Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 5 September 2019[1 i]

Case C-272/18

Verein für Konsumenteninformation
v
TVP Treuhand- und Verwaltungsgesellschaft für Publikumsfonds mbH & Co KG

(Request for a preliminary ruling
from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling — Area of freedom, security and justice — Judicial cooperation in civil matters — Applicable law — Trust agreements concluded between consumers habitually resident in one country and a professional established in another country concerning the management of shares in limited partnerships — Rome Convention on the law applicable to contractual obligations — Regulation (EC) No 593/2008 — Excluded matters — Article 1(2) — Questions governed by the law of companies and other bodies, corporate or unincorporated — Protection for consumer contracts — Excluded contracts — Article 5(4) of the Rome Convention and Article 6(4) of Regulation (EC) No 593/2008 — Contract for the supply of services under which the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence — Directive 93/13/EEC on unfair terms in consumer contracts — Unfairness of a choice-of-law clause designating the law of the State in which the service provider is established)

I. Introduction

1. The Verein für Konsumenteninformation ('the VKI'), a consumer protection association established in Austria, has brought an action for an injunction[2] against TVP Treuhand- und Verwaltungsgesellschaft für Publikumsfonds mbH & Co KG ('TVP'), a company whose registered office is located in Hamburg (Germany), seeking to prohibit that company from using in its business dealings with consumers residing in Austria a number of contractual terms. Those terms are contained in trust agreements concerning the management of shares in closed-end real property investment funds established in Germany in the form of limited partnerships. The terms in question include a choice-of-law clause designating German law.

2. The Oberster Gerichtshof (Supreme Court, Austria) asks about the compatibility of that choice-of-law clause with Directive 93/13/EEC on unfair terms in consumer contracts[3] in the light, in particular, of the Court's interpretation of that directive adopted in the judgment in *Verein für Konsumenteninformation*.[4] The answer to that question depends, in particular, on whether Austrian

1 Original language: French.

2 Within the meaning of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (OJ 2009 L 110, p. 30).

3 Council Directive of 5 April 1993 (OJ 1993 L 95, p. 29, 'the Unfair Terms Directive').

4 Judgment of 28 July 2016 (C-191/15, EU:C:2016:612, 'the judgment in *VKI* v *Amazon*').

law is applicable to the trust agreements at issue in the absence of such a choice, or whether German law is applicable. That issue is, in turn, dependent on the interpretation of the Convention on the law applicable to contractual obligations [5] and of Regulation (EC) No 593/2008 on the law applicable to contractual obligations. [6]

3. That court has thus submitted various questions to the Court seeking, *first*, to determine whether those trust agreements raise 'questions governed by the law of companies and other bodies, corporate or unincorporated', which are excluded from the material scope of the Rome Convention and of the Rome I Regulation, since they concern limited partners' shares and are closely linked to the agreements governing the relevant limited partnerships. Assuming that that is not the case, those questions turn, *next*, to whether those contracts are excluded from the scope of the protective rules on consumer contracts laid down in those instruments on the ground that the services are to be supplied to consumers, pursuant to those same agreements, exclusively outside Austria. *Ultimately*, those questions seek a ruling on the compatibility of the choice-of-law clause at issue with the Unfair Terms Directive.

4. In this Opinion, I will explain why, in my view, the law applicable to trust agreements such as those at issue in the main proceedings must be determined in accordance with the rules of the Rome Convention and the Rome I Regulation. Furthermore, I will set out the reasons why, in my opinion, such agreements, under which services must be provided at a distance in the country in which the consumer is habitually resident from the territory of another country, are covered by the protective rules on consumer contracts provided for in those instruments. Lastly, I will explain that a choice-of-law clause such as that included in the agreements in question is unfair where, notwithstanding that choice, it does not inform the consumer that he enjoys the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence.

II. Legal context

A. The Rome Convention

5. Article 1 of the Rome Convention, entitled 'Scope of the Convention', provides, in paragraphs 1 and 2:

'1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

…

(e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;

…'

5 Opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1, 'the Rome Convention').

6 Regulation of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 6), as corrected (OJ 2009 L 309, p. 87) ('the Rome I Regulation'). Both the Rome Convention and the Rome I Regulation are applicable *ratione temporis* to the case in the main proceedings (see point 9 of this Opinion).

6. Article 5 of the Rome Convention, entitled 'Certain consumer contracts', provides:

'1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

– if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract,

or

– if the other party or his agent received the consumer's order in that country

…

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:

…

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

…'

B. The Rome I Regulation

7. Article 1 of the Rome I Regulation, entitled 'Material scope', provides in paragraphs 1 and 2:

'1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

…

(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;

…'

8. Article 6 of that regulation, entitled 'Consumer contracts', provides:

'1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

…

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

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

3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.

4. Paragraphs 1 and 2 shall not apply to:

(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;

…'

9. The Rome I Regulation replaced the Rome Convention. Under Article 28 of that regulation, the Regulation is to apply to contracts concluded as from 17 December 2009. It is established that the action for an injunction at issue in the main proceedings concerns both contracts concluded before that date and contracts concluded and to be concluded after that date, such that those two instruments are applicable *ratione temporis*.

C. The Unfair Terms Directive

10. Article 3(1) of the Unfair Terms Directive provides:

'A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'

III. The dispute in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

11. The company MPC Münchmeyer Capital AG Hamburg ('MPC') structures and markets closed-end real property investment funds, established in the form of limited partnerships under German law.[7] TVP, which is a 100% subsidiary of MPC, is the managing and founding general partner of the partnerships in question.

7 For further explanations, see footnote 9 of this Opinion.

12. Those investment funds were, from the outset, designed in such a way as to enable private and institutional investors to invest in them as limited partners. Under the limited partnership agreements structuring those investment funds, TVP is thus authorised, in its capacity as managing and founding general partner, to introduce further limited partners.

13. To that end, another subsidiary of MPC was tasked with recruiting potential investors. The prospectuses relating to investments in the investment funds structured by MPC were distributed in particular (and, in certain cases, exclusively) in Austria.

14. Interested investors could invest in those funds, inter alia, by sending TVP a declaration of accession in the form of a proposal to enter into a trust agreement (*Treuhandsvertrag*). The amount corresponding to the investment was to be paid into one of the fiduciary accounts (*Treuhandkonten*) opened for that purpose at Austrian banks. Investors thus entered those investment funds indirectly as settlor-beneficiaries through TVP, acting as trustee of their limited-liability partnership shares. On that basis, TVP exercises, in its own name but for the benefit of the investors in question, those investors' rights deriving from their shares. It transfers to them the payment of dividends and other financial benefits arising therefrom. TVP also forwards to investors information received from the investment fund relating to its performance. In return for those various services, TVP receives a flat-rate fee.

15. The trust agreements thus concluded with TVP contain inter alia the following clause (or a clause equivalent to it): 'The trust agreement shall be governed by the law of the Federal Republic of Germany. The place of performance and jurisdiction for all disputes arising from this contract and concerning the conclusion of this contract shall be the seat of the trustee, in so far as this may legally be agreed.'

16. On 6 September 2013, the VKI brought an action for an injunction before the Handelsgericht Wien (Commercial Court, Vienna, Austria) seeking an order prohibiting TVP from using, in its business dealings with consumers residing in Austria, in the general terms and conditions forming the basis of the trust agreements which it concludes and/or in the standard contract forms used for that purpose, a number of terms on the ground, inter alia, that they are unfair within the meaning of the Unfair Terms Directive and the Austrian law transposing that directive. In addition, the VKI seeks authorisation to publish the judgment.

17. The action brought by the VKI concerns, in particular, the clause relating to the place of performance of the fiduciary services and the law applicable to the trust agreements, as set out in point 15 of this Opinion. In that context, the VKI has claimed that, in accordance inter alia with the provisions of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations,[8] the validity of the terms at issue must be assessed in the light not of the law applicable to those contracts but of the *lex loci damni* — that is, Austrian law. Moreover, it maintains that Austrian law is also applicable under the Rome Convention and the Rome I Regulation.

