher (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*. Munich: Sellier European Law Publishers 2011, Rn. 12.

[28] Article 9 (1) of Rome I defines overriding mandatory provisions as provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under Rome I.

Based on the example of the transposing provisions of the Estonian Law of Obligations Act, Article III highlights that even though the way the transposing provisions have been phrased in Estonian law does suggest that these could be considered overriding mandatory norms, the consumer directives nonetheless do not oblige the Member States to transpose their conflict-of-law rules as overriding mandatory provisions.[29] In this context, the paper also brings forth that the relationship of consumer protection rules to the overriding mandatory provisions is not uniformly solved neither in legal literature nor in the judicial practice of the Member States.[30]

In addition, Article III illustrates the problem of different transposition into internal legal orders of the provisions of the minimum harmonisation directives.[31] To explicate the importance of the national implementing provisions in this

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[29] F. Ragno. Article 6. – F. Ferrari (ed.). *Rome I Regulation*. Sellier European Law Publishers 2015, p 331.

[30] See, R. Piir, K. Sein (2016), p 69, where it was illustrated how the relation of consumer protection rules to overriding mandatory provisions is not uniformly solved neither in legal literature nor in the judicial practice of the Member States. Namely, for instance German doctrine and courts do not consider as overriding mandatory those provisions, where the protection of public interest is only a reflex of the primary purpose of protecting private interests, whereas French, Italian, Belgian and British doctrine have taken on a wider approach and consider as mandatory provisions also the rules that aim to protect the weaker party, as the abuse of the weaker party can be viewed as a threat for civil society – see, C. Bisping. Consumer protection and overriding mandatory rules in the Rome I Regulation. – J. Devenney, M. Kenny (eds.). *European Consumer Protection. Theory and Practice*. Cambridge University Press 2012, p 245; A. Bonomi. Le régime des règles impératives et des lois de police dans le réglement „Rome I" sur la loi applicable aux contrats. – E.C. Ritaine, A. Bonomi (eds.). *Le nouveau reglement européen „Rome I" relatif à la loi applicable aux obligations contractuelles*. Schulthess 2008, pp 228–229; L. M. van Bochove. Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law. – *Erasmus Law Review* 2014/3, pp 147 ff, para. 2.1.; A. Nuyts. Les lois de police et dispositions impératives dans le Règlement Rome I. – *Revue de Droit Commercial Belge* 2009/6, pp 553 ff, p 559. See also M. Giuliano, P. Lagarde. Report on the Convention on the law applicable to contractual obligations. – OJ C 282, 31.10.1980, pp1 ff, p 28, where consumer protection provisions are provided as an example of overriding mandatory provisions. It can be argued that the question therefore remains open and awaiting for further instructions from the Court of Justice of the European Union (CJEU).

[31] See S. Sánchez Lorenzo. Choice of Law and Overriding Mandatory Rules in International Contracts after Rome I. – *Yearbook of Private International Law* 2010/XII, pp 67 ff, p 75. See also F. Ragno (2015), p 242. One must bear in mind that unlike the targeted full harmonisation approach opted for in the newer Consumer Rights Directive (see Article 4 and Recital 2), Consumer Credit Directive (see Article 22 (1) and Recital 9), **Package Travel Directive** (Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC. – OJ L 326, 11.12.2015, pp 1 ff – see Article 4) as well as the new Digital Content Directive (see Article 4), the earlier consumer directives were based on the principle of minimum harmonisation, making it thus possible that their provisions are not uniformly implemented into national laws. – See also R. Piir, K. Sein (2016), p 64.

context, Article III studies whether the provisions of the directives with conflict-of-law relevance have been correctly implemented into the Estonian Law of Obligations Act.[32]

1.3.2. Relationship of Articles 8 and 9 of Rome I and the national provisions implementing the Posting of Workers Directive

Moving on to the next research question, Article IV explicates the interface of the Posting of Workers Directive with Article 8 and more importantly, with Article 9 (2) of Rome I. The paper discusses the legal nature of the national rules, which transpose the Posting of Workers Directive and therefore entail the core set of employment terms. It then proceeds to study the interaction of the provisions.

In so doing, Article IV first points out that the core labour conditions stipulated in the directive are similar to the overriding mandatory provisions in a way that these terms are also applicable to any situation falling within their scope, irrespective of which law applies to the employment relationship. It is recalled in this context that it remains important to distinguish between the provisions, which have acquired overriding mandatory character due to the Posting of Workers Directive, from the 'true' overriding mandatory provisions in the sense of Article 9 (1) of Rome I, as the latter aim to apply to the employment contract regardless of the interests of the employees.[33]

In order to demonstrate the importance of this distinction, the application of the preferential approach is additionally examined. The research shows that the core labour standards of the Posting of Workers Directive should allow for a comparison with the law objectively applicable under Article 8 (2) of Rome I in

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[32] For example, Article 6 (2) of the Unfair Terms Directive stipulates that Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by the directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member State. Similar rules are set forth by Article 12 (2) of the Distance marketing of consumer financial services directive, Article 7 (2) of the Consumer Sales Directive, Article 22 (4) of the Consumer Credit Directive. Those provisions have been transposed into Estonian national law by Articles 36 (2), 53 (1), 237 (2) and 403 (6) of the Estonian Law of Obligations Act. By contrast, the newer Consumer Rights Directive does not contain a separate conflict-of-law provision, referring all questions of determining whether the consumer retains the protection granted by the directive in situations where the law applicable to the contract is that of a third country, to Rome I. – See also, R. Piir, K. Sein (2016), pp 63–64.

[33] For instance, the Estonian transposing measure of the directive also expressly precludes the favour approach and regulates that the national Occupational Health and Safety Act shall be applied to a posted employee even when it is less favourable to the posted employee than the provisions of a foreign law. – See Working Conditions of Employees Posted to Estonia Act (*Eestisse lähetatud töötajate töötingimuste seadus*), § 5 (2) – RT I, 29.06.2018, 80. Available (in English) https://www.riigiteataja.ee/en/eli/ee/513072017009/consolide/current (01.09.2019).

order to determine the more favourable provisions for the employee. Nonetheless, this could not be the case with the 'true' overriding mandatory provisions in the strict sense of Article 9 (1) of Rome I, for example conditions of occupational health and safety, as the application of Article 9 (1) of Rome I does not enable a preferential approach.

The study of the application of the preferential approach also forms the basis for evaluating the conformity of Estonian jurisprudence concerning the implementing provisions of the Posting of Workers Directive to the directive, as set forth in the fourth research question. In order to estimate whether the Estonian jurisprudence concerning the implementing provisions of the Posting of Workers Directive is in line with the directive, special attention is given to the question of remuneration granted to posted workers and primarily to the question of how and under which law to determine the constituent elements of the minimum wage.

1.3.3. Relevance of the specific directive-based provisions alongside Rome I and the role of the public policy exception in private international law of contractual obligations

The fifth research question set in the dissertation is firstly devoted to analysing the necessity of the specific directive-based provisions alongside Rome I in protecting consumers and posted workers. The question is addressed in Articles III and IV.

To begin with, Article III studies whether the need for specific consumer directive-stemming provisions with conflict-of-law relevance remains, given that Rome I already contains a multilateral consumer-protecting conflict-of-law rule in its Article 6.[34] In this respect, Article III first points out that Rome I creates a coherent system of consumer protection,[35] wherein the regulation of Article 6 of Rome I is completed by non-consumer specific Articles 3 (4) and 9 (2) of Rome I. Therefore, the application of the mandatory provisions of the EU law for purely intra-EU cases as well as the overall mandatory provisions of the *forum* country should in any case be guaranteed. The article observes that the protection provided to consumers by the rules of Rome I has even been titled 'a bit too generous,'[36] and points out that it could therefore hardly be considered insufficient in protecting the consumer. Second, it is claimed that the newer EU

[34] R. Piir, K. Sein (2016), pp 64–66.

[35] See K. Thorn. Eingriffsnormen. – F. Ferrari, S. Leible (eds.). *Ein neues Internationales Vertragsrecht für Europa – Der Vorschlag für eine Rom I-Verordnung*. Jenaer Wissenschaftliche Verlagsgesellschaft 2007, p 143.

[36] See S. C. Symeonides. Party autonomy in Rome I and II: An outsider's perspective. – *Nederlands Internationaal Privaatrecht* 2010/28, 2, p 198.

legislation in the area also seems to refer to a decline in the need for consumer protection rules in specific directives.[37]

Following this, Article IV examines the relevance of the Posting of Workers Directive alongside Rome I. It highlights that Article 8 of Rome I does not establish any specific rules for workers posted abroad. Per contra, given that the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country,[38] the employment contracts of posted workers would almost always be governed by the law of their sending state. Therefore, Article IV observes that, as a rule, Rome I subjects the posted workers to the law of their sending state. This indicates that the posted workers might be left with lesser protection as compared to the employees of the host state.

With a view to assessing the role of the public policy exception in private international law of contractual obligations alongside the rules on protecting the weaker parties, Article II is dedicated to the review of the public policy exception or the so-called 'safety net clause.'[39] In investigating the public policy exception and its role in international contract law, Article II shows that the public policy clause in Rome I is formulated in a broad manner, so as to leave the national judge a considerable amount of discretion in its application. Article II addresses the prerequisites for recourse to this exceptional clause and then goes on to analyse the relativity of *ordre public*, exploring the three dimensions to be considered in the courts' use of this exception in a particular case. Subsequently, the analytical compendium evaluates the remaining need to turn to the public policy exception in contractual matters involving consumers or posted workers.

1.4. Methods and Resources

The research in the publications compiling this compendium is mainly based on a qualitative review of different resources, including primary standard-setting instruments (EU regulations and directives, national legal acts), academic

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[37] For example, the Consumer Rights Directive does not contain a separate conflict-of-law provision and refers all questions of determining whether the consumer retains the protection granted by the directive in situations where the law applicable to the contract is that of a third country, to Rome I. Similarly, the Package Travel Directive and the new Digital Content Directive do not contain a separate conflict-of-law provision. The legal doctrine has also pointed out that the 'great days' of the directive-based conflict-of-law rules are coming to an end. – See, D. Martiny. Europäisches Internationales Schuldrecht – Kampf um Kohärenz und Weiterentwicklung. – *Zeitschrift für Europäisches Privatrecht* 2013/4, pp 838 ff, p 848.

[38] See, 2nd sentence of Article 8 (2) of Rome I.

[39] See C. Renner. Art. 21 Rome I. – G.-P. Calliess (ed.). *Rome Regulations: Commentary on the European Rules of the Conflict of Laws*. The Netherlands: Kluwer Law International BV 2011, p 318.

literature (commentaries, books, articles, reports from authorities, etc.), and case law of the CJEU as well as the Estonian Supreme Court.

The sources analysed for the purposes of the compendium have generally been taken as of the date of the publication of the articles. Where appropriate, the compendium also refers to additional resources published at a later date, for example EU regulations and directives adopted after the publication of the corresponding papers.

The main research method used in the articles is the doctrinal approach. The papers that make up this compendium are principally seeking to explain the applicable legal norms and concepts as well as their application criteria. The aim of the analytical compendium is to organise and describe the according interrelated legal rules to be found in different EU directives and regulations in order to identify an underlying system of these rules.

The compendium and its compiling articles use the analysis on the basis of theoretical concepts and the empirical analytical research method to cast light on how the different legal concepts explored in the compendium operate together and what effects does their application have in praxis. Articles I and II deal with the theoretical concepts of overriding mandatory provisions and public policy and analyse the possible recourses to these general exceptions to party autonomy. Articles III and IV concentrate on the specific issues of mandatory norms applicable to contracts concluded with consumers and posted workers.

Comparative analysis approach is also used in the articles to investigate the application and implementation of the studied legal concepts in selected countries' legal systems, as well as to compare the wordings of pre-existing and amended legal instruments and to study their effects.

II. SUMMARY OF THE MAIN CONCLUSIONS OF THE PUBLICATIONS INCLUDED IN THE COMPENDIUM

2.1. Relationship of Articles 6 and 9 of Rome I to the national provisions implementing the consumer-related directives

2.1.1. Statement set to defence

National provisions transposing the consumer-related directives should be considered subordinately to Article 6 of Rome I and would therefore find application in cases where it has been established that the prerequisites for applying Article 6 of Rome I have not been met. The directive-based Estonian Law of Obligations Act's provisions with conflict-of-law relevance do not constitute overriding mandatory provisions in the sense of Article 9 (1) of Rome I.

The provisions of the Estonian Law of Obligations Act transposing the consumer directives unduly expand the cases where national consumer protection rules are given precedence and should be rephrased so as to comply with the wording of the directives.

2.1.2. Reasoning

The problem of the relationship between the conflict-of-law rules stemming from consumer-related directives to Article 6 of Rome I has mainly to do with the 'old style' consumer directives.[40] That is, the question of which of those rules – the conflict-of-law rules of Article 6 of Rome I or the directive-based national provisions – is to be given priority in case of a possible conflict, may rise mainly where the application of earlier consumer contract law directives is concerned. This is due to the fact these include specific conflict rules to be implemented by the Member States.[41]

In order to clarify the interface of the provisions implementing the various consumer contract law directives to Article 6 of Rome I, two theoretical approaches can be proposed, as was also stated earlier in the compendium.

According to the first approach, prevalence could be given to the national implementing provisions as *lex specialis*, if one considers these to be 'provisions of Community law which, in relation to particular matters, lay down

[40] See, R. Piir, K. Sein (2016), p 68, and L. M. van Bochove (2014), para. 4.1.