18. TVP contended that the action brought by the VKI should be dismissed. According to that company, in accordance with the provisions of the Rome I Regulation, the validity of the terms at issue must be determined under German law, which was chosen as the law applicable to the trust agreements. In addition, the trust and limited partnership agreements are so closely interwoven that the former must necessarily be subject to the same law as the latter, that is, German law. Moreover, TVP performed all its duties agreed under the agreements in Germany and has no branch, permanent establishment or even employees in Austria.

8 Regulation of the European Parliament and of the Council of 11 July 2007 (OJ 2007 L 199, p. 40, 'the Rome II Regulation').

19. By a judgment of 3 September 2015, the Handelsgericht Wien (Commercial Court, Vienna) granted the VKI's action. Applying Austrian law, that court ordered TVP to stop using, in its business dealings with consumers residing in Austria, the terms referred to in that action, including the choice-of-law clause. It also granted the application for publication of the judgment.

20. By an order of 13 September 2016, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) set aside the judgment given by the Handelsgericht Wien (Commercial Court, Vienna) and referred the case back to that court for a fresh decision after further proceedings. In particular, the court of appeal held, referring to the judgment in *VKI* v *Amazon*, that, whilst the validity of the choice-of-law clause at issue had to be analysed in the light of German law, such a term is unfair under that law in so far as it misleads the consumer by giving him the impression that only that law applies to the agreement, without informing him that, under the Rome Convention and the Rome I Regulation, he also enjoys the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence — in the present case, Austrian law.

21. The VKI and TVP each lodged an appeal against that order before the Oberster Gerichtshof (Supreme Court). In those circumstances, that court decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Does the exclusion from the scope of the legislation provided for in Article 1(2)(e) of the Rome Convention and in Article 1(2)(f) of the Rome I Regulation also apply to agreements between a settlor and a trustee who holds shares in a limited partnership on trust for that settlor, particularly where the partnership agreements and the trust agreements are interwoven?

(2) If Question 1 is answered in the negative:

Is Article 3(1) of Directive 93/13 to be interpreted as meaning that a clause in a trust agreement concluded between a professional and a consumer concerning the management of shares in a limited partnership, which was not individually negotiated and which provides that the law of the State in which the limited partnership has its seat is to apply, is unfair if the sole purpose of the trust agreement is the management of shares in the limited partnership and the settlor-beneficiary is granted the rights and obligations of a direct partner?

(3) If Question 1 or 2 is answered in the affirmative:

Does this answer change if the professional does not need to go to the consumer's State in order to perform his obligations, but is obliged to transfer to the consumer dividends and other financial benefits deriving from the shares, and to forward to him information about the performance of the business in which he holds the shares? Does it make a difference whether the Rome I Regulation or the Rome Convention is applicable?

4) If Question 3 is answered in the affirmative:

Does this answer still hold if, in addition, the consumer's subscription application was signed in his State of residence, the professional also provides information on the internet about the shares and a payment agency has been established in the consumer's State, to which the consumer must pay his subscription monies, even though the professional has no right to give directions as to that bank account? Does it make a difference whether the Rome I Regulation or the Rome Convention is applicable?'

22. The order for reference, dated 28 March 2018, was received at the Court Registry on 20 April 2018. Written observations were submitted by the VKI, TVP and the European Commission. The same parties were represented at the hearing on 27 February 2019.

IV. Analysis

23. The background to the action for an injunction brought in the present case by the VKI against TVP is investments by private investors residing in Austria in closed-end real property investment funds in the form of limited partnerships subject to German law.[9] More specifically, by signing an application to enter those investment funds, the investors did not *directly* acquire shares in the limited partnerships in question. In actual fact, they entrusted the value of their shares to TVP, which is the managing and founding general partner of those limited partnerships, and signed with that partnership *trust agreements* (*Treuhandvertrags*) concerning the management of those shares.[10]

24. It is important at this stage to explain briefly that, in the context of a *Treuhand* transaction (*Treuhand* being a German law concept, similar to a *fiducie* under French law), one person, referred to as the *settlor* (*Treugeber*), transfers the ownership of assets to another person, called the *trustee*, who is to hold those assets separately from his own assets and manage them for a specific purpose for a *beneficiary* (who may be, but is not necessarily, the settlor). As the owner of the assets transferred, the trustee acts *in his own name* but *for the benefit of* the beneficiary.[11]

25. Under the trust agreements at issue, TVP, which is thus also a 'direct' limited partner of the limited partnerships in question, therefore manages the shares owned by it in those partnerships in its name but on behalf of a large number of investors who are at the same time settlors and beneficiaries of trustee arrangements relating to the relevant shares. In that way, those investors (in the words of the referring court) 'became partners indirectly' in those partnerships.[12]

26. The action for an injunction brought by the VKI against TVP concerns the validity of various terms contained in those trust agreements (or, more specifically, in the general terms and conditions on which the agreements are based and in the standard contract forms used for that purpose). The VKI argues, in particular, that those terms are unfair within the meaning of Article 3(1) of the Unfair Terms Directive. Since TVP's registered office is located in Germany and the VKI is seeking to protect the interests of consumers resident in Austria, the issue arises of the law applicable to that action.

9 It is apparent from the VKI's observations that closed-end investment funds such as those structured by MPC consist in the raising of capital by issuing and selling shares in the partnerships established to that end, with a view to making investments in real property, the aim being to generate income through the rental and sale of the property in question. The shares can be subscribed by the investors for a limited period only. Once the capital required is collected, the investment fund is closed and will not issue new shares. The shares initially issued cannot be bought back by the investment fund, or may be bought back only subject to strict conditions. Investment funds of this type are particularly common in Germany (see, in relation to this issue, Opinion of Advocate General Trstenjak in *E. Friz*, C-215/08, EU:C:2009:522, points 33, 42 and 43 and the references cited). The VKI further states that, since 2002, approximately 16 000 Austrian consumers have concluded trust agreements with TVP in order to invest in the funds of MPC.

10 It is common ground that the investors could also opt to enter the investment funds directly as limited partners and be registered in the German commercial register. This is not, however, the situation at issue in the case in the main proceedings.

11 *Treuhand* and *fiducie* arrangements are comparable to *trusts* in common law countries (for a comparative law analysis, see Braun, A. and Swadling, W., 'Chapter Six — Management: Trust, Treuhand and Fiducie', in Van Erp, S. and Akkermans, B., *Cases, Materials and Text on Property Law*, *Ius commune casebooks for the common law of Europe*, Hart Publishing, 2012, pp. 553 to 615). In addition, the Rome Convention, in Article 1(2)(g) thereof, and the Rome I Regulation, in Article 1(2)(h) thereof, exclude from their material scope the constitution of trusts and the relationship between settlors, trustees and beneficiaries. However, that exclusion is not, a priori, applicable in the case in the main proceedings. It is clear from the Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I (OJ 1980 C 282, p. 1, 'the Giuliano-Lagarde Report') that, in principle, that exclusion relates solely to trusts and does not cover 'similar institutions under continental laws' (see p. 13 of that report). Be that as it may, since the question of the applicability of that exclusion was not posed by the referring court or raised before the Court, I will not address it in the remainder of this Opinion.

12 The referring court does not provide more detail as to the legal nature of the investments in question.

27. In the judgment in *VKI* v *Amazon*, the Court held, in essence, that the law applicable to an action for an injunction directed against the use of allegedly unfair contractual terms by an undertaking established in a Member State which concludes contracts with consumers resident in other Member States must be determined in accordance with Article 6(1) of the Rome II Regulation.[13] However, the question of the unfairness of a particular contractual term falls within the scope of the law applicable to the contract, which is, in principle, determined by the Rome Convention or the Rome I Regulation.[14] In the present case, in order to dispose of the action brought by the VKI against TVP, the law applicable to the trust agreements at issue must therefore be determined.

28. In this regard, TVP relies on a choice-of-law clause, provided for in those trust agreements and designating German law, the law in which TVP itself and the limited partnerships are established, as being applicable. The VKI, however, claims that that term is unfair. In the judgment in *VKI* v *Amazon*, the Court held that a term of that kind is such as to mislead the consumer in so far as it fails to inform him that he enjoys the protection offered, in accordance with the protective rules on consumer contracts laid down in the Rome I Regulation, notwithstanding the chosen law, by the mandatory provisions of the law of the country in which he has his habitual residence.[15] TVP submits in response that that case-law cannot be applied to the case in the main proceedings. The choice-of-law clause is purely declaratory: the trust agreements at issue in the main proceedings must, in any event, be subject to German law, which is applicable to those partnerships.

29. In that context, the referring court asks the Court, by its first questions, whether, as TVP submits, the trust agreements at issue in the main proceedings are excluded from the material scope of the Rome Convention and the Rome I Regulation under the exclusion laid down in Article 1(2)(e) of that convention and Article 1(2)(f) of that regulation concerning 'questions governed by the law of companies and other bodies, corporate or unincorporated' and, if that is the case, to what extent. I will consider this issue first in this Opinion (Section A).

30. If the trust agreements at issue do fall within the material scope of the Rome Convention and the Rome I Regulation, the referring court seeks to determine, by its third and fourth questions, whether those agreements are covered by the protective rules on consumer contracts contained in Article 5 of that convention and Article 6 of that regulation. More specifically, it asks about the scope of the exclusion laid down in paragraph 4 of those two articles, on which TVP relies, under which those protective rules do not apply to 'a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence'. For the sake of convenience, I will examine those questions together and secondly (Section B).

31. Finally, I will end this Opinion by considering the second question put by the referring court concerning the unfairness, within the meaning of Article 3(1) of the Unfair Terms Directive, of the choice-of-law clause at issue (Section C).

13 It must be borne in mind that an action for an injunction is based on a non-contractual obligation in so far as there is no contract between the trader and the consumer organisation. In that regard, Article 6(1) of the Rome II Regulation provides that the law applicable to a non-contractual obligation arising out of an act of unfair competition is to be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected. In the judgment in *VKI* v *Amazon* (paragraph 42), the Court held that 'unfair competition', within the meaning of that provision, covers the use of unfair terms inserted into general terms and conditions, as this is likely to affect the collective interests of consumers as a group and hence to influence the conditions of competition on the market.

14 See, to that effect, judgment in *VKI* v *Amazon*, paragraphs 35 to 60.

15 See points 83 to 90 of this Opinion.

A. The non-applicability of the exclusion concerning 'questions governed by the law of companies and other bodies, corporate or unincorporated' (first question)

32. By its first question, the referring court asks, in essence, whether Article 1(2)(e) of the Rome Convention and Article 1(2)(f) of the Rome I Regulation are to be interpreted as meaning that the exclusion provided therein, concerning 'questions governed by the law of companies and other bodies, corporate or unincorporated', covers contractual obligations which arise out of a trust agreement concerning the management of shares in a limited partnership, in particular where that agreement and agreements governing the partnership are interwoven.

33. The Rome Convention and the Rome I Regulation apply, as stated in Article 1(1) of both instruments, to 'contractual obligations'.[16] The law applicable to such obligations must, in principle, be determined according to the conflict-of-laws rules of those instruments.

34. However, Article 1(2) of those instruments expressly excludes certain matters from their scope. In particular, under Article 1(2)(e) of the Rome Convention and Article 1(2)(f) of the Rome I Regulation, they do not apply to 'questions governed by the law of companies and other bodies, corporate or unincorporated'. Accordingly, the law applicable to such 'questions' must be determined according to national conflict-of-laws rules.[17]

35. It is not disputed that, as a general rule, a trust agreement creates between the parties 'contractual obligations' falling within the material scope of the Rome Convention and the Rome I Regulation.

36. However, the trust agreements to which the action brought in the present case by the VKI against TVP relates are peculiar in that, first, they concern the management of shares in limited partnerships and, second, that, to use the wording of the referring court, those agreements and the partnership agreements in question are 'interwoven'.

37. It is apparent from the order for reference and from the observations submitted to the Court that that 'interwoven' nature stems from the fact that provision is made in the agreements governing the partnerships for investors to conclude a trust agreement with TVP and 'indirectly' become partners of the limited partnerships as settlor-beneficiaries. Furthermore, the partnership agreements provide that settlor-beneficiaries are to be treated as 'direct' limited partners in their relationship with the partnership concerned and with the other limited partners, who have the same obligations (including participation in capital and losses) and rights (including the right to receive dividends and voting rights). TVP's fee for its fiduciary services is provided for in the partnership agreements and paid not by the settlor-beneficiaries but by the partnerships. The trust agreements in question also refer, in several places, to the partnership agreement governing those partnerships.

38. It is therefore necessary to ascertain, in the light of those particular facts, whether the law applicable to the contractual obligations arising under those agreements is to be determined in accordance with national conflict-of-laws rules, on the basis of the exclusion relating to 'questions governed by the law of companies and other bodies, corporate or unincorporated,' within the meaning of Article 1(2)(e) of the Rome Convention and Article 1(2)(f) of the Rome I Regulation.

16 The concept of a 'contractual obligation', within the meaning of those instruments, refers to a legal obligation freely consented to by one person towards another. See judgment of 21 January 2016, *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2016:40, paragraph 44).

17 Notwithstanding the question of the applicable law, the question of whether the trust agreements in question raise questions governed by the law of companies is similarly liable to have consequences, in substantive terms, for the VKI's ability to rely on the rules prohibiting unfair terms. Like the Rome Convention and the Rome I Regulation, the Unfair Terms Directive does not apply, as stated in recital 10 thereof, to 'contracts relating to the incorporation and organisation of companies or partnership agreements'.

39. The VKI submits that that is not the case. The trust agreements established a unique relationship between the settlor-beneficiaries and TVP which is covered not by the law of companies but by the law of obligations. The settlor-beneficiaries do not have the status of limited partners, which is reserved for persons registered in that capacity in the German commercial register. They have no direct legal relationship with those partnerships or its partners. The settlor-beneficiaries cannot, for instance, directly exercise any voting rights or right to dividends as does a partner. They may only instruct TVP to transfer to them any dividends that it receives as a partner and to exercise its voting rights in a particular way for their benefit.

40. Conversely, TVP contends that, in so far as the settlor-beneficiaries have the same rights and obligations as 'direct' partners, those settlor-beneficiaries are directly involved in those limited partnerships and must, from the perspective of the law of partnerships, be regarded as partners (or 'quasi-partners') in their internal relationship with those partnerships. There is a direct relationship between the settlor-beneficiaries, the partnerships and the partners. The settlor-beneficiaries can, for instance, exercise voting rights and the right to dividends vis-à-vis the partnership. As a trustee, TVP's involvement is confined to facilitating the handling of the status of settlor-beneficiaries as partners in matters relating to registration and facilitating the internal management of those partnerships. The relationship between the settlor-beneficiaries and TVP is also determined by the law of partnerships. The trust agreements are therefore inseparable from the limited partnership agreements. There is a single legal relationship between the partnership, the 'direct' partners, trustees and settlor-beneficiaries, which falls squarely within the exclusion provided for in Article 1(2)(e) of the Rome Convention and Article 1(2)(f) of the Rome Regulation. [18]

41. For my part, I take the view that contractual obligations such as those arising from the trust agreements at issue *do not fall within the scope* of the exclusion relating to 'questions governed by the law of companies and other bodies, corporate or unincorporated', within the meaning of Article 1(2)(e) of the Rome Convention and Article 1(2)(f) of the Rome I Regulation for the following reasons. Since the content of those provisions is essentially the same, I will refer in the following points, for the sake of convenience, to that regulation alone; however, my analysis is entirely applicable to that convention.

42. The Rome I Regulation does not define the concept of 'questions governed by the law of companies and other bodies, corporate or unincorporated' within the meaning of Article 1(2)(f) of that regulation. Nevertheless, its meaning cannot, in my view, be left to the law of each Member State. Where it contributes to defining the scope of that regulation, and in order to guarantee the uniform application in all Member States of the conflict-of-laws rules for which it provides, that concept must be given an *autonomous meaning*, by reference to the wording of that provision, its legislative history, the scheme and the objectives of the regulation. [19] In view of the factual context of the present case, I will focus solely on 'questions governed by the law of companies' and partnerships, thus setting aside all other bodies, corporate or unincorporated.