[41] See, in contrast, newer consumer contract law directives that do not separately regulate issues of conflict-of-law. For examples of the newer consumer directives which refer the private international law questions to Rome I, see, e.g., Digital Content Directive, Article 4 and Recital 80; Package Travel Directive, Article 4 and Recital 49; Consumer Rights Directive, Article 4 and Recital 2.

conflict-of-law rules relating to contractual obligations' in the sense of Article 23 of Rome I. However, it must be emphasised that their prevalence could apply only insofar as the rules of the directives have not been excessively implemented into national laws. To be more precise, in case of 'over-implementation' of the directives, attributing priority to the national transposing provisions under Article 23 of Rome I could not be justified.[42] The reason behind this position is the argument that the excessively implemented rules should not be considered Community rules in the sense of Article 23 of Rome I on the grounds that the aim of the European legislator was not to rule out the choice of law of another Member State.[43]

Thus, according to this first approach, in case of a difference between the domestic rule and its European model, the national court should apply Article 6 of Rome I and not attribute prevalence to the domestic rule. Therefore, when the application requirements of Article 6 are met, the court should, according also to the preferential approach provided for by Article 6 (2) of Rome I,[44] apply the law that provides the consumer with better protection, be it the chosen law or the *lex causae*. However, applying this approach would also mean that the national judge should prove the consistency of the directive-based conflict-of-law provisions with the directives each time that the directive-based transposing provisions might be applicable.

The second approach analysed in Article III was to consider the national implementing provisions only after determining that the application requirements of Article 6 of Rome I have not been met. To be more precise, it was concluded that Article 23 of Rome I does not in fact oblige the Member States to automatically grant priority also to the specific national implementing rules regardless of the provisions of Rome I. The rationale behind this position is the gap-filling role of the transposing provisions with respect to the gaps left by the primarily party-autonomy orientated Rome I.[45] In accordance with this position, the transposing provisions would thus only come into play in cases where a

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[42] See, R. Piir, K. Sein (2016), p 68; F. Ragno (2015), pp 245–246; L. M. van Bochove (2014), para. 4.1.

[43] See, R. Piir, K. Sein (2016), p 68. See also, O. Remien (2011), p 340.

[44] 2nd sentence of Article 6 (2) of Rome I states that a choice of law may not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1. See also, R. Piir, K. Sein (2016), p 68. For more on the preferential/double protection approach (in German *Günstigkeitsvergleich*), see, for example, S. C. Symeonides. Party Autonomy in Rome I and II from a Comparative Perspective. – *Convergence and Divergence in Private International Law. Liber Amicorum Kurt Siehr*. Schulthess 2010, p 532. Symeonides states that, although the double protection rule may appear too generous, the other party may avoid it by not choosing a law other than the *lex causae,* as objectively determined under Rome I. For commentary on application of the preferential approach or favour principle, see also below, Fn 75.

[45] For more on this, see R. Piir, K. Sein (2016), pp 66 and 68.

'mobile' consumer[46] is concerned, since Rome I covers other areas concurrently regulated by the consumer directives.[47]

This dissertation takes a position in favour of the second approach.[48] To offer reasoning to the statement that the national implementing rules should be considered subordinately to Rome I, several considerations can be brought forward.

First, it is advocated that the obligation for the judiciary to prove whether the national rule has correctly transposed the provisions of the consumer contract law directives upon each occasion of its application, would be disproportionate.

Second, this approach also deserves support particularly as regards the application of the preferential approach established in Article 6 (2) of Rome I. Notably, the 2nd sentence of Article 6 (2) states that a choice of the law may not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which would otherwise have been applicable. Therefore, the favour principle of Article 6 (2) of Rome I allows the judge to apply whichever law is more protective to the consumer. Furthermore, according to this preferential approach, it would also be conceivable to exploit the protection of both laws for different aspects of the contract if necessary.[49] Per contra and as indicated in Article III, the transposing measures of the specific consumer contract law directives might not establish a preferential approach, as is also the case for Estonia.[50] This means that the prioritized application of the transposing provisions instead of the rules of Article 6 of Rome I might not allow to reach the most advantageous result for the consumer in a particular case.[51]

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[46] A 'mobile' or 'holidaying' consumer is a consumer who concludes a contract abroad with a trader that is seated abroad and does not pursue any activities in the consumer's country nor direct activities to that country.

[47] R. Piir, K. Sein (2016), p 69.

[48] This approach has also found support in Estonian legal writing after the article R. Piir, K. Sein (2016) had been accepted for publication. – See I. Kull (2016), Section 36, Nr 4.2.1, who – similarly to the findings of the article (see R. Piir, K. Sein (2016), p 68) – states that the Estonian national implementing rules should be considered subordinately where the prerequisites of Article 6 (1) of Rome I are not met and the protection afforded by Article 6 (2) of Rome I proves inadequate under the circumstances.

[49] See Section 4.1. of R. Piir, K. Sein (2016), and S. C. Symeonides. Party autonomy in Rome I and II from a comparative perspective (2010), p 532. However, it has been emphasised that the application of the favour principle should not, in conclusion, lead to a result that exceeds the protection and advantages foreseen in either of the legal orders – see D. Martiny. Art. 6 – J. von Hein (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 12. Internationales Privatrecht II, Internationales Wirtschaftsrecht, Einführungsgesetz zum Bürgerlichen Gesetzbuche (Art. 50–253)*. 7th edition. Munich: C. H. Beck 2018 (MüKoBGB/Martiny (2018)), Rom I-VO Art. 6 Rn 59.

[50] See more on this below.

[51] To illustrate, let us bring forward the hypothetical case of a consumer residing in Estonia, who – via the Internet – concludes a credit agreement with a German credit provider, who advertises its credit products also in Estonian media. Notably, suppose that according to the German credit provider's standard terms, the consumer has to pay 40 euros as a contract fee, and another clause of the standard terms provides that German law is applicable to the credit

In addition to investigating the role of the national implementing provisions in the context of Article 6 of Rome I, Article III also raised the issue of the interaction of the consumer protection rules stemming from the consumer directives to the overriding mandatory provisions in the sense of Article 9 (1) of Rome I. Notably, one can pose the question whether and to what extent the national implementing rules could be classified and applied as overriding mandatory provisions of the national law.[52]

In that context, it should first be noted that the consumer contract law directives mainly aim to grant the consumers the standard of protection necessary according to the directives for all cases closely related to the Member States. Therefore, the aim with the national implementing provisions is primarily to ensure the effective application of secondary EU law, as they foresee that the protection offered by the directives cannot be avoided by a mere choice of law. Consequently, they do not set forth multilateral conflict-of-law rules as such.[53]

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agreement. Under German law, however, such a contract-fee clause would be unfair and void. – See *Bundesgerichtshof*, 13.5.2014 – XI ZR 405/12. BGH NJW 2014, 2420. Therefore, applying German law would mean that the consumer would not be obliged to pay the fee, or even if the fee had already been paid, the consumer could reclaim it under the unjust-enrichment regime. According to Article 36 (2) of the Estonian Law of Obligations Act, however, Estonian rules on unfair contract terms should be applied. Under Estonian law, such standard terms have never been considered unfair, and therefore the credit provider's claim for contract fees would be justified. As a result, applying the second approach would mean that the law applicable to the consumer credit contract should be determined on the basis of Article 6 of Rome I, leading to the result that, according to Article 6 (1) of Rome I, German law governs the contract, apart from the Estonian law's provisions that cannot be derogated from by agreement, as set forth in Article 6 (2). Even though this would lead to the application of Estonian unfair-contract-terms regulation as mandatory consumer protection provisions, the consumer could still be favoured on account of the favour approach of Article 6 (2) of Rome I. This allows the national judge to apply whichever law is more protective to the consumer and also to exploit the protection of both laws, for separate aspects of the contract, if necessary. Therefore, the Estonian consumer could still make use of the provisions of German law that are more advantageous than the Estonian rules on unfair contract terms and consequently escape payment of the contract fee. In contrast, had we employed the first approach, such a comparison could not have been conducted and Estonian consumer contract provisions would have to have been applied notwithstanding the substantive content of the provisions. See, R. Piir, K. Sein (2016), pp 64 and 69.

[52] The question of the possibility to apply consumer protection rules as overriding mandatory provisions has long been an object of discussion and has not found a definite answer in legal scholarship, thus awaiting interpretation from the CJEU. – See, for example, MüKoBGB/Martiny (2018), Rom I-VO Art. 6 Rn 67, 68; A. Staudinger. – F. Ferrari, E.-M. Kieninger et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ.* Kommentar. 3rd edition. C. H. Beck 2018 (Ferrari IntVertragsR/Staudinger (2018)), VO (EG) 593/2008 Art. 6, Rn 6.

[53] The national transposing provisions have also been called scope rules, localising rules, outward conflict rules, or in German *Annexkollisionsnormen.* – For the terms, see, respectively, J.-J. Kuipers. *EU Law and Private International Law. The Interrelationship in Contractual Obligations*. Brill Nijhoff 2011, p 224; L. M. van Bochove (2014), para. 4;

Second, it must be pointed out that the consumer contract law directives do not, according to their wording, oblige the Member States to transpose the corresponding rules as overriding mandatory provisions,[54] even though the wording of the corresponding national transposing provision may refer to their overall mandatory nature. This is also the case for Estonia. Notably, most of the transposing provisions of the Estonian Law of Obligations Act stipulate that the Estonian rules apply regardless of which state's law is applicable to the contract.[55]

Investigating in this context more profoundly the compatibility of Estonian Law of Obligations Act's conflict-of-law rules to the rules provided for in the consumer directives, it can in fact be concluded that the Estonian implementing provisions do not comply with the requirements set forth in the consumer directives.[56] Namely, Articles 36 (2), 53 (1), 237 (2) and 403 (6) of the Estonian Law of Obligations Act all stipulate that the provisions determining the rights and obligations of the consumer and of the trader, apply to contracts with consumers residing in Estonia or EU, if the contract is entered into as a result of a public tender, advertising or other similar economic activities taking place in Estonia or if the contract is essentially linked to the territory of Estonia for any other reason, *regardless of which state's law applies to the contract* (emphasis added by the author).

The scope of application of the Estonian law is therefore wider than the level of protection foreseen by the consumer directives, since the latter only require as a prerequisite that a choice of a law of a third country has been made. Per contra, according to the Law of Obligations Act, national consumer contract rules should also be given precedence over a choice of law of another Member State.[57] This leads one to the conclusion that differences between the Estonian domestic rules and their European models exist, meaning that the Estonian

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S. Sánchez Lorenzo (2010), p 75; and D. Kluth. *Die Grenzen des kollisionsrectlichen Verbraucherschutzes*. Jenaer Wissenschaftliche Verlagsgesellschaft 2009, p 29. See also, R. Piir, K. Sein (2016), p 70.

[54] See also, R. Piir, K. Sein (2016), p 70, and F. Ragno (2015), p 331.

[55] See, R. Piir, K. Sein (2016), p 67, and Fn 37. It has been noted that the aim of these provisions is to guarantee the level of protection afforded to the consumer by the consumer directives and to prevent that the consumer be deprived of the backing of the consumer protection provisions through a choice of law for contracts concluded in Estonia. – see, I. Kull. Section 36. – P. Varul, I. Kull (eds.). *Võlaõigusseadus I. Kommenteeritud väljaanne*. Juura 2006, Nr 4.2.1; and I. Kull (2016), Section 36, Nr 4.2.1.

[56] See, R. Piir, K. Sein (2016), p 67. In this context, the paper also referred to the example of the Italian legislator, who had mishandled the implementation by stipulating the priority of Italian consumer contract provisions for all consumer contracts where a choice of law other than Italian law had been made. – See, R. Piir, K. Sein (2016), p 66, and F. Ragno (2015), p 245.

[57] However, it has been emphasised in legal doctrine that in case the law of another Member State already grants consumers the minimum protection required by secondary EU law, a Member State should not be able to restrict the party autonomy in choosing the law of that Member State to apply to the contract. – See, J. D. Lüttringhaus. Eingriffsnormen im Internationalen Unionsprivat- und Prozessrecht: Von Ingmar zu Unamar. – *Praxis des Internationalen Privat- und Verfahrensrechts* 2014/2, pp 146 ff, p 152.

legislator has overly implemented the directives. Therefore, the rules of the Estonian Law of Obligations Act unduly expand the cases where national consumer contract law rules are given precedence, since the national rules demand application and precedence not only over a choice of law of a third state, but also over a choice of law of another Member State.

It can be estimated that the reason for such discrepancy is the Estonian legislator's opting for a unified approach when transposing the directives into Estonian national legal order.[58] Notably, while it is true that the former Time-share directive,[59] that was transposed into Estonian law through Article 386 of the Law of Obligations Act, obliged the Member States to ensure that whatever the law was applicable, the purchaser was not to be deprived of the protection afforded by the directive, if the immovable property was situated within the territory of a Member State,[60] it was not the case for other consumer directives. The latter only aim to prevent a choice of law in favour of the law of a third country depriving the consumers from the protection afforded to them by the directives. Therefore, they do not operate in situations where no choice of law is made or the law of another Member State has been chosen. However, the wordings used in other aforementioned provisions of the Estonian Law of Obligations Act overlap with that of Article 386 as far as their mandatory nature is concerned. Therefore, it can be concluded that the Estonian legislator over-looked the differentiated level of protection foreseen in different consumer directives.[61]

In light of the above and irrespective of the wording that has been used in the Estonian Law of Obligations Act, it is nevertheless argued in this dissertation that the intention of the Estonian legislator has not been to give the transposing provisions overriding mandatory nature in the sense of Article 9 (1) of Rome I. On the contrary, according to the general remark in the explanatory note to the draft of the Estonian Law of Obligations Act, its consumer protection provisions are based on the directives and are supposed to be in compliance with the

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[58] R. Piir, K. Sein (2016), p 67.

[59] Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis. – OJ L 280, 9.10.1994, pp 83 ff (**former Timeshare Directive**). Replaced by directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts. – OJ L 33, 3.2.2009, pp 10 ff (**new Timeshare Directive**).

[60] Article 9 of the former Timeshare directive. The new Timeshare Directive also obliges the Member States to ensure, when the contract is closely connected to the EU, the application of the protective provisions of the directive by stipulating that when the law of a third country applies to the contract, consumers shall not be deprived of the protection granted by the directive, if the immovable property concerned is situated in a Member State or if the trader pursues or directs commercial activities in a Member State. – See Article 12 (2) and Recital 17.