18 In this regard, TVP cites the case-law of the Bundesgerichtshof (Federal Court of Justice, Germany) under which, where a trust agreement relating to shares and the partnership agreements of the partnership concerned are interwoven, the settlor-beneficiary must be treated as a partner. The law of partnerships applicable to the partnership agreements also applies to the trust agreement where the settlor-beneficiary is heavily and directly involved in the partnership, by having the same rights and obligations as direct partners, who are required to pay subscription monies and who directly enjoy the benefits — in particular, tax advantages — of a partner. In that case, the partnership agreements and the trust agreement are inseparable, such that there is no need for them to be 'split in the light of an issue relating to a conflict of laws'. On the contrary, there is a 'single legal relationship' which must be dealt with in accordance with one and the same law (see the judgment of the Federal Court of Justice, II ZR 276/02).

19 It is possible to reason here by analogy with the Court's autonomous interpretation of the exclusions laid down in Article 1(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1) ('the Brussels Ia Regulation'). See, inter alia, with regard to the exclusion relating to 'social security', judgment of 14 November 2002, *Baten* (C-271/00, EU:C:2002:656, paragraph 42); with regard to the exclusion relating to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings', judgment of 22 February 1979, *Gourdain* (133/78, EU:C:1979:49, paragraph 3); and, with regard to the exclusion relating to 'the status or legal capacity of natural persons', judgment of 3 October 2013, *Schneider* (C-386/12, EU:C:2013:633, paragraph 19).

43. Turning first of all to the *wording* of Article 1(2)(f) of the Rome I Regulation, that provision provides a list — which is admittedly not exhaustive but is nonetheless indicative — of such 'questions'. They relate, inter alia, to 'the creation …, legal capacity, internal organisation or winding-up of companies …, and the personal liability of officers and members as such for the obligations of the company …'. The Giuliano-Lagarde Report provides similar indications, clarifying that that exclusion covers 'all the complex acts (contractual, administrative, registration) which are necessary to the creation of a company or firm and to the regulation of its internal organisation and winding-up', that is to say acts which 'fall within the scope of company law'. [20]

44. Next, with regard to the *legislative history* of that exclusion, the Giuliano-Lagarde Report explains that its inclusion in the Rome Convention was justified by the action undertaken by the European Community in the field of substantive company law when that convention was drawn up, with a view to approximating the related laws of the Member States. [21] Furthermore, the differences that exist between Member States vis-à-vis the company law conflict-of-laws rules similarly explain that exclusion in my view. [22]

45. As for the *scheme and objectives* of the Rome I Regulation, I note that that regulation lays down conflict-of-laws rules which are intended to be highly foreseeable, with a view to ensuring legal certainty as to the applicable law. [23] In my view, the exclusion relating to 'questions governed by the law of companies' provided for in Article 1(2)(f) of the Rome I Regulation contributes to that objective. In that connection, companies operating internationally are confronted with various legal systems which may claim to govern those companies. In that context, it is generally accepted within the legal systems of the Member States that, with the same aim of ensuring foreseeability and legal certainty, in the interest in particular of the creditors and members of a company, a certain number of questions relating to that company must be centralised and fall within the scope of a single body of law, commonly referred to as company law (or *lex societatis*).

46. In short, the purpose of Article 1(2)(f) of the Rome I Regulation is to exclude from its scope questions of company law, or in other words, questions falling within the scope of the *lex societatis*, with a view to preventing these specific questions being subject to different legal systems, since the objective is to ensure foreseeability and legal certainty as regards the applicable law to companies and, in so doing, the movement of companies on the international stage. [24]

47. In the absence of a uniform and complete body of rules applicable to companies in EU law, [25] it is difficult, if not impossible, to provide an exhaustive definition of what constitutes a question governed by the law of companies and by the *lex societatis*. A case-by-case approach must be adopted, looking to the *general principles which stem from the corpus of the national legal systems*. I further note that, in some legal systems, the conflict-of-laws rules contain a list of the questions falling within the scope of the *lex societatis*. However, those lists are only illustrative and differences exist between Member States

20 Giuliano-Lagarde Report, p. 12. I would point out that, although the report relates to the Rome Convention, it also offers relevant guidance for the interpretation of the equivalent provisions of the Rome I Regulation. See, inter alia, judgment of 8 May 2019, *Kerr* (C-25/18, EU:C:2019:376, paragraph 34).

21 See Giuliano-Lagarde Report, p. 12.

22 I note, briefly, that some Member States use the place of incorporation as the connecting factor for the purposes of determining the law applicable to companies, whereas others apply the 'real head office principle', which requires that the company is established in the Member State in which its actual head office is located. See, with regard to this question, judgments of 9 March 1999, *Centros* (C-212/97, EU:C:1999:126); of 5 November 2002, *Überseering* (C-208/00, EU:C:2002:632); and of 25 October 2017, *Polbud — Wykonawstwo* (C-106/16, EU:C:2017:804).

23 See recitals 6 and 16 of the Rome I Regulation.

24 See, to that effect, judgment of 8 May 2019, *Kerr* (C-25/18, EU:C:2019:376, paragraph 33).

25 Current EU legislation on company law is piecemeal. See, in particular, Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ 2017 L 169, p. 46). See also Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1).

as to the questions governed by that law.[26] In view of those differences, attention should undoubtedly be focussed on the core set of questions generally accepted in those States, whilst seeking to preserve the objective of foreseeability and legal certainty vis-à-vis the law applicable to a company sought by Article 1(2)(f) of the Rome I Regulation.[27]

48. In that context, a company's constitution or partnership agreement, in so far as it governs questions regarding the internal organisation of that company or partnership, such as the extent and exercise of company or partnership rights (such as voting rights) and financial rights (such as the right to dividends) which stem from the status of shareholder or partner, fall within the exclusion laid down in that provision.

49. However, I take the view that the mere fact that a contract concerns shares, whether it is for example a contract of sale or — as in the present case — a trust agreement, cannot justify excluding the obligations which arise from that contract or agreement from the scope of Article 1(2)(f) of the Rome I Regulation.

50. It is true that transactions such as the sale of, or a trust over, shares may raise 'questions governed by the law of companies', which are excluded from the Rome I Regulation.[28] However, in my view, a distinction must be drawn between such questions and those raised by the contracts underpinning such transactions, which — for their part — fall within the field of the *lex contractus*,[29] and within the scope of that regulation.

51. A rigorous *classification* exercise must therefore be undertaken in every case. In that context, as the referring court rightly points out, a *distributive classification* approach must generally be adopted according to the *points of law* posed by a request.

52. For example, in the case which gave rise to the judgment in *KA Finanz*,[30] which specifically concerned the exclusion relating to 'questions governed by the law of companies' (in the iteration of that exclusion contained in Article 1(2)(e) of the Rome Convention), the question at issue was that of the law applicable, following a cross-border merger by acquisition, to the interpretation, performance and means of extinguishing obligations under a loan contract taken out by the acquired company prior to that merger. The Court stated that the interpretation, performance and extinguishing of the obligations to which such contracts give rise are questions falling within the field of the *lex contractus* and the scope of that convention. However, the question of the effect of a merger by acquisition on the contracts taken out by the acquired company fell, in the Court's view, within the field of *lex societatis* and the scope of the exclusion.[31]

26 See, inter alia, in Belgium, Article 111 of the loi du 16 juillet 2004 portant sur le code de droit international privé (Law of 16 July 2004 on the Code of Private International Law) (*Moniteur belge* of 27 July 2004, p. 57344) and, in Italy, Article 25 of Legge 31 maggio 1995 n.218 (Law No 218 of 31 May 1995) (ordinary supplement to GURI No 128 of 3 June 1995). For a comparative analysis of the legal systems of the Member States in relation to company law, see Gerner-Beuerle, C., Mucciarelli, F., Schuster, E. and Siems, M., *The Private International Law of Companies in Europe*, Beck, Hart and Nomos, 2019, pp. 47 to 127.

27 For a list of that 'core', see Gerner-Beuerle, C., Mucciarelli, F., Schuster, E. and Siems, M., op. cit.

28 For example, in respect of a sales contract, is a partner entitled to transfer his shares to a third party without the trustee's consent? Does that transfer give rise to a pre-emptive right for other partners? For various questions of company law raised by trust transactions related to the management of shares, see *Fiducie sur titres, Les nouvelles perspectives*, a colloquium organised by the *Association française des fiduciaires*, LGDJ, Coll. Grands colloques, 2017.

29 See, in this regard, in connection with the field of the *lex contractu*s, the list contained in Article 12 of the Rome I Regulation. For example, in the case of a sales contract, what contractual liability is there between the seller and the buyer?

30 Judgment of 7 April 2016 (C-483/14, EU:C:2016:205).

31 See judgment of 7 April 2016, *KA Finanz* (C-483/14, EU:C:2016:205, paragraphs 52 to 58). For an identical distributive classification, see judgment of 21 January 2016, *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2016:40, paragraphs 50 to 62). See also the judgment in *VKI* v *Amazon* and the distinction drawn by the Court between the law applicable to the main question raised by a similar action for an injunction (which therefore had to be determined in accordance with Article 6(1) of the Rome I Regulation) and the law applicable to the incidental question of the unfairness of the terms at issue, which falls within the field of the *lex contractus* and the scope of the Rome I Regulation (see point 27 of this Opinion).

53. In other words, the mere fact that there is a link between a contract and 'questions governed by the law of companies' does not have the effect of excluding from the scope of the Rome I Regulation the obligations arising from that contract. This will be the case only in relation to such 'questions', which must therefore be classified separately from questions of a contractual nature. [32]

54. That being clarified, in the present case, the action for an injunction brought by the VKI concerns, I reiterate, the unfairness and, therefore, the validity of certain terms of the trust agreements at issue, terms which concern questions such as the extent of TVP's liability as a trustee, the limitation and prescription periods within which the investor, as a settlor-beneficiary, may bring a claim against TVP, the place of performance of the fiduciary services and the law applicable to the trust agreement. In my view, all those questions are contractual in nature and therefore fall within the field of the *lex contractus* and the scope of the Rome I Regulation.

55. The fact that those agreements and the limited partnership agreements are 'interwoven', as has been explained in point 37 of this Opinion, does not, in my opinion, call that interpretation into question.

56. In this regard, I note that the parties in the main proceedings disagree as to whether or not, given the interwoven nature of the transaction, the settlor-beneficiaries have the status of partners. In my view, that is indeed a 'question governed by the law of companies' excluded from the Rome I Regulation and falling within the field of *lex societatis*. As a general rule, it is for that law to determine who has that status. It is, where appropriate, for the referring court to answer that question of substantive law in the light of German law. [33]

57. However, in the context of the action brought by the VKI, that question is not the decisive factor. The matter at issue is not determining the extent of any rights and obligations which the settlor-beneficiaries may have, under the applicable partnership law, directly vis-à-vis the limited partnerships. If the law applicable to those partnerships, that is, German law, were to provide that, in the light of the rights and obligations of the settlor-beneficiaries, as laid down in the partnership agreements, it is necessary to regard those settlor-beneficiaries as partners, [34] this would not, in my view, alter the contractual nature of the questions submitted in the present case. Questions such as the extent of TVP's liability as a trustee, or the rules on the limitation of actions brought by settlor-beneficiaries against TVP, are not simply 'questions governed by the law of companies', which must be centralised within the context of the *lex societatis*. An interpretation to the contrary would, as the referring court rightly points out, go beyond the objective of foreseeability and legal certainty pursued by Article 1(2)(f) of the Rome I Regulation.

32 The issue of voting rights in the case of a trust agreement over shares provides a good example of a distributive classification. The question of the extent of a shareholder's voting rights is a 'question governed by the law of companies' and the *lex societatis*. However, the way in which a trustee must exercise voting rights for the benefit of the settlor-beneficiary (must the trustee follow general or specific instructions from the beneficiary? must the trustee consult the beneficiary prior to each vote?) is a question which concerns their contractual relationship and respective obligations, governed by the *lex contractus*.

33 Put simply, in a trust transaction which I would classify as 'basic', the shares placed in trust are the property of the trustee, and that person enjoys the rights and owes the obligations attached thereto. It is therefore the trustee who has the status of a partner. In the present case, the fact that the settlor-beneficiaries have, as is provided for in the partnership agreements, the same rights as direct partners (including rights in the partnership and pecuniary rights attached to the shares), that they may rely on those rights as against the partnership and that they have the same obligations (including the obligation to contribute to losses) complicates that 'basic' arrangement. There are two ways of viewing the situation: on the one hand, as the VKI claims, the trust arrangement may be regarded as a 'contractual arrangement' intended to imitate the status of partner without entailing certain disadvantages of that status (including registration in the commercial register), but applying only in the context of internal relationships; on the other, as TVP contends, the view could be taken that, regardless of the ownership of the shares and of the person registered in the commercial registers, it is necessary to 'pierce the contractual veil' and recognise the settlor-beneficiary as the real partner, including in relation to third parties. Ultimately, the question raised is that of the criterion governing the status of partner: is it ownership of the shares? Registration in the commercial register? Or even the ability to rely on the rights of a partner as against the partnership and therefore who owes the corresponding obligations? This is a classic issue raised in the law of companies and of bodies corporate and unincorporate.

34 See footnote 18 of this Opinion.

58. As the Commission claims, it is also possible to reason in terms of *legal relationships*. The terms of the trust agreement are intended to govern the legal relationship between the settlor-beneficiary and the trustee. They determine their respective rights and obligations under the trust agreement. Even where the agreement reproduces rights and obligations provided for in the agreements governing a partnership, one party to the agreement may rely on them against the other only in so far as that same agreement so provides. The contractual obligations at issue must therefore be distinguished from those agreements. The partnership agreements and the *lex societatis* are directly relevant only with regard to the settlor-beneficiaries' potential relationships, as partners (supposing that they are partners) vis-à-vis the partnership and its limited partners,[35] relationships which are not at issue in the present case.

59. The interpretation which I am advocating is not undermined by TVP's submission that distinguishing between the trust agreement and the partnership agreement for the purposes of determining the applicable law could disturb the balance between the partners of those limited partnerships and the settlor-beneficiaries, in particular, as far as concerns the partnership's liability to third-party creditors for the debts of the partnership. TVP maintains, in that regard, that, in accordance with the case-law of the Bundesgerichtshof (Federal Court of Justice), although the settlor-beneficiaries are not directly liable to third-party creditors, they are nevertheless to reimburse the trustee any liability it may have incurred as a limited partner vis-à-vis those beneficiaries (since they are 'indirectly' liable to creditors). In that regard, I accept that the liability of partners for the debts of the partnership is again a 'question governed by the law of companies and other bodies corporate or unincorporate', which is excluded from the Rome I Regulation, as expressly laid down in Article 1(2)(f) thereof. However, the question of any obligation owed by a settlor-beneficiary to reimburse the trustee his liability for the debts of the partnership is, above all, a question of their contractual relationship. In my opinion, it is therefore governed by the *lex contractus* and falls within the scope of that regulation.[36]

60. In the light of all the foregoing considerations, I suggest that the Court answer the first question to the effect that the exclusion provided for in Article 1(2)(e) of the Rome Convention and in Article 1(2)(f) of the Rome I Regulation, which relates to 'questions governed by the law of companies and other bodies, corporate or unincorporated', does not apply to contractual obligations arising from a trust agreement relating to the management of shares in a limited partnership.

B. The non-applicability of the exclusion relating to certain contracts for the supply of services concluded by consumers (third and fourth questions)

61. In so far as the Court holds, as I propose that it do, that contractual obligations arising from the trust agreements at issue do not fall within the scope of the exclusion provided for in Article 1(2)(f) of the Rome I Regulation (or the equivalent exclusion in the Rome Convention), the law applicable to those agreements must be determined in accordance with the conflict-of-laws rules provided for in those instruments.

35 The settlor-beneficiaries cannot rely as against the partnership and the partners on the rights provided for in the trust agreement to which the partnership and partners are not parties.