[61] R. Piir, K. Sein (2016), p 68.

requirements of the directives.[62] Estonian legal doctrine has also pointed out that the aim of these transposing provisions is to guarantee the level of protection afforded to the consumer by the consumer directives.[63]

It is thus submitted that the Estonian transposing provisions in the Law of Obligations Act do not constitute overriding mandatory provisions in the sense of Article 9 (1) of Rome I, given that neither the aim of the European nor the Estonian legislator has been to give those provisions internationally mandatory character. Even the fact that the obligation to transpose the specific conflict-of-law provisions has been regulated on a European level and by directives which aim to ensure the proper functioning of the internal market, does not suffice to provide these provisions with an overriding public interest.[64]

Subsequently, it is proposed that the Estonian transposing provisions be rephrased in order to be aligned with the wordings of the respective consumer contract law directives. In cases where the directives require precedence over the choice or the application of the law of a third country, the transposing provisions in the Estonian Law of Obligations Act should also clearly indicate that these are to be applied when the law of a third country applies to the contract, as opposed to demanding application regardless of which state's law applies to the contract.

In respect of the foregoing, it is interesting to note that the recent amendments to the Estonian Law of Obligations Act have been in line with the consumer contract law directives. For example, the explanatory memorandum to the Estonian Draft Act amending the Tourism Act, Law of Obligations Act and Consumer Protection Act, which *inter alia* repealed the previous transposing measure and declared invalid the provision that required that the according Estonian rules be applicable irrespective of the law otherwise applicable to the contract,[65] has pointed out the need to abandon the specific conflict-of-law rules from the Estonian Law of Obligations Act's rules on package travel.[66] This waiver, with reference to the analysis conducted in one of the articles compiling this compendium,[67] was based on the fact that the law applicable will be determined according to the rules of Rome I.

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[62] See the general remark in the explanatory note to the draft of the Estonian Law of Obligations Act (116 SE), p 194. Available (in Estonian) http://www.riigikogu.ee/tegevus/eelnoud/eelnou/0d9390ea-974c-35ab-a6c7-cb14062c3ad3/V%C3%B5la%C3%B5igusseadus/ (01.09.2019).

[63] See, I. Kull (2016), Section 36, Nr 4.2.1.

[64] See, R. Piir, K. Sein (2016), p 70, and F. Ragno (2015), p 253.

[65] The provision declared invalid as of 01.07.2018 was Estonian Law of Obligations Act's Article 880 (2).

[66] Explanatory memorandum to the Estonian Draft Act amending the Tourism Act, Law of Obligations Act and Consumer Protection Act (*Seletuskiri turismiseaduse, võlaõigusseaduse ja tarbijakaitseseaduse muutmise seaduse eelnõu juurde*, 492 SE), p 56, point 39. – Available (in Estonian) https://www.riigikogu.ee/tegevus/eelnoud/eelnou/b908028a-c6ca-42b7-bdc3-cc9eced8997d (01.09.2019).

[67] The explanatory memorandum referred, in this context, to R. Piir, K. Sein (2016).

2.2. Relationship of Articles 8 and 9 of Rome I and the national provisions implementing the Posting of Workers Directive

2.2.1. Statement set to defence

In situations of postings, the minimum labour standards provided for in the national provisions transposing the Posting of Workers Directive have acquired internationally mandatory character and are to be applied alongside the otherwise applicable law. However, their mandatory nature derives directly from the Posting of Workers Directive. Otherwise, such national employee protection provisions, with the exception of labour market policy provisions or occupational health and safety conditions, could not be considered to have a universally mandatory character in the sense of Article 9 (1) of Rome I. The distinction is of importance as the core labour standards of the Posting of Workers Directive allow the favour principle to claim application, as opposed to Article 9 (1) of Rome I.

2.2.2. Reasoning

To offer reasoning to the statement put to defence, it must, as a preliminary remark, be noted that for the core labour standards of the host Member State to apply and guarantee protection to posted workers, as set forth in the Posting of Workers Directive,[68] corresponding transposing measures need to be introduced into national laws. To this end, Article 3 (1) of the Posting of Workers Directive stipulates that Member States shall ensure that, whatever the law applicable to the employment relationship, their undertakings guarantee workers posted to the territory of the said Member State the core labour terms and conditions of employment covered by the Directive.[69] Therefore, the Member States need to stipulate the according labour terms and conditions in their national laws and ensure that this core set of terms also cannot be avoided via an adverse choice of law.

In addition, in the context of examining the interaction of the core standards of the Posting of Workers Directive and Article 8 of Rome I, it is worth mentioning that the list of the standards set forth in the Directive does not lay down a European-wide harmonised level of protection for posted workers, as is the case for certain consumer contract law directives.[70] On the contrary, the

[68] Articles 3 (1) (a) – (g) of the Posting of Workers Directive, or, as of 30.7.2020, Articles 3 (1) (a) – (i) in the amended Posting of Workers Directive.

[69] The Estonian transposing measure of the directive is the Working Conditions of Employees Posted to Estonia Act, which in its § 5 sets forth the conditions that have to be granted to workers posted to Estonia.

[70] See, R. Piir (2019), pp 107–108, and its Fn 33.

Posting of Workers Directive only imposes specific obligations on Member States and aims at coordinating the applicable law as long as certain employment conditions are concerned.[71]

Hence, the law applicable to the employment relationship of the posted worker shall in all other aspects be determined according to the general rules of Article 8 of Rome I. It follows that the employment contract of a worker temporarily posted abroad is usually regulated by the law of the home state (the sending state) of the employee, or in case of a chosen law, by the law chosen to govern the contract. At the same time, the national provisions implementing the Posting of Workers Directive and laying down the core standards of the host state would be applied in addition to the law otherwise applicable to the employment contract.[72]

Equally noteworthy in this context is the importance of the favour principle laid down in Article 8 of Rome I. Notably, the second sentence of Article 8 (1) of Rome I sets forth that a choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that would have been applicable in the absence of choice.[73] It is interesting to observe that although

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[71] It has been argued that the Posting of Workers Directive is actually not a true conflict-of-law instrument as its Article 3 (1) by its wording imposes obligations on host states, but leaves open, which terms can be invoked if a posted worker sues in its home country. – See S. Evju (2010), pp 90 and 98. In fact, Article 3 (1) of the Posting of Workers Directive is comparable to Articles 3 (1) and (2) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (**Directive on Electronic Commerce**). – OJ L 178, 17.7.2000, pp 1 ff, in that they impose certain obligations on Member States rather than constituting a conflict-of-law rule that is designed to resolve a specific conflict between several laws. In that context, see also joined cases *eDate Advertising and Martinez v. MGN Limited*, C-509/09 and C-161/10, EU: C:2011:685, at 57 and 61. See also, R. Piir (2019), p 108.

[72] It is interesting to note that although the CJEU could have had occasion to explicate the reciprocal interaction of the Posting of Workers Directive and the law applicable to individual employments contracts under Rome I, it has not gone into the issue. For example, the CJEU pointed out in *Sähköalojen ammattiliitto*, C-396/13, ECLI: EU: C:2015:86, at 23, that, according to the second subparagraph of Article 3 (1) of the Posting of Workers Directive, questions concerning 'minimum rates of pay' within the meaning of the Directive are governed, whatever the law applicable to the employment relationship, by the law of the Member State to whose territory the workers are posted in order to carry out their work. Nevertheless, the judgement contains no reference to Rome I. For criticism, see H-P. Mansel, K. Thorn, R. Wagner. Europäisches Kollisionsrecht 2015: Neubesinnung. – *Praxis des Internationalen Privat- und Verfahrensrechts* 2016/1, pp 1 ff, p 30, who consider the judgement extremely sparse in its dogmatic conclusions. See also, R. Piir (2019), p 113 and Fn 68.

[73] See also R. Piir (2019), p 114, and Recital 35 of Rome I. For more on the preferential approach and the choice-of-law clause, see, e.g., P. Mankowski. Stillschweigende Rechtswahl, Günstigkeitsvergleich und Anknüpfung von Kündigungsschutzrecht im Internationalen Arbeitsvertragsrecht. – *Praxis des Internationalen Privat- und Verfahrensrechts* 2015/4, pp 309 ff, pp 311–312.

the preferential approach in Rome I therefore presupposes a choice-of-law clause, the Posting of Workers Directive also implements the favour principle, but without such a prerequisite. In particular, the Posting of Workers Directive sets forth that the listed core set of conditions shall not prevent the application of terms and conditions of employment which are more favourable to workers.[74] Subsequently, the national judge would have to apply the provisions more favourable to the posted worker irrespective of the existence of a choice-of-law clause.[75]

The potential application of the favour principle is also a key element in the need to investigate the interface of the implementing provisions of the Posting of Workers Directive and Article 9 of Rome I. To be more exact, the practical importance of their distinction – and of the question whether the implementing provisions also represent overriding mandatory provisions in the sense of Article 9 (1) of Rome I – stems from the fact that even though the Posting of Workers Directive clearly provides for the favour principle, the overriding mandatory provisions in the context of Article 9 (1) of Rome I shall be applied without comparing which provision would be more beneficial to the employee. Therefore, the latter do not allow for a comparison to be made.

This in turn raises the question of the legal nature of the national implementing rules transposing the Posting of Workers Directive. In this respect, several aspects need to be taken account of.

First, already the examination of the wording of the Posting of Workers Directive, which explicitly prescribes that the listed core employment terms are

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[74] See Article 3 (7) of the Posting of Workers Directive and Article 1 (2) (c) of the amended Posting of Workers Directive. Their wording therefore brings us clearly to the conclusion that although the minimum conditions must mandatorily be observed, these conditions are nevertheless not aimed at precluding the application of a more favourable provision that might have otherwise been applicable under the objectively applicable law or the chosen law. See also, R. Piir (2019), p 113.

[75] See also, R. Piir (2019), p 114. Let us mention that applying the preferential approach in cases dealing with posted workers should not in essence differ from its application to other conflict-of-law cases involving the application of the favour principle. To summarise, the national judge should determine the standard of protection ensured by the national implementation measures of the host state and apply these, if appropriate. However, this does not presuppose an abstract comparison of the provisions, but rather a group comparison of interrelated provisions. In practice, the national judge should therefore take account of disputed issues and the applicant's claim (*ne ultra petita*), instead of trying to distinguish the content of individual protective provisions. On favour approach, see also, P. Mankowski (2015), pp 311–312; Ferrari IntVertragsR/Staudinger (2018), VO (EG) 593/2008 Art. 8 Rn 13; MüKoBGB/Martiny (2018), Rom I-VO Art. 8 Rn 42, 43. This approach has also found application in Estonian case law. – See Tartu Circuit Court Judgement of 22 Oct. 2014, no. 2-13-30411, p. 11.2, where the court stated that it is not the social guarantees of each concerned state that have to be compared; instead, the strength of the regulatory protection applicable to the legal situation at hand have to be measured. However, application of the favour principle should not lead to a result that exceeds the protection of both legal orders or allows to rely on individual advantages only. – See MüKoBGB/Martiny (2018), Rom I-VO Art. 8 Rn 43.

applicable to any situation falling within their scope, irrespective of the otherwise applicable law, brings one to the conclusion that these provisions represent overriding mandatory provisions.[76] A second aspect to consider in determining a provision's internationally mandatory character is the intention of the legislator – be it the national or European legislator.[77] One can conclude here as well that contrary to most of the consumer protection standards set forth in the consumer directives, which the European legislator did not intend to have internationally mandatory character,[78] this has not been the case for the Posting of Workers Directive. Namely, in addition to the wording of the Directive itself, the European legislator has also emphasised in the Recitals of the Preamble to Rome I the overriding mandatory nature of the terms set forth in the Posting of Workers Directive.[79] Last, legal writing has predominantly considered the core set of working conditions as prescribed by the Posting of Workers Directive as overriding mandatory provisions, too.[80]

In spite of the above, however, it appears contentious whether these provisions would, without the existence of the Posting of Workers Directive, fulfill the necessary prerequisites to consider them as overriding mandatory provisions in

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[76] As the listed of terms and conditions have to be granted by each Member State to workers posted to their territory, the national transposing measures should be clearly phrased in the first place so as to include an obligation to ensure application of the required standards as overriding mandatory rules. See, for example, the Working Conditions of Employees Posted to Estonia Act § 5; German *Arbeitnehmer-Entsendegesetz* (Law on Posting of Workers). – Available (in German) https://www.gesetze-im-internet.de/aentg_2009/ (01.09.2019), § 2; French *Code du travail* (Labour Code). – Available (in French) https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072050 (01.09.2019), article L. 1261–1 ff that explicitly require mandatory application. See also, R. Callsen. *Eingriffsnormen und Ordre public-Vorbehalt im Internationalen Arbeitsrecht. Ein deutsch-französischer Vergleich*. Nomos 2015, pp 138 and 175.

[77] See also, R. Piir (2019), p 111, and Ferrari IntVertragsR/Staudinger (2018), VO (EG) 593/2008 Art. 9 Rn 13–14. For analysis of the concept of overriding mandatory provisions, see, e.g., R. Piir (2010), pp 200 ff.

[78] For a more profound analysis on the matter, see the previous subsection of the compendium.

[79] Recital 34 of Rome I states that the rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with the Posting of Workers Directive.

[80] E.g. D. Martiny. Neuanfang in Europäischen Internationalen Vertragsrecht mit der Rom I-Verordnung. – *Zeitschrift für Europäisches Privatrecht* 2010/4, pp 747 ff, p 773; U. Magnus. *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB – EGBGB/IPR Einführungsgesetz zum Bürgerlichen Gesetzbuche/IPR. Einleitung zur Rom I-VO; Art 1–10 Rom I-VO (Internationales Vertragsrecht 1)*. Sellier-de Gruyter 2016, Art. 8 Rom I-VO Rn 200; MüKoBGB/Martiny (2018), Rom I-VO Art. 8 Rn 134. R. Callsen (2015), at p 259, considers the minimum core working conditions as overriding mandatory provisions in the sense of Article 9 of Rome I; U. Grušić. The Territorial Scope of Employment Legislation and Choice of Law. – *Modern Law Review* 2012/75(5), pp 722–752, sees the Posting of Workers Directive as an implementation of Article 9 of Rome I.

the strict sense of Article 9 (1) of Rome I.[81] It should be recalled that Rome I expressly requires that a distinction be made between the simple mandatory rules and the internationally mandatory rules.[82] According to Article 9 (1) of Rome I, the latter refer to provisions the respect for which is regarded as crucial by a country for safeguarding its public interests and these are applied irrespective of the otherwise applicable law.