36 For the sake of being exhaustive, I add that, even if the trust agreements were void according to the *lex contractus*, that would not necessarily mean that the Austrian consumers would automatically recover their investments. In so far as their investments were used as subscription monies for shares in a limited partnership, the possibility of the consumer withdrawing from the partnership, recovering those subscription monies and any outstanding obligations owed by them in such a case would still be 'questions governed by the law of companies and other bodies, corporate or unincorporated' within the meaning of Article 1(2)(f) of the Rome I Regulation. See, in that regard, as far as concerns the rule on de facto corporations (*Lehre der fehlerhaften Gesellschaft*) in German law, judgment of 15 April 2010, *E. Friz* (C-215/08, EU:C:2010:186).

62. In this regard, the referring court has found that the trust agreements at issue are consumer contracts which may fall within the scope of the relevant protective rules laid down in Article 5 of that convention and Article 6 of that regulation.[37] They bind a 'professional', namely TVP, acting in the exercise of its trade or profession, to various investors who are 'consumers', namely natural persons who, by concluding those agreements, have acted for a purpose which can be regarded as being outside their trade or profession.[38] That court has also found that the conditions governing the application of that protection are met.[39]

63. However, paragraph 4 of those articles expressly excludes certain contracts from their scope. In particular, Article 5(4)(b) of the Rome Convention and Article 6(4)(a) of the Rome I Regulation, the wording of which is identical, provide that the protection for consumer contracts is not to apply to 'a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence'. The law applicable to contracts falling within the scope of that exclusion must be determined in the light of the general conflict-of-laws rules provided for in Articles 3 and 4 of those instruments.

64. In that context, by its third and fourth questions, the referring court asks, in essence, whether trust agreements such as those concerned by the action for an injunction brought by the VKI may be covered by that exclusion.

65. The VKI and the Commission submit, in essence, that that exclusion should not apply in the present case where the consumers receive certain services under trust agreements at issue in Austria. TVP, on the other hand, contends that it provides fiduciary services exclusively in Germany,[40] as provided for in those agreements, since the activities required to perform those agreements are carried out exclusively in that Member State.

66. I share the view of the latter for the following reasons. Once again, since there is no difference between the Rome Convention and the Rome I Regulation as far as concerns the issue at hand, the same interpretation must be adopted for both instruments. For the sake of convenience, I will therefore once more refer in the remainder of this Opinion to the Rome I Regulation only.

67. Two cumulative conditions are clear from the wording of Article 6(4)(a) of the Rome I Regulation. The exclusion contained in that provision applies provided that, first, there is a 'contract for the supply of services' and, second, that the services are to be supplied to the consumer 'exclusively in a country other than that in which he has his habitual residence'.

68. The interpretation of the *first condition* leaves no room for doubt. In that regard, the concept of a 'contract for the supply of services' used in Article 6(4)(a) of the Rome I Regulation must, in my view, be defined autonomously and must be given the same meaning as that of a 'contract for the provision of services' contained in Article 4(1)(b) of that regulation.[41] The category of contracts covered by both concepts, despite a slight difference in terminology, is quite clearly the same. Furthermore, that

37 More specifically, Article 5 of the Rome Convention applies only to consumer contracts the object of which is the supply of goods or services or contracts for the provision of credit for that object. Article 6 of the Rome I Regulation is broader in scope since it covers any type of consumer contracts, subject to the express exclusions laid down therein.

38 Furthermore, those trust agreements constitute 'contracts for the supply of services', within the meaning of Article 5 of the Rome Convention (see point 68 of this Opinion), such that they fall, in principle, within the narrower scope of that article.

39 With regard to the conditions laid down in Article 5(2) of the Rome Convention, it should be noted that the conclusion of the trust agreements in Austria 'was preceded … by a specific invitation addressed to [the consumer] or by advertising' (the prospectuses relating to investments at issue were distributed in that Member State). Furthermore, the Austrian consumers '[took] in that country all the steps necessary on [their] part for the conclusion of the agreement' and 'the other party or his agent received the consumer[s'] order[s] in that country' (the juridical acts required of the consumers were carried out in Austria and accepted in that Member State by contractual partners of TVP). With regard to the conditions contained in Article 6(1) of the Rome I Regulation, the same factors indicate that TVP 'directed' its activities 'to' the Austrian market and that the contracts fell within the scope of such activities.

40 See point 15 of this Opinion.

41 See, to that effect, Ragno, F., 'Article 6: Consumer contracts', in Ferrari, F., *Rome I Regulation — Pocket Commentary*, selp, 2015, p. 219 and the references cited.

category must therefore have the same scope as that of a 'provision of services' laid down, for the purposes of jurisdiction in matters relating to a contract, in Article 7(1)(b) of the Brussels Ia Regulation.[42] It is apparent from the case-law of the Court on that provision that the concept of 'services' implies, at the very least, that the party who provides the service carries out a particular activity in return for remuneration.[43] As TVP makes clear, a trust arrangement constitutes such a 'service': under a trust agreement, the trustee carries out a particular activity — consisting in the management of the assets vested in trust — in return for remuneration.

69. The scope of the *second condition*, relating to the place where the services 'shall be supplied' to the consumer is less obvious. The Court has indeed previously addressed the question of the place of performance of a contractual obligation or of a contract for the purposes of determining jurisdiction in matters relating to a contract, using a variety of criteria.[44] However, the Court has not yet examined that question in the context of Article 4(1)(b) of the Rome I Regulation for the purposes of determining the applicable law. It is necessary to determine, first of all, whether the question of the place of performance is governed by national law, in particular by the *lex contractus*, or must be defined autonomously under EU law, and the significance to be attributed to any place of performance stipulated in the contract.

70. In that regard, I note that the referring court has focussed on certain obligations under the trust agreements at issue, namely TVP's obligation to provide the investor with information about the performance of the investment fund and the obligation to transfer to that investor dividends and any other financial benefits owed to him, and has determined where those obligations are to be performed, having regard both to Austrian and German law, that is to say the two laws capable of being applicable to those agreements.[45] That court also took the view that, under either law, the clause designating the place of performance under the trust agreements is invalid.[46]

71. However, I take the view that the question of the place where the services are to be supplied to the consumer (and of the effect of any term designating that place of performance), for the purposes of the application of Article 6(4)(a) of the Rome I Regulation, should not be left to the *lex contractus*. That question must in fact be settled before the *lex contractus* is designated, and its specific purpose is to

42 See, to that effect, recital 17 of the Rome I Regulation and judgment of 8 May 2019, *Kerr* (C-25/18, EU:C:2019:376, paragraphs 39 to 41). I note that Article 7(1) of the Brussels Ia Regulation provides that a person domiciled in a Member State may be sued, in matters relating to a contract, pursuant to point (a) of that paragraph, in the courts for the place of performance of the obligation in question. Point (b) of that paragraph clarifies that, for the purpose of that provision and unless otherwise agreed, the place of performance of the obligation in question is to be, in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered and, in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.

43 See judgments of 23 April 2009, *Falco Privatstiftung and Rabitsch* (C-533/07, EU:C:2009:257, paragraph 29); of 10 September 2015, *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:574, paragraph 57); and of 8 May 2019, *Kerr* (C-25/18, EU:C:2019:376, paragraph 39).

44 In the context of Article 7(1)(a) of the Brussels Ia Regulation, which provides that a defendant domiciled in a Member State may be sued 'in the courts for the place of performance of the obligation in question', the Court finds that it is necessary to determine the obligation which corresponds to the contractual right on which the applicant's action is based and to assess, in accordance with the law governing that obligation, the place where that obligation has been or is to be performed (see, by analogy, judgments of 6 October 1976, *De Bloos* (14/76, EU:C:1976:134, paragraph 13) and *Industrie Tessili Italiana Como* (12/76, EU:C:1976:133, paragraph 13). Within the framework of Article 7(1)(b) of that regulation, relating to contracts of sale and contracts for the provision of services, the Court provided an autonomous and factual definition of the place of performance of the contract, assessed in its entirety, and lending significant weight to the terms or the structure of the contract (see, inter alia, judgments of 3 May 2007, *Color Drack* (C-386/05, EU:C:2007:262); of 23 April 2009, *Falco Privatstiftung and Rabitsch* (C-533/07, EU:C:2009:257); and of 25 February 2010, *Car Trim* (C-381/08, EU:C:2010:90)).