This brings one to the conclusion that in the context of employment law, overriding mandatory provisions in the strict sense of Article 9 (1) of Rome I could mainly entail various labour market policy provisions, such as protection against dismissal of employee representatives, or pregnant women, and also matters of health and safety at work.[83] Alternatively, national employee protection provisions, which mainly protect the weaker party, would represent the so-called simple mandatory rules.[84]

Therefore, the previously established overriding character of most of the minimum labour standards of the Posting of Workers Directive derives from the European-origin transposing provisions. Hence, it is advocated that the Directive is of pivotal importance in the sense that this is what gives the rules on, for

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[81] In practice, the national transposing provisions should due to their wording adequately ensure that their overriding mandatory character must not be established separately under Article 9 (1) of Rome I. Nevertheless, a clear distinction between the mandatory provisions in the strict sense of Article 9 (1) of Rome I and the provisions that have acquired their mandatory character due to the Posting Workers Directive is not always expressly made nor emphasised in legal writing, including the works referred to in the previous footnote.

[82] See Recital 37, 2nd sentence, of Rome I.

[83] See R. Piir (2019), p 111; Ferrari IntVertragsR/Staudinger (2018), VO (EG) 593/2008 Art. 8 Rn 15–16. See also, M. Schlachter. – R. Müller-Glöge, U. Preis et al (eds.). *Erfurter Kommentar zum Arbeitsrecht*. 16th edition C. H. Beck 2016, § 2 AEntG, Rn 2.

[84] These constitute provisions of general employment and contract law, such as minimum paid annual leave, general protection against dismissal, general principle of equal treatment, control of general terms and conditions etc. – See J. Kropholler. *Internationales Privatrecht*. Tübingen 2006, § 52 IX 1; U. Magnus. Die Rom I-Verordnung. – *Praxis des Internationalen Privat- und Verfahrensrechts* 2010/1, pp 27 ff, p 41. See also, H.-J. Sonnenberger. Eingriffsrecht – Das trojanische Pferd im IPR oder notwendige Ergänzung? –*Praxis des Internationalen Privat- und Verfahrensrechts* 2003/2, pp 104 ff, p 107; Ferrari IntVertragsR/ Staudinger (2018), VO (EG) 593/2008 Art. 8 Rn 14; and P. Mankowski (2015), p 317. Nevertheless, the question of considering as overriding mandatory rules also those provisions where protection of the public interest is but a reflex of the primary purpose of protecting private interests, is unsettled in the legal doctrine of the Member States. German courts and doctrine do not consider such provisions as overriding mandatory; whereas others, for example, French, Italian, Belgian and British doctrine seem to have taken a broader approach, viewing the abuse of weaker parties as a threat to civil society – for specific references, see, R. Piir (2019), Fn 63. In international employment law, one tool for the distinction would be to assess whether the provision is targeted at the functioning of the labour market or whether it is directed against misuses of authority in labour relations. The former would constitute an overriding mandatory provision whereas in most cases probably not the latter. – See also, U. Grušić (2012), p 43.

example, minimum paid annual holidays, minimum rest periods and maximum work periods their internationally mandatory character.[85]

Given that Article 9 of Rome I does not establish the favour principle as long as the application of overriding mandatory provisions of the law of the *forum* is concerned, one might ask how to solve a situation wherein a national provision, which entails the core working conditions of the Posting of Workers Directive, simultaneously represents an overriding mandatory provision in the strict sense of Article 9 (1) of Rome I. This would be the case, for instance, with the Posting of Workers Directive's requirement to guarantee posted workers the host state's terms and conditions covering health, safety and hygiene at work.[86] In this respect, it is worthy of mention that for example the Estonian transposing measure of the Directive explicitly prohibits the preferential approach with respect to terms and conditions covering health, safety and hygiene at work, and stipulates that the national Occupational Health and Safety Act shall be applied to a posted employee even when it is less favourable to the posted employee than the provisions of a foreign law.[87]

Indeed, provisions which can also be regarded as overriding mandatory provisions in the strict sense of Article 9 (1) of Rome I should, in the sense intended with Rome I, apply to the employment contract regardless of the interests of the employees. Therefore, the non-application of the favour principle can in principle be justified. It follows that the favour principle thus claims application only as long as it is not dealing with overriding mandatory provisions in the strict sense of Article 9 (1) of Rome I.

2.2.3. Statement set to defence

When applying the favour principle in situations of postings, the national judge should conduct a group comparison of the provisions instead of distinguishing the content of each protective provision. Thus, for example an Estonian worker posted to Finland would not be entitled to claim daily allowances under Estonian law in addition to the Finnish minimum rates of pay. Estonian jurisprudence concerning the implementing provisions of the Posting of Workers Directive is in this sense not in line with the Posting of Workers Directive.

2.2.4. Reasoning

To offer reasoning to the statement that Estonian jurisprudence concerning the implementing provisions of the Posting of Workers Directive is not in line with the Posting of Workers Directive, it must first be underlined that even though the Posting of Workers Directive requires that posted workers are subject to the

[85] R. Piir (2019), p 112.
[86] See R. Piir (2019), p 113.
[87] See Working Conditions of Employees Posted to Estonia Act, § 5 (2).

minimum rates of pay[88] of the host state, the determination of the minimum rates of pay may differ from one Member State to another. In this respect, the CJEU has emphasised that, as long as the definition of the constituent elements of the minimum wage is concerned, the task remains up to the law of the host Member State.[89] However, only a few national laws or collective agreements impose specific rules determining the elements of the minimum rates of pay due to posted workers and therefore, it is rather unclear whether and which elements – in addition to overtimes rates and allowances specific to the posting, which are explicitly mentioned in the Posting of Workers Directive[90] – can be included in its calculation.[91]

To illustrate the foregoing, the Estonian case law does not consider daily posting allowances to form part of the wages on the grounds that daily posting allowances are paid for being on the road and residing in the host state, not for the actual work performance.[92] In contrast, Finnish Act on Posting Workers, in accordance with the Posting of Workers Directive, explicitly provides that allowances specific to the posting, which do not involve expenditures actually incurred on account of the posting, are considered to be part of the minimum rates of pay.[93]

Having regard to first, the logic of applying the favour principle, which should consist of establishing and comparing the total gross amounts of remuneration rather than its individual constituent elements,[94] and second, to the guidelines of the CJEU on how to determine the elements of the minimum rates due, one can therefore conclude that a posted worker should not be entitled to claim daily allowances under Estonian law in addition to the minimum pay as laid down under Finnish law in Finnish collective agreements. On the contrary, the court would have to take into account the Finnish conception of the constituent

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[88] Replaced by the term 'remuneration' in the amended Posting of Workers Directive.

[89] See *Isbir*, C-522/12, EU: C:2013:711, 37; and *Sähköalojen ammattiliitto*, C-396/13, ECLI: EU:C:2015:86, 34. See also, R. Piir (2019), p 108.

[90] See Articles 3 (1) (c) and 3 (7) of the Posting of Workers Directive.

[91] See, R. Piir (2019), p 109, and more precisely its Fn 41.

[92] See judgements of Estonian Supreme Court of 7 Jun. 2011, no. 3-2-1-43-11, p. 15; and of 5 Mar. 2014, no. 3-2-1-187-13, p. 16; see also Estonian Employment Contracts Act (*Töölepingu seadus*). – RT I, 13.03.2019, 173. Available (in English) https://www.riigiteataja.ee/en/eli/515012019003/consolide (01.09.2019); and Regulation of the Government laying down the conditions and procedure for paying the allowances (*Töölähetuse kulude hüvitiste maksmise kord ning välislähetuse päevaraha alammäär, maksmise tingimused ja kord*). – RT I, 2912.2015, 48. Available (in Estonian) https://www.riigiteataja.ee/akt/129122015048 (01.09.2019).

[93] According to Section 5 (4) of Finnish Act 447/2016 on Posting Workers. – Available (in English) https://www.finlex.fi/fi/laki/kaannokset/2016/en20160447_20170074.pdf (01.09.2019), special allowances paid due to the worker's posting are considered part of the worker's pay, unless these are paid in reimbursement of actual costs incurred because of the posting. Article 3 (7) of the Posting of Workers Directive also provides for such inclusion of allowances specific to the posting in the minimum wage. See also, R. Piir (2019), p 102, Fn 5.

[94] See also Recital 18 of the amended Posting of Workers Directive, and R. Piir (2019), p 110. On application of the favour principle, see Fn 75, above.

elements of the minimum wage, instead of separately applying Estonian law to the notion of daily allowances.[95]

However, the Estonian Supreme Court has reached a reverse conclusion in its judgement of 5 March 2014, no. 3-2-1-187-13. In that judgement, in addition to the Finnish minimum rates of pay that the court declared applicable, it also applied the Estonian perception of daily posting allowances, thus enabling the employee to claim the Finnish minimum wages together with the daily posting allowances the employee received supplementarily under Estonian law. Notably, the Court stated that Finnish law concerning the daily allowances, notwithstanding its consistency with the second sentence of Article 3 (7) of the Posting of Workers Directive, was not applicable due to the preferential approach of Article 6 (2) of the Rome Convention.[96] One can thus conclude that the Estonian Supreme Court did not take into account the instructions given by the CJEU with regard to defining of the constituent elements of the minimum wage.

2.3. Relevance of the specific directive-based provisions alongside Rome I and the role of the public policy exception in private international law of contractual obligations

2.3.1. Statement set to defence

The specific consumer directive-based conflict rules may create problems deriving from the possible variations of their transposition into national laws. Therefore, the conflict-of-law issues should subsequently be left to be resolved within the framework of Rome I. However, the practical need pertains for an instrument which takes into account the specifics of postings. Finally, with regard to the protective mechanisms provided for in Rome I as well as the specific directive-based regulations, the role of public policy in protecting consumers and posted workers is likely to remain marginal.

2.3.2. Reasoning

In order to determine whether the need for the directive-based consumer protection provisions next to the rules of Rome I persists, attention must first be

[95] R. Piir (2019), pp 114–115.

[96] See, judgement of Estonian Supreme Court of 5 March 2014, no. 3-2-1-187-13, p. 15–16; see also R. Piir (2019), p 115, Fn 77. It should be mentioned that M. Fornasier and M. Torga (2013), in their paper, analysed the judgement of Estonian Supreme Court of 16 January 2013, no. 3-2-1-179-12, wherein the court examined the application of the Posting of Workers Directive and Article 8 of Rome I, as well as the preferential approach, but which did not deal with the question of determining the elements of minimum wage and applying the preferential approach in this context.

paid to the question of whether the directive-based rules grant consumers a higher level of protection when compared to the protection guaranteed by Rome I. Article III established that the answer to this is affirmative.[97] While it is true that Article 6 (2) of Rome I together with the Regulation's other more general mandatory provisions already provides the consumers with enlarged protection against an adverse choice of law, it cannot be overlooked that some types of consumer contracts are still *expressis verbis* excluded from the scope of the application of Rome I.[98] What is more, the 'mobile' or the 'holidaying'[99] consumer, who concludes a contract abroad with a trader that is also seated abroad and that does not pursue any activities in or direct activities to the country of the consumer, would also remain unprotected under Article 6.[100] We can thus conclude that the consumer contract law directives and their transposing measures play a gap-filling role in so far as they grant the application of specific consumer-protection rules also to consumers who would otherwise be left out of the scope of application of Article 6 of Rome I.[101]

However, a second aspect to consider in this respect is the need to grant legal certainty and predictability of the law applicable to consumer contracts. The research carried out for this dissertation indicated the problem that the transposition of the directive-based rules into different national legal orders can be conducted by various means and often incorrectly, especially where minimum harmonisation directives are concerned.[102] To be more precise, the earlier consumer directives – unlike the full harmonisation approach opted for in the newer consumer directives such as, for example, Consumer Rights Directive,[103] Consumer Credit Directive,[104] Package Travel Directive,[105] the newly adopted Digital Content Directive[106] and the new Consumer Sales Directive[107] – were based on the principle of minimum harmonisation, making it therefore possible

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97 R. Piir, K. Sein (2016), p 65.

98 Article 6 (4) of Rome I excludes service contracts where the services are to be provided exclusively in a country other than the consumer's residence; contracts related to a right *in rem* in or a tenancy of immovable property; contracts which concern financial instruments; carriage contracts and insurance contracts. – See, R. Piir, K. Sein (2016), p 65.

99 C. Bisping (2012), p 242.

100 See, R. Piir, K. Sein (2016), p 66.

101 In German *Lückenfüllungsfunktion*; see, for instance, D. Kluth (2009), p 30.

102 See subsection 2.1., above. See also, S. Sánchez Lorenzo (2010), p 75; F. Ragno (2015), p 242.

103 See Article 4 and Recital 2 of the Consumer Rights Directive. Similar approach has been adopted in the new Digital Content Directive – see its Recital 80, which states that nothing in the Directive should prejudice the application of the rules of private international law of Rome I, and Article 4, which prohibits any national provisions diverging from those laid down in the Directive.

104 See, Article 22 (1) and Recital 9 of the Consumer Credit Directive.

105 See, Article 4 of the Package Travel Directive.

106 See, Article 4 of the Digital Content Directive.

107 See, Article 4 of the new Consumer Sales Directive.

that their provisions are not uniformly implemented into national laws.[108] This, in turn, may have as a result 'a colorful bouquet'[109] of not only diverging consumer contract law rules in the Member States, but also of different national conflict-of-law rules, causing unpredictability as well as general difficulties in their application.[110]

Taking into account that the implementation of the directives may not and has not always been done faithfully,[111] it would be reasonable to gradually abandon the specific directive-based conflict-of-law rules on the EU level in favour of a uniform set of rules along the lines of the newer consumer directives, for example the Consumer Rights Directive. The latter refers questions of determining whether the consumer retains the protection granted by the directive in situations wherein the law applicable to the contract is that of a third country, to Rome I.[112] The advantage of such waiver would lie in the possibility to prevent problems deriving from the variations in transposing the directive-based conflict rules into national laws as was established earlier in this compendium.

However, the suggestion on abandoning the specific directive-based conflict-of-law rules cannot be extended to the question of the relevance of a specific directive dealing with posted workers alongside Rome I. From this perspective, it was concluded above that the practical need remains for an instrument such as the Posting of Workers Directive, which takes into account the specifics of postings.[113]

To explicate, Rome I takes as a base the application of the law of the habitual workplace of the employee and does not foresee any specific protection for workers posted abroad. On the contrary, according to Article 8 (2) of Rome I, the individual employment contract is as a general rule governed by the law of the country in which or from which the employee habitually carries out his work, with subsidiary objective criteria to determine the applicable law foreseen in Articles 8 (3) and (4) of Rome I. As a result, the posted workers, who would be working only temporarily in the host state according to the definition given in Rome I,[114] would remain subject to their home state rules. Applying only the rules provided for in Rome I for individual employment contracts would there-

[108] See, R. Piir, K. Sein (2016), p 66.

[109] For the term (in German, *Bunter Strauss*), see E. Čikara. *Gegenwart und Zukunft der Verbraucherkreditverträge in der EU und in Kroatien*. Berlin: LIT Verlag 2010, p 488, with further references.

[110] S. Sánchez Lorenzo (2010), p 76. See also, R. Piir, K. Sein (2016), p 66.

[111] For an analysis of the Estonian transposing measures and their incompliance with the consumer contract law directives, see subsection 2.1., above.

[112] See, Recitals 10 and 58 of the Consumer Rights Directive; see also, R. Piir, K. Sein (2016), p 66.

[113] For more on the subject, see also subsection 2.2., above; and R. Piir (2019), p 104.

[114] According to the 2nd sentence of Article 8 (2) of Rome I, the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country.

fore not sufficiently allow to take into consideration the specifics of postings in granting protection to posted workers.

Therefore, it is argued that the directive-based rules grant posted employees a fairer level of protection when compared to Rome I, given that these allow for the application of specific core terms and conditions for cases when the employee is posted to another country. Namely, it should be reminded that the Posting of Workers Directive sets forth a list of minimum core working conditions that are to be applied to posted workers in the host Member State.[115] The amended Posting of Workers Directive goes even further by not only determining the core set of minimum rules to be applied, but, in certain cases, requiring compliance with specific standards of the host country.[116] One can thus conclude that in addition to Rome I, an instrument such as the Posting of Workers Directive pertains its continuous importance in safeguarding the interests of posted workers.

Finally, to offer reasoning to the statement that the public policy exception will not retain a substantial role in private international law of contractual obligations and abreast the specific rules on protecting the weaker parties, one must first take into consideration that typical contract law cases are probably not likely to raise issues of public policy,[117] especially when compared to the more value-sensitive areas, such as family law or inheritance law.[118] Second,

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[115] See, R. Piir (2019), p 104. According to Article 1 (3) of the Posting of Workers Directive, Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings guarantee workers posted to their territory the terms and conditions of employment covering the following matters: (a) maximum work periods and minimum rest periods; (b) minimum paid annual holidays; (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes; (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; (e) health, safety and hygiene at work; (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; (g) equality of treatment between men and women and other provisions on non-discrimination.

[116] Let us take as an example the obligation to comply with the remuneration rules of the host country instead of just minimum rates of pay. See also, R. Piir (2019), p 104.

[117] See, S. Leible, M. Lehmann. Die Verordung über das auf vertragliche Schuldverhältnisse anzuwendende Recht („Rom I"). – *Recht der Internationalen Wirtschaft* 2008/8, pp 528 ff, p 543. See also, R. Piir (2015), pp 31–32, for analysis of the relativity of public policy and conclusion that due to the high substantive treshold of this instrument, it is likely to come into play rather infrequently.

[118] See, W. Wurmnest, M. Kübler-Wachendorff. The Constitutionalization of Public Policy in Private International Law. – C. Hugo, T. M. J. Möllers (eds.). *Legality and Limitation of Powers. Values, Principles and Regulations in Civil Law, Criminal Law, and Public Law*. Germany: Nomos, 2019, p 281. It has been pointed out, based on an analysis of German jurisprudence, that in the field of contract law, violations of public policy have been found in very special circumstances, for example cases of excessively high contractual penalties, or foreign legal orders not containing provisions for objecting contractual obligations on the grounds of abuse of law – see W. Wurmnest, M. Kübler-Wachendorff (2019), p 278. The substantive public policy retains a limited role also in matters of recognition and enforcement of foreign judgements and awards. For example, Estonian Supreme Court has recently explained, in the context of recognition of arbitral awards, that not all imperative norms of

while it is true that the rules in Rome I concerning *ordre public* do not differentiate between its application in cases dealing with the law of other Member States and third states, it has been correctly noted that as long as the EU level is concerned, the public policy exception can only have a restricted relevance due to the approximation of laws.[119]

It is further advocated that the corrective and regulatory function of public policy is to a large part already fulfilled by overriding mandatory provisions and other mandatory norms, such as Articles 3 (3), 3 (4), 6 (2) and 8 (1) of Rome I, not to mention the specific directives protecting consumers and posted workers. On the basis of the research conducted for this dissertation, we can conclude that for consumer contracts, Rome I already contains rather generous rules when determining the law applicable, which is further supplemented by the specific directive-based rules. In the context of postings, the Posting of Workers Directive complements the rules on determining the law applicable to individual employment contracts.

Therefore, the need to turn to the exceptions of overriding mandatory provisions or all the more restricted instrument of public policy is likely to remain limited under the application of Rome I.[120] This is due to the fact that firstly, the minimum protection of the weaker party to the contract has been consistently reinforced on the EU level, and secondly, the application of foreign law to such contracts is in any case restricted because of Articles 3, 6, 8 and 9 of Rome I.[121] Thus, other protective mechanisms have likely already come into play even before the application of the instrument of public policy could be considered. It is therefore argued here that in matters of international contract law and more specifically in cases concerning consumers or posted workers, public policy will continue to function only as a safety net for the general conflict rules.[122]

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the recognising state can be placed under the exception of public policy, but only those provisions that reflect the fundamental values of the legislative system of the state that has to decide over the recognition – see Order of Estonian Supreme Court of 12 Dec. 2018, no. 2-18-4731, p. 17.

[119] See H. J. Sonnenberger. Grenzen der Verweisung durch europäisches internationales Privatrecht. – *Praxis des Internationalen Privat- und Verfahrensrechts* 2011/4, pp 325 ff, p 332.

[120] See, MüKoBGB/Martiny (2018), Rom I-VO Art. 6 Rn 68, who emphasises that due to the sufficient protection already granted by the rules of Article 6 of Rome, little room would be left to apply the consumer protection rules as overriding mandatory provisions. See also, Ferrari IntVertragsR/Staudinger (2018), VO (EG) 593/2008 Art. 9 Rn 29.

[121] M. Schlachter (2016), § 9 Rom I-VO Rn 26.

[122] See R. Piir (20015), p 32. The public policy clause has also been referred to as a relief valve or an emergency brake before an *excursus* into the depths of a foreign law. – See, respectively, C. von Bar, P. Mankowski. *Internationales Privatrecht, 1*. 2nd edition. Munich: C.H. Beck 2003, p 714; and K. Siehr. *Internationales Privatrecht*. Heidelberg, Germany: C.F. Müller Verlag 2001, p 490.

III. CONCLUSIONS

This dissertation has discussed the issues concerning mandatory provisions foreseen in Rome I in favour of parties regarded as being weaker in the contractual relationship, in particular consumers and posted workers. It raised the question as to the role of some of the specific domain based-directives (consumer contract law directives and the Posting of Workers Directive) and their national transposing measures abreast the rules provided for in Articles 6 and 8 of Rome I. In addition, the dissertation drew attention to the need to clarify the interaction of the provisions protecting the weaker party and the two more general limitations to party autonomy also foreseen in Rome I – the overriding mandatory provisions of the *forum* state and the general public policy exception.

After examining the relationship of Articles 6 and 9 of Rome I to the national provisions implementing the consumer directives, it was concluded that the national directive-based rules should be considered subordinately to Rome I. As a result, the national rules could be applied only in cases where the prerequisites for applying Article 6 of Rome I have not been met. It was also submitted that the directive-based conflict rules of the Estonian Law of Obligations Act are not to be viewed as overriding mandatory rules in the sense of Article 9 (1) of Rome I.

On the issue of compliance of the directive-based conflict rules of the Estonian Law of Obligations Act to the consumer contract law directives, it was observed that the Estonian legislator has unduly expanded the cases where the Estonian consumer protection provisions are given precedence in that they demand application regardless of which state's law applies to the contract. Therefore, these provisions demand precedence not only over a choice of law of a third state, but also over a choice of law of another Member State. In that respect, it was proposed that the corresponding transposing provisions be rephrased so as to comply with the wordings of their underlying directives.

After investigating the interaction of Articles 8 and 9 of Rome I and the national provisions implementing the Posting of Workers Directive, the dissertation concluded that the core labour standards of the Posting of Workers Directive have acquired internationally mandatory character and are to be applied alongside the otherwise applicable law. However, it was indicated that the majority of the national core employment provisions would not fill the prerequisites of determining them as overriding mandatory provisions in the sense of Article 9 (1) of Rome I. Therefore, the Posting of Workers Directive, together with its national transposing measures, is the source of their internationally mandatory character. The dissertation also concluded that unlike the 'true' overriding mandatory provisions in the sense of Article 9 (1) of Rome I, the majority of these core set of working conditions do not preclude a preferential approach. As a result, they generally allow for the determination and application of the more favourable provisions to posted workers.

Having regard to the question of the conformity of the Estonian jurisprudence concerning the implementing provisions of the Posting of Workers Directive, the research indicated some discrepancies. In this respect, the dissertation also investigated the general application of the favour principle in situations of postings. The provided research led to the conclusion that the national judge should conduct a group comparison of the provisions instead of distinguishing the content of each provision, including, for example, the definition of the constituent elements of the minimum wage.

On examining the relevance of the specific directive-based provisions abreast Rome I, the dissertation identified that, within the framework of consumer contract law, various problems may derive from transposing the consumer directives into national laws. It was therefore advocated that the questions of determining whether the consumer retains the protection granted by the directives in situations wherein the law applicable to the contract is that of a third country, should subsequently be referred to Rome I. Apart from consumer directives, the research indicated the continuous need for an instrument which takes into account the specificities of postings. Finally, as regards the role of the public policy exception in private international law of contractual obligations, it was concluded that due to the protective mechanisms provided for in Rome I as well as the specific directive-based regulations, the role of public policy in protecting consumers and posted workers is likely to remain marginal and will continue to function only as a safety net for the general rules.

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107. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (**Directive on Electronic Commerce**). – OJ L 178, 17.7.2000, pp 1 ff.
108. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. – OJ L 271, 9.10.2001, pp 16 ff (**Distance Marketing of Consumer Financial Services Directive**).

109. Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC. – OJ L 133, 22.5.2008, pp 66 ff (**Consumer Credit Directive**).
110. Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts. – OJ L 33, 3.2.2009, pp 10 ff (**new Timeshare Directive**).
111. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. – OJ L 304, 22.11.2011, pp 64 ff (**Consumer Rights Directive**).
112. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'). – OJ L 159, 28.5.2014, pp 11 ff.
113. Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC. – OJ L 326, 11.12.2015, pp 1 ff (**Package Travel Directive**).
114. Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. – OJ L 173, 9.7.2018, pp 16 ff (**amended Posting of Workers Directive**).
115. Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services. – OJ L 136, 22.5.2019, pp 1 ff *(***Digital Content Directive).**
116. Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods. – OJ L 136, 22.5.2019, pp 28 ff (**new Consumer Sales Directive**).
117. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). – OJ L 177, 4.7.2008, pp 6 ff (**Rome I**).
118. 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). – OJ L 199, 31.7.2007, pp 40 ff (**Rome II**).
119. Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM (2005) 650 final.
120. Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM (2015) 634 final.
121. Proposal for a directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 Dec. 1996 concerning the posting of workers in the framework of the provision of services. COM (2016) 128 final; and impact assessment accompanying the Proposal for a Directive, 8 Mar. 2016 SWD (2016) 52 final.
122. Proposal for a Regulation on a Common European Sales Law, COM (2011) 0635 final.

C. National Legislation of the Republic of Estonia

123. Employment Contracts Act (*Töölepingu seadus*). – RT I, 13.03.2019, 173. Available (in English) https://www.riigiteataja.ee/en/eli/515012019003/consolide (01.09.2019).
124. Law of Obligations Act (*Võlaõigusseadus*). – RT I 20.02.2019, 8. Available (in English) https://www.riigiteataja.ee/en/eli/507032019001/consolide (01.09.2019).
125. Explanatory note to the draft of the Law of Obligations Act (116 SE) – Available (in Estonian) https://www.riigikogu.ee/tegevus/eelnoud/eelnou/0d9390ea-974c-35ab-a6c7-cb14062c3ad3/V%C3%B5la%C3%B5igusseadus.
126. Explanatory memorandum to the Estonian Draft Act amending the Tourism Act, Law of Obligations Act and Consumer Protection Act (*Seletuskiri turismiseaduse, võlaõigusseaduse ja tarbijakaitseseaduse muutmise seaduse eelnõu juurde*) (492 SE) – Available (in Estonian) https://www.riigikogu.ee/tegevus/eelnoud/eelnou/b908028a-c6ca-42b7-bdc3-cc9eced8997d (01.09.2019).
127. Occupational Health and Safety Act (*Töötervishoiu ja tööohutuse seadus*). – RT I, 13.03.2019, 177. Available (in English) https://www.riigiteataja.ee/en/eli/520032019007/consolide (01.09.2019).
128. Private International Law Act (*Rahvusvahelise eraõiguse seadus*). – RT I, 26.06.2017, 31. Available (in English) https://www.riigiteataja.ee/en/eli/526062017004/consolide (01.09.2019).
129. Regulation of the Government laying down the conditions and procedure for paying the allowances (*Töölähetuse kulude hüvitiste maksmise kord ning välislähetuse päevaraha alammäär, maksmise tingimused ja kord*). – RT I, 2912.2015, 48. Available (in Estonian) https://www.riigiteataja.ee/akt/129122015048 (01.09.2019).
130. Working Conditions of Employees Posted to Estonia Act (*Eestisse lähetatud töötajate töötingimuste seadus*). – RT I, 29.06.2018, 80. Available (in English) https://www.riigiteataja.ee/en/eli/ee/513072017009/consolide/current (01.09.2019).