45 The referring court observed that, in the absence of a choice, Austrian law provides that financial obligations must be fulfilled at the creditor's place of domicile. For its part, German law draws a distinction between the place where the financial obligation is physically fulfilled (the *Leistungsort* or *Erfüllungsort*), located in the debtor's place of domicile, and the place where the result of that fulfilment is obtained (the *Erfolgsort*), which would be the creditor's place of domicile.

46 TVP disputes the referring court's findings concerning German and Austrian law. However, it is not for the Court to call into question the interpretation of those national laws at issue provided by that court.

determine that law. In order to avoid adopting circular or complex logic,[47] it is necessary, in my view, to adopt an *autonomous interpretation* of the 'place where the services are to be supplied to the consumer', within the meaning of that provision, which must be identified in the light of the context and the objectives of that provision.

72. With regard, *in the first place*, to the context of Article 6(4)(a) of the Rome I Regulation, I take the view, as do the VKI and the Commission, that that provision must be interpreted strictly, since it has the effect of causing the consumer to lose the protection afforded to him by the law of the country in which he has his habitual residence (or at the very least the mandatory rules of that law) and it thus runs counter to the objective of protection generally pursued by that article.[48]

73. In addition, the fact that an equivalent exclusion is not found in Article 17 of the Brussels Ia Regulation[49] in relation to jurisdiction likewise argues, in my view, in favour of such a strict interpretation.[50]

74. With regard, *in the second place*, to the objective pursued by the exclusion in question, it is explained in the Giuliano-Lagarde Report, in relation to Article 5(4)(b) of the Rome Convention, that, 'in the case of contracts relating to the supply of services (for example, accommodation in a hotel, or a language course) which are supplied exclusively outside the State in which the consumer is resident, the latter cannot reasonably expect the law of his State of origin to be applied[51] in derogation from the general rules of Articles 3 and 4'. In such cases, 'the contract is more closely connected with the State in which the other contracting party is resident, even if the latter has performed one of the acts described [in Article 5(2)] (advertising, for example) in the State in which the consumer is resident'.[52]

75. Furthermore, it is apparent from the discussions held at the time the Rome I Regulation was adopted, in particular those within the Council of the European Union, that that exclusion was maintained in that regulation inter alia because certain delegations feared that consumers would otherwise be 'over-protected' and they wanted to prevent too great an impact on small and medium-sized undertakings, particularly in the tourism sector.[53]

76. In my view, it follows from those factors that, in order to determine the place where the services 'shall be supplied' to the consumer, within the meaning of Article 6(4)(a) of the Rome I Regulation, regard must be had, from a factual perspective, to the nature of the services in question. Although a term designating the place of performance of the contractual obligations may perhaps be indicative in

47 Such logic would involve either determining, in the light of the law designated by the protective rules in matters relating to consumer contracts laid down in the Rome I Regulation, whether those rules are genuinely meant to be applied, or designating, as TVP suggests, an initial *lex contractus* in accordance with the general rules of that regulation (Articles 3 and 4) and determining, in the light of that law, whether those protective rules must be applied, which could result in the designation of a second *lex contractus* instead of the first.

48 As is clear from recital 23 of the Rome I Regulation, the purpose of the special rules for consumer contracts laid down in that regulation is, inter alia, to protect the consumer, who is regarded as being the weaker party to the contract, by means of conflict-of-laws rules that are more favourable to his interests than the general rules.

49 Unlike, for example, the exclusion provided for in Article 6(4)(b) of the Rome I Regulation in contracts for carriage other than a contract relating to package travel, which has an equivalent in Article 17(3) of the Brussels Ia Regulation.

50 The service provider able to rely on Article 6(4)(a) of the Rome I Regulation and thereby to escape the mandatory provisions of the law of the Member State in which the consumer has his habitual residence should in any event bring his action (and the consumer could bring his) before the courts of the Member State in which the latter has his habitual residence, in accordance with Article 18(1) and (2) of the Brussels Ia Regulation. This inconsistency has been criticised by legal scholars. See Calliess, G.P., *Rome Regulations — Commentary on the European Rules of the Conflict of Laws*, Kluwer Law International, 2011, p. 147 and the references cited, as well as Ragno, F., op. cit., p. 219 and the references cited.

51 See points 85 and 87 of this Opinion.

52 Giuliano-Lagarde Report, pp. 24 and 25.

53 The exclusion in question appeared in the Proposal of 15 December 2005 for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (COM/2005/0650 final). That exclusion prompted objections from various delegations (the French Republic, the Italian Republic and the Republic of Austria) who wanted it to be removed, whilst others (the Republic of Lithuania and the Kingdom of the Netherlands) wanted it to be retained and the Grand Duchy of Luxembourg proposed that it be extended to contracts of sale. A number of professional associations in the hotel and catering sectors made public statements supporting that exclusion, fearing that they could be subject to different laws depending on the country of residence of their clients. See Calliess, G.P., op. cit., pp. 146 to 148, and McParland, M., *The Rome I Regulation on the Law Applicable to Contractual Obligations*, Oxford University Press, 2015, pp. 554 and 555.

that regard, it is by no means decisive. The words 'to be supplied' do not refer, in that context, as TVP contends, to the place where the obligations must be performed in accordance with the terms of the contract.[54] As the VKI claims, it is in reality necessary to ascertain whether it follows from the very nature of the contracted services that they will necessarily be supplied outside the State in which the consumer has his habitual residence. Furthermore, in the case of 'complex' services, regard must be had to all the services provided to the consumer.[55]

77. The assessment of the place where the services are to be supplied to the consumer is relatively simple in the case of the tourist industry services mentioned in the Giuliano-Lagarde Report and discussed in the Council, such as catering or hotel accommodation. In such situations, the provision of services is, by its nature, located in a single place: the professional physically performs the necessary activities and the consumer receives the corresponding result in one and the same place.

78. However, other services may be supplied at a distance, that is to say the place where the services are physically provided is not the same place where the consumer receives the result of that service. In particular, those two places may be in different countries. This means that the services are thus provided on a cross-border basis and the trader has not, as stated by the referring court in its third question, travelled to the consumer's country to perform his obligations.

79. In that regard, I share the view of the referring court and of the Commission that, in the case referred to in the previous point, 'services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence' within the meaning of Article 6(4)(a) of the Rome I Regulation.[56] In other words, the exclusion provided for in that provision should not apply in that case.

80. In my view, first, the EU legislature's insistence, in the wording of Article 6(4)(a) of the Rome I Regulation, that the services must be supplied 'exclusively' outside the country in which the consumer has his habitual residence and, second, the explanations underlying that provision[57] tend to make it clear that the exclusion in question should apply only to situations in which the consumer must, having regard to the nature of the relevant services, go to another country in order to receive the services. In this scenario, the contract has few connections with the country in which the consumer has his habitual residence and is (manifestly) more closely connected with the country in which the services are supplied.[58] However, in the case of services supplied at a distance in the country in which the consumer has his habitual residence, those services are more closely connected with that country and the consumer may reasonably expect that the law of that country applies (or at least mandatory provisions of that law).

54 In this regard, it is impossible to put forward a line of reasoning by analogy with the case-law of the Court regarding Article 7(1)(b) of the Brussels Ia Regulation. In that regard, the Court attributes paramount importance in order to determine 'the place in a Member State where, under the contract, the services were provided or should have been provided' within the meaning of that provision, to the terms of the contract. Although that approach is justified in the light both of the wording of that provision and the objective of foreseeability pursued by it, it would be improper in the context of Article 6(4)(a) of the Rome I Regulation. The objective of protection pursued by that regulation supports an interpretation which does not depend on the wording of the contract.

55 See, to that effect, Bělohlávek, A.J., *Rome Convention — Rome I Regulation*, Volume 1, Juris, 2010, p. 1167. I add that the mere fact that the professional has 'directed' his activities 'to' the country in which the consumer has his habitual residence cannot be a sufficient basis for the view that the services are 'supplied' in that country within the meaning of Article 6(4) of the Rome I Regulation, since otherwise that provision would be deprived of any practical effect. In any event, the protective rules laid down in that article apply only if the condition relating to 'directed activities' is satisfied. The relevant factors in assessing whether the professional's activities are 'directed to' the country in which the consumer is resident, such as advertising and the conclusion of the agreement in that country, are not, in themselves, decisive in showing that the services 'are to be supplied to the consumer [there]'.