D. National legislation of other states

131. Belgian *Code de droit international privé du 16 juillet 2004* (Code of Private International Law of 16 July 2004). – Available (in French) http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2004071631&table_name=loi (01.09.2019).
132. Finnish Act 447/2016 on Posting Workers. – Available (in English) https://www.finlex.fi/fi/laki/kaannokset/2016/en20160447_20170074.pdf (01.09.2019).
133. French *Code du travail* (Labour Code). – Available (in French) https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006072050 (01.09.2019).
134. German *Arbeitnehmer-Entsendegesetz* (Law on Posting of Workers). – Available (in German) https://www.gesetze-im-internet.de/aentg_2009/ (01.09.2019).
135. German *Einführungsgesetz zum Bürgerlichen Gesetzbuche* (Introductory Act to the Civil Code), 18 August 1896, BGBl. I.S. 2494, BGBl. I.S. 2010, 2012.

136. Legislative proposal of the German Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*). – BT-Drucks, 10/504.
137. Italian Consumer Code. – Available (in English) http://www.consumatori.it/images/stories/documenti/Codice%20del%20consumo%20english%20version.pdf (01.09.2019).

Case law

A. Case law of the Court of Justice of the European Union

138. Joined cases *Arblade and Leloup,* C-369/96 and C-376/96, EU: C:1999:575.
139. *Commission v. Germany,* C-341/02, EU: C:2005:220.
140. *Commission v. Luxembourg,* C-319/06, EU: C:2008:350.
141. Joined cases *eDate Advertising and Martinez v. MGN Limited,* C-509/09 and C-161/10, EU: C:2011:685.
142. *Heiko Koelzsch,* C-29/10, EU: C:2011:151.
143. *Ingmar,* C-381/98, EU: C:2000:605.
144. *Isbir,* C-522/12, EU: C:2013:711.
145. *Krombach v. Bamberski,* C-7/98, EU: C:2000:164.
146. *Laval,* C-341/05, EU: C:2007:809.
147. Joined cases *Nogueira et al and Osacar v. Ryanair,* C-168/16 and C-169/16, EU: C:2017:688.
148. *Rüffert,* C-346/06, EU: C:2008:189.
149. *Sähköalojen ammattiliitto,* C-396/13, EU: C:2015:86.
150. *Unamar,* C-184/12, EU: C:2013:663.
151. *Voogsgeerd,* C-384/10, EU: C:2011:842.

B. Estonian case law

152. Judgement of the Estonian Supreme Court of 7 June 2011, no. 3-2-1-43-11.
153. Judgement of the Estonian Supreme Court of 16 January 2013, no. 3-2-1-179-12.
154. Judgement of the Estonian Supreme Court of 5 March 2014, no. 3-2-1-187-13.
155. Order of the Estonian Supreme Court of 12 Decembre 2018, no. 2-18-4731.
156. Judgement of Tartu Circuit Court of 22 Octobre 2014, no. 2-13-30411.

C. Case law of other states

157. *Bundesgerichtshof*, 4.06.1992. – BGHZ 118, 312/349.
158. *Bundesgerichtshof*, 27.02.2003. – BGHZ 154, 124.
159. *Bundesgerichtshof*, 13.12.2005. – BGHZ 165, 248.
160. *Bundesgerichtshof*, 28.01.2014. – III ZB 40/13.
161. *Bundesgerichtshof*, 13.5.2014. – XI ZR 405/12. BGH NJW 2014, 2420.

KOKKUVÕTE

Imperatiivsed normid Eesti ja Euroopa rahvusvahelise lepinguõiguse kontekstis tarbijate ja lähetatud töötajate näitel

1. SISSEJUHATUS

1.1. Uurimisprobleemi olemusest ja uurimisvaldkonna hetkeseisust

Rahvusvahelises lepinguõiguses kehtivast lepinguvabaduse põhimõttest tulenevalt on lepingupooltel õigus ise kokku leppida, millise riigi õigust nendevahelisele lepingule kohaldada tuleb. Rooma I määrus,[124] mis reguleerib lepingulistele võlasuhetele kohaldatavat õigust, näeb selles osas siiski ette mitmeid olulisi piiranguid. Muuhulgas kuuluvad siia piirangud, mille eesmärgiks on kohtu asukohariigi olulisimate põhimõtete kaitse (nt kohtu asukohariigi üldist kehtivust omavad sätted ja avalik kord),[125] aga ka lepingulises suhtes eelduslikult nõrgemat poolt kaitsvad sätted (veo-, tarbija-, kindlustus- ja individuaalsete töölepingute osas).[126]

Lisaks eelnevale näeb Rooma I määrus ette erireeglid juhtumiteks, kus kõik muud kohaldatava õiguse valimise ajal olukorda mõjutanud asjaolud esinevad muus riigis kui riik, mille õigus kohaldamiseks valiti, või kui need asjaolud esinevad ühes või mitmes liikmesriigis.[127] Samuti sisaldub Rooma I määruses eriregulatsioon selle riigi üldist kehtivust omavate sätete kohaldamise osas, kus lepingust tulenevaid kohustusi tuleb täita või kus need täideti.[128] Oma spetsiifilisusest tulenevalt jäid need sätted selle väitekirja uurimisobjektist siiski välja.

Väitekiri keskendub peamiselt nõrgemat lepingupoolt kaitsvate kohustuslike sätete ning avalikku huvi kaitsvate üldist kehtivust omavate sätete ja avaliku korra klausli vahekorra selgitamisele. Lisaks tuleb arvestada, et nt tarbijalepingute ja individuaalsete töölepingute osas on EL-s vastu võetud mitmeid eri direktiive,[129] mis omakorda sisaldavad kohaldatavat õigust reguleerivaid sätteid.

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[124] Euroopa Parlamendi ja nõukogu määrus (EÜ) nr 593/2008, 17. juuni 2008, lepinguliste võlasuhete suhtes kohaldatava õiguse kohta (Rooma I). – OJ L 177, 4.7.2008, lk 6 jj.

[125] Rooma I määruse artiklid 9 ja 21.

[126] Vastavalt Rooma I määruse artiklid 5, 6, 7 ja 8.

[127] Vt Rooma I määruse artiklid 3 (3) ja 3 (4).

[128] Rooma I määruse artikkel Art 9 (3).

[129] Näiteid tarbijadirektiividest: Nõukogu direktiiv 93/13/EMÜ, 5. aprill 1993, ebaõiglaste tingimuste kohta tarbijalepingutes. – OJ L 095, 21.4.1993, lk 29 jj; Euroopa Parlamendi ja Nõukogu direktiiv 2002/65/EÜ, 23. september 2002, milles käsitletakse tarbijale suunatud finantsteenuste kaugturustust ja millega muudetakse nõukogu direktiivi 90/619/EMÜ ning direktiive 97/7/EÜ ja 98/27/EÜ. – OJ L 271, 9.10.2001, lk 16 jj; Euroopa Parlamendi ja Nõukogu direktiiv 1999/44/EÜ, 25. mai 1999, tarbekaupade müügi ja nendega seotud garantiide teatavate aspektide kohta. – OJ L 171, 7.7.1999, lk 12 jj, mis asendatakse alates 01.01.2022 Euroopa Parlamendi ja Nõukogu direktiiviga (EL) 2019/771, 20. mai 2019, kaupade müügilepingute teatavate aspektide kohta, millega muudetakse määrust (EL) 2017/2394 ja direktiivi 2009/22/EÜ ning tunnistatakse kehtetuks direktiiv 1999/44/EÜ. –

Seega vajab täiendavat analüüsi ka küsimus, milline on direktiivide ja neil põhinevate riigisiseste sätete roll Rooma I määruses sisalduvate nõrgema lepingupoole kaitsesätete kõrval, aga ka Rooma I määruses sisalduvate avalikku huvi kaitsvate normide kõrval.

Väitekiri on ajendatud asjaolust, et lisaks EL tasandil kohaldatava õiguse määramise reeglistiku ühtlustamisele Rooma I ja Rooma II[130] määrustega, mis muuhulgas lähtuvad vajadusest nõrgemat lepingupoolt kaitsta, sisalduvad eraldi nõrgema lepingupoole kaitsesätted ka mitmetes valdkonnapõhistes direktiivides, mis aga erinevalt määrustest tuleb riigisisesesse õigusesse üle võtta. Seega tuleb uurida, kuidas suhestub määruste regulatsioon vastavate riigisiseste sätetega. Samuti vajab analüüsi, kas direktiivid on töös käsitletavas osas Eesti õigusesse õigesti üle võetud ning kas neid rakendatakse õigesti.

Ehkki õiguskirjanduses on põhjalikult käsitatud nii Rooma I määruse kui ka selle eellase, Rooma Konventsiooni[131] sätteid, sh üldist kehtivust omavaid sätteid, avalikku korda ja nn nõrgema lepingupoole kaitsesätteid ning samuti on analüüsitud valdkonnapõhiseid direktiive, ei ole nende omavahelist suhestumist vähemalt Eesti õiguskirjanduses lähemalt uuritud ning ka väliskirjanduses on mitmed aspektid leidnud ainult põgusat käsitlust. Tihti ei ole selge, millal ja kuidas kohaldada Rooma I määruse sätteid ning millal valdkonnapõhiseid direktiive üle võtvaid riigisiseseid norme. Samuti ei ole teemat sellest aspektist käsitatud Eesti õiguskirjanduses, sh arvestades Eesti vastavaid riigisiseseid norme ja Eesti kohtupraktikat. Väitekiri peakski selles osas täiendama Eesti õigusteaduslikke töid, mis valdavalt on olnud kas väga üldised, pärinevad varasemast ajast, mil ei olnud võimalik arvestada viimase aja regulatsioonide ja kohtupraktikaga, või milles on käsitatud üksnes väga spetsiifilisi valdkondi.

OJ L 136, 22.5.2019, lk 28 jj; Euroopa Parlamendi ja Nõukogu direktiiv 2008/48/EÜ, 23. aprill 2008, mis käsitleb tarbijakrediidilepinguid ja millega tunnistatakse kehtetuks nõukogu direktiiv 87/102/EMÜ. – OJ L 133, 22.5.2008, lk 66 jj; Euroopa Parlamendi ja Nõukogu direktiiv (EL) 2019/770, 20. mai 2019, digisisu üleandmise ja digiteenuste osutamise lepingute teatavate aspektide kohta Individuaalsete töölepingute kohta. – OJ L 136, 22.5.2019, lk 1 jj (digisisu direktiiv); Euroopa Parlamendi ja Nõukogu direktiiv 2011/83/EL, 25. oktoober 2011, tarbija õiguste kohta, millega muudetakse nõukogu direktiivi 93/13/EMÜ ning Euroopa Parlamendi ja nõukogu direktiivi 1999/44/EÜ ja millega tunnistatakse kehtetuks nõukogu direktiiv 85/577/EMÜ ning Euroopa Parlamendi ja nõukogu direktiiv 97/7/EÜ. – OJ L 304, 22.11.2011, lk 64 jj (tarbijaõiguste direktiiv). Individuaalsete töölepingute ja lähetatud töötajate osas vt: Euroopa parlamendi ja nõukogu direktiiv 96/71/EÜ, 16. detsember 1996, töötajate lähetamise kohta seoses teenuste osutamisega. – OJ L 18, 21.1.1997, lk 1 jj (lähetatud töötajate direktiiv) ja selle muudatus, Euroopa Parlamendi ja Nõukogu direktiiv (EL), 28. juuni 2018, millega muudetakse direktiivi 96/71/EÜ töötajate lähetamise kohta seoses teenuste osutamisega. – OJ L 173, 9.7.2018, lk 16 jj.

[130] Euroopa Parlamendi ja nõukogu määrus (EÜ) nr 864/2007, 11. juuli 2007, lepinguväliste võlasuhete suhtes kohaldatava õiguse kohta (Rooma II). – OJ L 199, 31.7.2007, lk 40 jj.

[131] Lepinguliste kohustuste suhtes kohaldatava õiguse konventsioon (Rooma konventsioon). – OJ C 334, 30.12.2005, lk 1 jj.

1.2. Uurimisülesande püstitus ja uurimisküsimused

Väitekirja eesmärgiks on uurida Rooma I määruses sisalduvate üldiste ja spetsiifiliste kohaldatava õiguse valiku vabaduse põhimõtet piiravate normide olemust ja kohaldamise eeldusi, keskendudes seejuures tarbijalepinguid ning lähetatud töötajate individuaalseteid töölepinguid reguleerivatele normidele. Samuti on väitekirja eesmärgiks analüüsida nende normide ning valdkonnapõhiseid direktiive üle võtvate sätete vahekorda. Väitekiri uurib sedagi, kas nõrgemat lepingupoolt kaitsvaid sätteid saab käsitada üldiste kehtivust omavate sätetena Rooma I määruse artikli 9 (1) mõttes, ning vaatleb nende vahekorda üldiste kehtivust omavate sätete ja avaliku korra regulatsiooniga üldisemalt. Seejuures on väitekirja aluseks olevates artiklites välja toodud kaks hüpoteetilist kaasust probleemi näitlikustamiseks ning paremini mõistmiseks.

Uurimisülesande lahendamiseks on väitekirjas püstitatud järgmised viis uurimisküsimust:

1. Milline on erinevatest direktiividest tulenevate riigisiseste kollisiooninormide ja Rooma I määruse artiklite 6 ja 9 vahekord?
2. Milline tähendus on võlaõigusseaduses[132] sisalduvatel tarbijalepingute direktiive üle võtvatel kollisiooninormidel[133] ning kas direktiivid on selles osas Eesti õigusesse õigesti üle võetud?
3. Milline on Rooma I määruse artiklite 8 ja 9 ning lähetatud töötajate direktiivi üle võtvate riigisiseste sätete vahekord?
4. Kuidas nende sätete vahekord Eesti kohtupraktikas kajastub ja kas Eesti kohtupraktika on lähetatud töötajate direktiiviga kooskõlas?
5. Kas tarbijate ning lähetatud töötajate kaitsmiseks on lisaks Rooma I määruse regulatsioonile jätkuvalt vajalikud ka direktiividel põhinevad kollisiooninormid? Milline on avaliku korra erandi tähtsus lepingulistele võlasuhetele kohaldatava õiguse kontekstis, arvestades nõrgemat lepingupoolt kaitsva eriregulatsiooni olemasolu?

Väitekirja teemal on avaldatud neli teaduspublikatsiooni. Uurimisülesande lahendamiseks ning uurimisküsimustele vastamiseks analüüsitakse töös esmalt tarbijalepingutele (**Artikkel III**)[134] ning teiseks lähetatud töötajate töölepingutele (**Artikkel IV**)[135] kohaldatava õigusega seonduvaid küsimusi, seejärel uuritakse vajadust vastava eriregulatsiooni järele (Artiklid III ja IV). Samuti hinnatakse avaliku korra erandi rolli lepingulistele võlasuhetele kohaldatava

[132] RT I, 20.2.2019, 8.
[133] Võlaõigusseaduse § 36 lg 2, § 53 lg 1, § 237 lg 2 ja § 403 lg 6.
[134] R. Piir, K. Sein. Law applicable to consumer contracts: Interaction of the Rome I Regulation and EU-directive-based rules on conflicts of laws. – Juridica International 2016/24, pp 63 ff.
[135] R. Piir. Safeguarding the Posted Worker. A Private International Law Perspective. – European Labour Law Journal 2019, Volume 10, Issue 2, pp 101 ff.

õiguse kontekstis (**Artikkel II**).[136] **Artikkel I**[137] annab üldise ülevaate ning sissejuhatuse üldist kehtivust omavate sätete olemuse mõistmiseks.

Väitekiri käsitab esiteks Rooma I määruse artiklite 6 ja 9 ning valdkonnapõhiseid tarbijadirektiive üle võtvate riigisiseste kollisiooninormide vahekorda, teiseks Rooma I määruse artiklite 8 ja 9 ning lähetatud töötajate direktiivil põhinevate normide vahekorda ja viimaks vajadust direktiividel põhineva eriregulatsiooni ja avaliku korra erandi järele.

1.3. Metoodika kirjeldus

Doktoritöö põhineb valdavalt erinevate allikate (EL määrused ja direktiivid, õigusalased kommentaarid, raamatud ja artiklid, Euroopa Kohtu ja Eesti Riigikohtu praktika) kvalitatiivsel analüüsil.

Peamine artiklites kasutatud uurimismeetod on dogmaatiline meetod, kuna artiklite eesmärgiks on eelkõige kehtivas õiguses sisalduvate vastavate sätete olemuse ja kohaldamiseelduste selgitamine. Väitekirjaga luuakse süsteem, mis võimaldab erinevate EL määruste ja direktiividel põhinevate reeglite kohaldamist selgitada. Töös analüüsitakse teoreetilisi mõisteid ning väitekirjas käsitatavate normide koostoimet, võrdlevalt on analüüsitud ka uuritavate mõistete tähendust erinevate riikide õiguses ning õigusaktide sõnastustes toimunud muudatusi.

2. KAITSMISELE ESITATAVAD VÄITED JA PÕHJENDUSED

2.1. Rooma I määruse artiklite 6 ja 9 ning tarbijalepingute direktiive üle võtvate riigisiseste kollisiooninormide vahekord

Kaitsmisele kuuluv väide

Rooma I artiklit 6 tuleb kohaldada esmajärjekorras riigisiseste kollisiooninormide ees, millega võetakse üle tarbijalepingute direktiivides sisalduvad kollisioonireeglid. Direktiividel põhinevad võlaõigusseaduse kollisiooninormid[138] ei ole vaadeldavad üldist kehtivust omavate sätetena Rooma I määruse artikkel 9 (1) mõttes.

Võlaõigusseaduses sisalduvad kollisiooninormid laiendavad liigselt Eesti õiguse tarbijalepingu sätete kohaldamisala ning tuleks direktiividega kooskõlla viimiseks ümber sõnastada.

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[136] R. Piir. Application of the Public Policy Exception in the Context of International Contracts – The Rome I Regulation Approach. – Juridica International 2015/23, pp 26 ff.

[137] R. Piir. Eingreifen oder nicht eingreifen, das ist hier die Frage. Die Problematik der Bestimmung und des Anwendungsbereichs der Eingriffsnormen im internationalen Privatrecht. – Juridica International 2010/XVII, pp 199 ff.

[138] Võlaõigusseaduse § 36 lg 2, § 53 lg 1, § 237 lg 2 ja § 403 lg 6.

Põhjendused

Küsimus Rooma I artikli 6 ning tarbijalepingute direktiive üle võtvate kollisiooninormide vahekorrast tõusetub eelkõige vanemate direktiivide puhul, mis panevad liikmesriikidele kohustuse riigisisesesse õigusesse üle võtta ka konkreetsed kollisiooninormid. Seevastu mitmed uuemad tarbijalepingute direktiivid (nt digisisu direktiiv, tarbija õiguste direktiiv) ei sisalda eraldi kollisiooninorme ja viitavad selles osas Rooma I määrusele.

Rooma I määruse artikli 6 ja tarbijalepingute direktiividel põhinevate kollisiooninormide vahekorra selgitamiseks võib välja pakkuda kaks põhimõttelist lähenemisviisi – esiteks võimaluse käsitada direktiividel põhinevaid riigisiseseid kollisiooninorme eriregulatsioonina Rooma I määruse artikli 23 tähenduses, ning teiseks seisukoha, et artiklit 6 tuleb kohaldada esmajärjekorras riigisiseste kollisiooninormide ees.

Väitekiri peab õigustatuks teist seisukohta.[139] Nimelt eeldaks esimese lähenemisviisi kasutamine kohtunikult igakordset hindamist mh osas, kas direktiiv on riigisisesesse õigusesse õigesti üle võetud, kuna Rooma I määruse artikli 23 alusel ei saaks eesõigust omavateks lugeda sätteid, mis direktiivi sätteid õigesti üle ei võta. Selline kohustus oleks ilmselt ebaproportsionaalne. Samuti ei pruugiks esmajoones riigisiseste kollisiooninormide kohaldamine alati tagada tarbija jaoks parimat tulemust. Nii võimaldab Rooma I määruse artikli 6 (2) kohaldamine, lähtudes selles sätestatud soodsuse põhimõttest, kohaldada tarbija jaoks antud asjaoludel soodsamaid norme, mis sõltuvalt riigisisese kollisiooninormi sõnastusest ei pruugi aga olla võimalik riigisiseste kollisiooninormide prioritiseerimisel. Ka võlaõigusseaduses sisalduvad kollisiooninormid ei sätesta soodsuse põhimõtet, mis tähendab, et neile prioriteedi andmisel ei saaks nt Eestis tegutseva Saksa krediidiandjaga lepingu sõlminud Eesti tarbija tugineda tema jaoks soodsamatele Saksa õiguse sätetele ka juhul, kui pooled on lepingule kohaldatavaks õiguseks valinud Saksa õiguse, kuna võlaõigusseaduse § 36 lg 2 kohaselt tuleks sellisel juhul tüüptingimustega lepingule kohaldada igal juhul Eesti õiguse tüüptingimuste regulatsiooni. Seevastu Rooma I määrusele prioriteedi andmisel oleks võimalik lähtuda poolte vahel kokku lepitud Saksa õigusest, kui see tagab konkreetsel juhul tarbijale soodsama tulemuse.

Väitekirjast järeldub seegi, et riigisiseseid kollisiooninorme ei ole alust käsitada üldist kehtivust omavate sätetena Rooma I määruse artikli 9 tähenduses. Seejuures võib välja tuua, et ehkki võlaõigusseaduse vastavad sätted nõuavad Eesti regulatsiooni kohaldamist sõltumata sellest, millise riigi õigust lepingule kohaldatakse, mis sõnastuslikust aspektist lähtuvalt justkui viitaks nende üldisele kehtivusele, ei nõua nende sätete aluseks olnud direktiivid iseenesest seda, et liikmesriigid peaksid direktiivide regulatsiooni riigisisesesse õigusesse üle võtma üldist kehtivust omavate sätetena. Direktiivide eesmärk on olnud tagada vastava tarbijakaitse taseme kehtivus üksnes juhtudel, kus lepingule valitakse

[139] Tasub mainida, et see seisukoht on pärast väitekirja aluseks olnud artikli R. Piir, K. Sein (2016) avaldamiseks esitamist ja vastuvõtmist leidnud toetust ka Eesti võlaõigusseaduse kommentaarides – vt I. Kull (2016), § 36, nr 4.2.1.

kohaldatavaks õiguseks kolmanda riigi õigus. Seega on Eesti seadusandja direktiivid ülemääraselt üle võtnud.

Doktoritööst ilmneb, et tegelikult ei ole ka Eesti seadusandja eesmärgiks olnud võlaõigusseaduse sätetele üldise kehtivuse andmine. Nimelt nähtub võlaõigusseaduse eelnõu seletuskirjast 116 SE, et eelnõu eesmärgiks on olnud direktiivide ülevõtmine ning puuduvad mistahes viited sellele, et või miks Eesti seadusandja oleks pidanud vastava regulatsiooni järgimist riigi avalike huvide seisukohast niivõrd oluliseks, et neid sätteid peaks kohaldama olenemata sellest, milline õigus lepingule muidu kohalduks. Niisamuti on ka Eesti võlaõigusseaduse kommentaarides vastavate sätete osas varasemalt välja toodud, et nende eesmärgiks on olnud üksnes direktiivides ette nähtud kaitse tagamine.[140] Seega pole ei EL ega Eesti seadusandja eesmärgiks olnud vastavale tarbijakaitse regulatsioonile üldise kehtivuse andmine, mistõttu puudub alus ka Eesti võlaõigusseaduse sätteid üldist kehtivust omavateks säteteks pidada, ehkki nende sõnastus selgesõnaliselt sellele viitab.[141] Eelneva tõttu tasuks võlaõigusseaduse vastavaid kollisioonինorme muuta ning sõnastada nende lõpuosa selliselt, et tarbijale tuleb tagada Eesti tarbijalepingute regulatsiooni kohaldamine juhtudel, kui lepingu suhtes on kohaldatavaks õiguseks valitud kolmanda riigi õigus.[142]

2.2. Rooma I määruse artiklite 8 ja 9 ning lähetatud töötajate direktiivil põhinevate normide vahekord

Kaitsmisele kuuluvad väited

Lähetatud töötajate direktiivi alusel lähetatud töötajatele kohaldatavad töötingimusi reguleerivad normid on üldise kehtivusega ning neid tuleb kohaldada lisaks töölepingule muidu kohaldatavale õigusele. Ilma lähetatud töötajate direktiivita ei saaks vastavaid norme valdavalt siiski Rooma I määruse artikli 9 (1) mõttes üldist kehtivust omavateks pidada, v.a töötervishoidu ja tööohutust puudutavad sätted. Eristus on oluline, kuna Rooma I määruse üldist kehtivust

[140] Vt I. Kull (2006), § 36, nr 4.2.1.

[141] Nt võlaõigusseaduse § 36 lg 2 sõnastus on järgmine: „Kui tüüptingimustega lepingu teiseks pooleks on tarbija, kelle elukoht on Eestis või Euroopa Liidu liikmesriigis, ning leping sõlmiti Eestis toimunud avaliku pakkumise, reklaami või muu sellesarnase tegevuse tulemusena või kui leping on muul põhjusel Eesti territooriumiga oluliselt seotud, kohaldatakse käesolevas jaos sätestatut ka siis, kui tingimuse kasutaja tegevuskoht, selle puudumisel aga elu- või asukoht, ei ole Eestis, sõltumata sellest, millise riigi õigust lepingule kohaldatakse."

[142] Siinjuures võib välja tuua, et seoses uue direktiivi ülevõtmisega on seletuskirjas turismiseaduse, võlaõigusseaduse ja tarbijakaitseseaduse muutmise seaduse eelnõu juurde (492 SE) võlaõigusseaduse § 880 lg 2 kehtetuks tunnistamisel alates 01.07.2018 viidatud mh käesoleva väitekirja aluseks olevale artiklile R. Piir, K. Sein (2016). – Vt seletuskirja lk 56, p 39. Kättesaadav https://www.riigikogu.ee/tegevus/eelnoud/eelnou/b908028a-c6ca-42b7-bdc3-cc9eced8997d (01.09.2019). Varem sätestas ka võlaõigusseaduse § 880 lg 2, et pakettreisilepingute peatüki sätteid tuleb nende reguleerimisalas kohaldada sõltumata sellest, millise riigi õigust lepingule kohaldatakse.

omavate sätete regulatsioon ei näe ette soodsuse põhimõtte rakendamist, samas kui direktiivi eesmärgiks on tagada lähetatud töötaja jaoks soodsama regulatsiooni kohaldamine.[143]

Soodsuse põhimõtte rakendamisel tuleb töötajat kaitsvaid sätteid hinnata kogumis, mitte analüüsida ja võrrelda iga kaitsesätte sisu eraldiseisvalt. Seega ei saa nt Soome lähetatud Eesti töötaja nõuda samaaegselt lähetuskoha riigi ehk Soome kollektiivlepingus ette nähtud töötasu alammäära ja lisaks sellele säilitada Eesti tööandja poolt Eesti õiguse alusel makstud päevaraha. Eesti Riigikohtu praktika ei ole selles osas lähetatud töötajate direktiiviga kooskõlas.