56 In my view, that interpretation also applies to services supplied online. See, to that effect, Tang, Z.S., *Electronic Consumer Contracts in the Conflict of Laws*, Hart Publishing, 2nd edition, 2015, pp. 240 and 241.

57 See point 74 of this Opinion.

58 See, in the same vein, Calliess, op. cit., p. 148.

81. Those considerations are, in my view, fully applicable to a case such as that in the main proceedings. In particular, the fact that the subscription monies required were paid by Austrian consumers into fiduciary accounts *(Treuhandkonten)* held by TVP in Austria,[59] that TVP transfers the payment of the dividends and other financial benefits owed to Austrian consumers into Austrian accounts, that that partnership fulfils its obligations to provide information arising from the trust agreement by sending reports on the performance of the investment funds in Austria and that it has a website for Austrian consumers on which they may consult information and exercise their voting rights[60] shows that those consumers receive the result of the services supplied by TVP in the country in which they are habitually resident. Therefore the exclusion laid down in Article 6(4)(a) of the Rome I Regulation is not, in my opinion, intended to apply.

82. In the light of the foregoing, I suggest that the Court answer the third and fourth questions to the effect that Article 5(4)(b) of the Rome Convention and Article 6(4)(a) of the Rome I Regulation are to be interpreted as meaning that the exclusion provided for therein, relating to 'a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence', does not apply to a trust agreement under which the services are supplied by the trader to the consumer, in the country in which the consumer has his habitual residence, at a distance from the territory of another country.

C. The unfairness, within the meaning of Article 3(1) of the Unfair Terms Directive, of the choice-of-law clause designating the seat of the seller or supplier (second question)

83. By its second question, the referring court asks, in essence, whether Article 3(1) of the Unfair Terms Directive is to be interpreted as meaning that a term of a trust agreement concluded between a professional and a consumer concerning the management of shares in a limited partnership, which was not individually negotiated and which provides that the law of the Member State in which that limited partnership has its seat is to apply, is unfair within the meaning of that provision.

84. As indicated in this Opinion, in my view, the law applicable to contractual obligations such as those arising from the trust agreements at issue must be determined in accordance with the conflict-of-laws rules laid down in the Rome Convention and in the Rome I Regulation and, more specifically, in accordance with those relating to consumer contracts contained in Article 5 of that convention and in Article 6 of that regulation.

85. Article 5(3) of the Rome Convention and Article 6(1) of the Rome I Regulation provide that, in principle, a consumer contract is governed by the law of the country where the consumer has his habitual residence. In the present case, this would therefore be Austrian law.

86. However, the trust agreements at issue provide, I reiterate, for a choice-of-law clause designating the law of the country where TVP and the limited partnerships has its seat, that is, German law. The VKI argues however that that clause is unlawful. In particular, like the other terms to which its action refers, that clause is unfair.

59 The question whether TVP is legally authorised to hold such an account does not appear to me to be decisive.

60 The fact that there was no contractual obligation requiring TVP to set up that website, assuming that were to be established, is similarly not decisive in my view. In any event, that website is just one of the factors which make clear that the services are supplied 'at a distance'.

87. In that regard, it should be borne in mind that Article 5(2) of the Rome Convention and Article 6(2) of the Rome I Regulation allow, in principle, such a choice-of-law clause. However, under those provisions, such a choice may not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement (or 'mandatory provisions'[61]) by virtue of the law of the country where he has his habitual residence. In the present case, the term at issue cannot therefore prevent consumers residing in Austria (and the VKI in its action for an injunction) from relying on the mandatory provisions of Austrian law.

88. In the judgment in *VKI* v *Amazon*, the Court held that a term in the general terms and conditions of a seller or supplier which has not been individually negotiated, under which the contract concluded with a consumer electronically is to be governed by the law of the Member State in which the seller or supplier is established, is unfair — within the meaning of Article 3(1) of the Unfair Terms Directive — in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of the Rome I Regulation (or, as the case may be, Article 5(2) of the Rome Convention) he also enjoys the protection of the mandatory provisions of the law of the country in which he has his habitual residence.[62]

89. Like the VKI and the Commission, I am of the opinion that that case-law may be applied to the case in the main proceedings. In that regard, I share the Commission's view that the fact that the trust agreements at issue do not appear to have been concluded electronically is irrelevant. In my understanding, a choice-of-law clause is unfair where, contrary to the requirement that terms must be drafted in plain, intelligible language, as set out in Article 5 of the Unfair Terms Directive, it does not inform the consumer that, notwithstanding that choice, he may rely on the mandatory provisions of the law of the country in which he has his habitual residence.[63] The form and manner in which the contract was concluded is not a relevant factor to that reasoning. By contrast, the fact that the term at issue does not satisfy that information requirement is decisive.[64]

90. In the light of the foregoing considerations, I suggest that the Court answer the second question to the effect that Article 3(1) of the Unfair Terms Directive is to be interpreted as meaning that a term of a trust agreement concluded between a professional and a consumer concerning the management of shares in a limited partnership, which has not been individually negotiated and under which the applicable law is that of the Member State in which the seller or supplier and that limited partnership is established, is unfair — within the meaning of that provision — where it does not inform the consumer that, notwithstanding that choice of law, under Article 5(2) of the Rome Convention and Article 6(2) of the Rome I Regulation, he also enjoys the protection afforded to him by the mandatory provisions of the law that would be applicable in the absence of that clause.

61 With regard to this concept, see my Opinion in *Verein für Konsumenteninformation* (C-191/15, EU:C:2016:388, points 99 to 101).

62 See judgment in *VKI* v *Amazon*, paragraphs 72 to 81.

63 See judgment in *VKI* v *Amazon*, paragraphs 68 and 69.

64 For further explanations, see my Opinion in *Verein für Konsumenteninformation* (C-191/15, EU:C:2016:388, points 95 to 104). In addition, for a discussion of that case-law, see Mankowski, 'Just how free is a free choice of law in contract in the EU?', Journal of Private international Law, 2017, 13:2, pp. 231 to 258, in particular pp. 235 to 241; Müller, M.F., 'Amazon and Data Protection Law — The end of the Private/Public Divide in EU conflict of laws?', *EuCML*, 2016, No 5, p. 215 et seq.; and the Opinion of Advocate General Hogan in *Lovasné Tóth* (C-34/18, EU:C:2019:245, points 87 to 89 and 95 to 108).

V. Conclusion

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

(1) Article 1(2)(e) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, and Article 1(2)(f) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations are to be interpreted as meaning that the exclusion provided for therein, which relates to 'questions governed by the law of companies and other bodies, corporate or unincorporated', does not apply to contractual obligations arising from a trust agreement relating to the management of shares in a limited partnership.

(2) Article 5(4)(b) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, and Article 6(4)(a) of Regulation No 593/2008 on the law applicable to contractual obligations are to be interpreted as meaning that the exclusion provided for therein, relating to 'a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence', does not apply to a trust agreement under which the services are supplied by the trader to the consumer, in the country in which the consumer has his habitual residence, at a distance from the territory of another country.

(3) Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts is to be interpreted as meaning that a term of a trust agreement concluded between a seller or supplier and a consumer concerning the management of shares in a limited partnership, which has not been individually negotiated and under which the applicable law is that of the Member State in which the seller or supplier and that limited partnership is established, is unfair — within the meaning of that provision — where it does not inform the consumer that, notwithstanding that choice, under Article 5(2) of the Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, and Article 6(2) of Regulation No 593/2008, he also enjoys the protection afforded to him by the mandatory provisions of the law that would be applicable in the absence of that clause.

i — The wording of points 11, 12, 15, 17, 23, 26, 28, 36, 43, 45, 48, 51, 52, 54, 57, 58, 59, 66, 68, 77, 80, 81, 90, operative part 3, and footnotes 9, 17, 18, 26, 29, 31, 32, 33, 35, 39, 54 and 60 of this document have been modified since it was first put online.