Põhjendused

Rooma I määruses individuaalsetele töölepingutele kohalduva õiguse regulatsioonist tulenevalt kohaldub ka lähetatud töötajate töölepingutele kohaldatava õiguse valiku puudumisel üldreeglina selle riigi õigus, kus või kust töötaja teeb harilikult oma lepingujärgset tööd, sest töö tegemise koha riiki ei loeta muutunuks, kui töötaja asub ajutisel tööle teise riiki. Lisaks sellele sätestab lähetatud töötajate direktiiv teatud töötingimused, mis liikmesriigil tuleb enda territooriumile lähetatud töötajatele igal juhul tagada. Eesti õiguses on need tingimused üle võetud Eestisse lähetatud töötajate töötingimuste seaduse[144] §-s 5. Seega kohalduvad lähetatud töötajate direktiivil põhinevad riigisisesed normid (lähetusriigi normid) Rooma I määruse artikkel 8 alusel kohaldatava õiguse (lähetava riigi õiguse) kõrval.

Küsimus sellest, kas direktiivil põhinevaid riigisiseseid norme saaks käsitada Rooma I määruse kohaselt üldist kehtivust omavate sätetena, on oluline eelkõige soodsuse põhimõtte rakendamist arvestades. Nimelt näevad nii Rooma I määruses sisalduv töölepingutele kohalduva õiguse regulatsioon (Rooma I määruse artikkel 8 (1)) kui ka lähetatud töötajate direktiivi artikkel 3 (7) ette võimaluse lähtuda kohaldatava õiguse määratlemisel töötaja jaoks soodsamatest sätetest. Seevastu Rooma I määruse artiklist 9 tulenev üldist kehtivust omavate sätete regulatsioon soodsuse põhimõtte kohaldamist ei võimalda.

Analüüsides lähetatud töötajate direktiivi ülevõtvate sätete olemust, võib asuda seisukohale, et vastavate riigisiseste normide näol on tegemist üldist kehtivust omavate sätetega eelkõige tulenevalt asjaolust, et selline on normide kehtestamisel olnud seadusandja eesmärk. Erinevalt tarbijalepingute direktiividest on lähetatud töötajate direktiivis selgelt sätestatud, et sätetele tuleb anda riigisiseses õiguses üldine kehtivus ning sama tuleneb omakorda Rooma I määruse põhjenduspunktist 34. Ka Eestisse lähetatud töötajate töötingimuste seaduse vastavate normide sõnastus viitab sätete üldisele kehtivusele. Selliselt on direktiivi ülevõtvaid norme valdavalt käsitatud ka õiguskirjanduses.

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[143] Vt lähetatud töötajate direktiivi artikkel 3 (7), mis sätestab, et sama artikli lõiked 1–6 ei piira töötajate jaoks soodsamate töötingimuste kohaldamist.

[144] RT I, 29.06.2018, 80.

Väitekiri rõhutas siiski, et ilma lähetatud töötajate direktiivi regulatsioonita ei saaks enamust direktiivil põhinevaid norme üldist kehtivust omavateks sätteteks pidada. Direktiivi alusel kehtestatud loetelust on üksnes töötervishoidu ja tööohutust puudutavad sätted oma olemuselt sellised, mida üldist kehtivust omavate sätete teoreetiline käsitlus üldist kehtivust omavatena tunnustada võimaldaks. Nende osas tuleks eelnevast tulenevalt aga asuda seisukohale, et kuna tegu on ka rangelt võttes üldist kehtivust omavate sätetega, ei ole selliste sätete kohaldamisel soodsuse põhimõtte rakendamine põhjendatud. Nii on ka Eesti riigisiseses õiguses selgesõnu sätestatud, et lähetatud töötajale kohaldatakse töötervishoiu ja tööohutuse seadust ka siis, kui see on talle vähem soodne kui välisriigi seaduse sätted,[145] ehkki muude töötingimuste osas on rõhutatud võimalust kohaldada töötaja jaoks soodsamaid sätteid.[146]

Väitekiri käsitas ka küsimust, kas Eesti Riigikohtu praktika on lähetatud töötajate direktiiviga kooskõlas, ning jõudis järeldusele, et Riigikohtu 5. märtsi 2014 lahendi nr 3-2-1-187-13 lõppjäreldused ei vasta Euroopa Kohtu antud juhistele ja direktiivi mõttele. Nimelt on Euroopa Kohus selgitanud, et töötasu alammäära sisustamine peaks toimuma vastuvõtva riigi õiguse kohaselt.[147] Selliselt tuleks seda sisustada ka juhul, kui vastava riigi õigus täpselt ei sätesta, mida konkreetselt töötasu alammäära puhul arvesse võtta tuleb. Samuti tuleb arvestada, et soodsuse põhimõtte rakendamine direktiivi kontekstis ei tähenda seda, et iga üksiku aspekti puhul kuulub kohaldamisele töötaja jaoks soodsam säte. Vastupidi – soodsuse põhimõtte kohaldamisel tuleks hinnata sätete mõju kogumis. Arvestades soodsuse põhimõtte kohaldamise loogikat ning Euroopa Kohtu juhiseid töötasu sisustamise kohta, ei saa pidada õigustatuks samaaegselt Soome kollektiivlepingus ette nähtud töötasu alammäärast lähtumist ja lisaks sellele lähetatud töötajale Eesti tööandja poolt Eesti õiguse alusel makstud päevaraha säilitamise võimaldamist.

2.3. Vajadus direktiividel põhineva eriregulatsiooni ja avaliku korra erandi järele

Kaitsmisele kuuluv väide

Tarbijalepingute direktiivide ülevõtmine riigisiseste kollisiooninormidega võib tulenevalt erisustest ülevõtmisel tekitada probleeme. Kollisiooniõiguslikud küsimused peaksid edaspidi jääma Rooma I määruse lahendada. Seevastu lähetatud töötajate kontekstis on jätkuvalt vajadus eraldiseisva instumendi järele, mis arvestaks lähetatud töötajatega seotud erisusi. Arvestades nii Rooma I määruses kui ka valdkonnapõhistes direktiivides sisalduvaid kaitsesätteid, jääb avaliku korra erandi roll tarbijate ja lähetatud töötajate kaitsmisel ka edaspidi üksnes marginaalseks.

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[145] Eestisse lähetatud töötajate töötingimuste seaduse § 5 lg 2.
[146] Eestisse lähetatud töötajate töötingimuste seaduse § 4 lg 3.
[147] Vt *Isbir*, C-522/12, EU: C:2013:711, 37; ja *Sähköalojen ammattiliitto*, C-396/13, ECLI: EU:C:2015:86, 34.

Põhjendused

Doktoritöö tõi välja, et ehkki tarbijalepingute direktiivide puhul on direktiividel teatud osas säilinud nn lünka täitev roll, ei taga selliselt eraldi direktiivides sätestatud ning riigisisesesse õigusesse ülevõtmist vajavad kollisiooninormid õiguskindlust, sest teatud riigid ei pruugi olla direktiivide vastavaid norme õigesti üle võtnud. Selle tagajärjel võivad liikmesriigiti erineda mitte üksnes vastavad tarbijalepinguõiguse sätted, vaid ka kollisiooninormid ise,[148] mille tagajärjeks on ettearvamatus ja üldised kohaldamisraskused. Seega oleks tarbijalepingute direktiivide puhul põhjendatud ning eelkirjeldatud probleeme aitaks ennetada see, kui kollisiooniõiguslikud küsimused jääksid üksnes Rooma I määruse lahendada. Selliselt on küsimus lahendatud ka nt tarbija õiguste direktiivis.[149]

Seevastu lähetatud töötajate puhul ei saa direktiivi eriregulatsioonist loobumist põhjendatuks pidada ning direktiiv, mis arvestab konkreetselt lähetatud töötajate töösuhte erisustega, on Rooma I määruse kohase regulatsiooni kõrval lähetatud töötajate kaitseks jätkuvalt vajalik. Selle põhjuseks on ennekõike asjaolu, et Rooma I määruse alusel kohalduks lähetatud töötaja töölepingule teistsuguse kokkuleppe puudumisel üldjuhul päritoluriigi õigus, see aga võib jätta lähetatud töötaja lähetuskoha riigis võrreldes sealsete töötajatega halvemasse olukorda. Seega aitab just lähetatud töötajate direktiiv ja selles sätestatud miinimum töötingimused, mis tuleb lähetatud töötajale lähetuskoha riigis võimaldada, paremini tagada lähetatud töötajate huvide kaitset.

Avaliku korra erandi osas järeldas doktoritöö, et rahvusvaheliste lepingute kontekstis ning vähemalt EL liikmesriikide tasandil ei ole selle tähendus märkimisväärne. Esiteks ei ole rahvusvaheline lepinguõigus oma olemuselt niivõrd väärtustundlik kui muud valdkonnad, nt perekonna- või pärimisõigus. Teiseks aitavad avaliku korra rolli suures osas täita nii üldist kehtivust omavad sätted kui ka muud kohustuslikud normid nii Rooma I määruses kui ka valdkonnapõhistes direktiivides. Kuna nn nõrgema lepingupoole kaitset on EL tasemel pidevalt tugevdatud ning arvestades sedagi, et välisriigi õiguse kohaldamist piiravad niigi mitmed Rooma I määruse kohustuslikud sätted, võib väita, et vähemalt tarbijalepingute ning lähetatud töötajate puhul jääb avaliku korra erandile üksnes ettevaatusabinõu roll ning marginaalne tähendus.

3. JÄRELDUSED

Doktoritöö analüüsis Rooma I määruses sisalduvat nn nõrgema lepingupoole, eelkõige tarbijate ja lähetatud töötajate kaitseks sätestatud eriregulatsiooni. Seejuures käsitas väitekiri valdkonnapõhiseid direktiive üle võtvate riigisiseste normide vahekorda Rooma I määruse vastavate sätetega ning nende riigisiseste sätete rolli Rooma I määruse kõrval. Samuti tõi töö välja vajaduse eristada

[148] Eelnev analüüs näitas, et nii on see ka Eesti õiguse puhul.
[149] Vt direktiivi põhjenduspunktid 10 ja 58.

nõrgema lepingupoole kaitsesätteid üldist kehtivust omavatest sätetest ning analüüsis neid võrdluses üldist kehtivust omavate sätete ja avaliku korra erandiga.

Tarbijalepingute direktiivide osas järeldas doktoritöö, et riigisisesed kollisiooninormid on Rooma I määruse suhtes teisese tähendusega ning neid ei ole alust pidada üldist kehtivust omavateks säteteks Rooma I määruse artikkel 9 mõttes. Samuti tõi väitekiri välja, et Eesti võlaõigusseaduse vastavad normid ei ole nende aluseks olevate tarbijalepingute direktiividega kooskõlas ning nende sõnastust tuleks muuta.

Doktoritöö rõhutas, et lähetatud töötajate individuaalsetele töölepingutele kohaldatakse lisaks muidu kohaldamisele kuuluvale õigusele ka lähetatud töötajate direktiivi alusel vastuvõtvas riigis sätestatud miinimumtöötingimusi, mida nii direktiivi kui ka Rooma I määruse sõnastust arvestades saab pidada üldist kehtivust omavateks. Siiski tuleb tähele panna, et soodsuse põhimõtet saab neist rakendada üksnes selliste sätete puhul, mille üldine kehtivus tuleneb direktiivist, ning mitte nende puhul, mis ka ilma direktiivi olemasoluta ja rangelt võttes vastavad Rooma I määruse artiklis 9 toodud üldist kehtivust omavate sätete määratlusele.

Töös käsitati ka lähetatud töötajate direktiivil põhinevate riigisisestele sätetele tuginedes ja soodsuse põhimõtet kohaldades tehtud Eesti Riigikohtu lahendit. Analüüs lahendi vastavusest Euroopa Kohtu antud juhistele ja lähetatud töötajate direktiivi mõttele näitas aga seda, et Riigikohtu lõppjäreldused ei ole nendega kooskõlas.

Lõpetuseks hindas doktoritöö vajadust valdkonnapõhistel direktiividel põhineva eriregulatsiooni ja avaliku korra erandi järele. Töö jõudis järeldusele, et tarbijalepingute direktiivide osas võiksid kollisiooniõiguslikud küsimused edaspidi jääda Rooma I määruse lahendada, lähetatud töötajate kontekstis eksisteerib aga jätkuvalt vajadus eraldiseisva ning lähetatud töötajate erisusi arvestava instrumendi järele. Avaliku korra erandi roll tarbijate ja lähetatud töötajate kaitsmisel jääb väitekirjas toodust nähtuvalt siiski ka edaspidi tõenäoliselt üksnes marginaalseks.

TÄNUSÕNAD

Tänan väga oma juhendajaid – Tartu Ülikooli sotsiaalõiguse professor Gaabriel Tavitsat ja tsiviilõiguse professor Karin Seina –, kelle abivalmidus, head nõuanded ning pidev valmisolek teadustöö teemadel arutleda ja tagasisidet anda mind doktoritöö kirjutamise vältel väga palju suunasid ja innustasid.

Tänan südamest oma vanemaid, kelle eeskuju ja abi õpingute jooksul on olnud asendamatud ning kelle teeneid minu haridustee kujunemisel on raske ülehinnata.

Samuti olen väga tänulik oma abikaasale ja lastele, kelle mõistvuse ja toeta poleks selle doktoritöö valmimine kindlasti võimalik olnud.

PUBLICATIONS

CURRICULUM VITAE

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Career

2017–…	Tallinn Administrative Court, judge
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2009–2016	Supreme Court of Estonia, adviser
2007 and 2011	University of Tartu, department of law, adjunct lecturer
2006–2009	Estonian Ministry of Justice, legal policy department, adviser
2004–2005	Tartu City Government, department of communal services, lawyer

Education

2008–...	University of Tartu, Estonia, PhD studies in law
2008–2009	University of Konstanz, Germany, LL.M.
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2002–2006	University of Tartu, Estonia, B.A.

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