The Titanium Brace Tightens: Rome II and Director Liability after Wunner

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In the preliminary reference Case C-77/24 *Wunner* (the Titanium Brace case), the CJEU was asked to determine whether a damages claim brought by a consumer directly against company directors for losses suffered from unlicensed online gambling fell within the scope of the Rome II Regulation (Regulation (EC) No 864/2007), or whether it was excluded under Article 1(2)(d) as a "*non-contractual obligation arising out of the law of companies*".

The practical stakes were considerable. If Rome II applied, Article 4(1) would designate the law of the place where the damage occurred — which, for online gambling losses, would normally be the habitual residence of the consumer. If excluded, the applicable law would instead be determined by national conflict-of-laws rules, typically, the *lex societatis*.

1. Facts and Reference

The case arose from losses suffered by an Austrian consumer who participated in online games of chance offered by Titanium Brace Marketing Limited, a Maltese-registered online gambling company that did not hold a licence under Austrian gambling law. Following the company's insolvency, the consumer brought an action for damages directly against two former directors, alleging that they were personally liable for having allowed or caused the unlicensed offering of gambling services in Austria.

The Austrian Supreme Court referred questions to the CJEU concerning: first, whether such a claim is excluded from the scope of Rome II under Article 1(2)(d); and secondly, if Rome II applies, how the applicable law should be determined.

2. The Court's Reasoning: A Functional Interpretation of Article 1(2)(d)

2.1 Structural vs Functional approach

The Court reaffirmed that the exclusion in Article 1(2)(d) is not confined to 'structural aspects' of companies, but must be interpreted functionally, by reference to the nature of the obligation giving rise to liability. Drawing on its earlier case law, including *BMA Nederland*, the Court held that the decisive question is whether the non-contractual obligation arises from reasons specific to company law or external to it.

Where a director's liability flows from obligations "*incumbent on them owing to the creation of the company or to their appointment and linked to the management, operation or organisation of the company*", it is considered a company law matter, and is excluded from Rome II.

By contrast, where liability arises from the breach of an obligation external to the company's affairs, the exclusion does not apply.

2.2 Application to unlicensed online gambling

Applying that test, the CJEU held that Article 1(2)(d) does not cover actions seeking to establish the tortious liability of company directors for breaches of national prohibitions on offering games of chances to the public without the requisite license. The Court reasoned that the directors' alleged liability did not arise from company law. The claim was based on an alleged infringement of a general statutory prohibition under Austrian gambling law, applicable to '*any person*' offering games of chance without a licence. As such, the action did not concern the internal relationship between the company and its directors, but the breach of a regulatory norm protecting the public.

The consequence was that the action fell within the scope of Rome II, with the applicable law determined in accordance with Article 4.

3. The Consequence: Consumer Habitual Residence as the Applicable Law

The consequence of the ruling is significant. In online gambling cases, the "*place where the damage occurs*" will often coincide with the habitual residence of the

consumer, since that is where participation in the gambling activity takes place and where the financial loss is suffered.

As a result, any action for damages brought directly against a director will, in principle, be governed by the law of the consumer's residence, regardless of where the company is incorporated, where the directors reside, or where the relevant management decisions were taken.

Following the preliminary ruling, the case will now be remitted to the Austrian court which is responsible for applying the CJEU's guidance and determining whether the directors actually incur liability under applicable Austrian law.

4. Analysis

4.1 A Tense Separation of Office and Obligation

The Court's distinction between obligations "*specific to company law*" and obligations "*external*" to it may be potentially difficult to sustain in this context.

A director's decision to offer online gambling services in a Member State without holding the requisite licence is not a general act performed *erga omnes*. It is a paradigmatic management decision, taken precisely because the individual holds the office of director and exercises control over the company's commercial strategy. The duty to ensure regulatory compliance in market entry is closely bound up with corporate governance and risk allocation, particularly in highly regulated sectors such as gambling.

The Court relies on the fact that the prohibition is framed as a general rule applicable to "any person". However, in practice, only those directing the activities of the undertaking are capable of infringing the prohibition in the manner alleged.

4.2 The generic 'duty of care' analogy

The Court relies heavily on the distinction drawn in earlier case law between:

- a specific duty of care owed by directors to the company (company law), and
- a generic duty of care *erga omnes* (tort law).

However, this analogy sits uneasily with regulatory breaches in highly regulated sectors such as gambling. Unlike ordinary negligence, compliance with licensing regimes is inseparable from corporate governance. Treating such obligations as "external" significantly limits the operation of Article 1(2)(d) in regulated industries.

5. Consumer Protection Without a Consumer Contract?

The ruling confirms the applicability of Rome II while, in substance, applying the consumer-protective logic of Article 6 of the Rome I applicable to contractual obligations:

> *51. In the present case, those requirements militate also in favour of designating the place where the player is habitually resident as the place where the alleged damage occurred…*

The CJEU justifies the approach as analogous to the determination of the 'place where the harmful event occurred or may occur' in Article 7(2) of Regulation No 1215/2012 for the purposes of jurisdiction. However, this approach may risk encroaching on the distinction between contract and tort that has traditionally been treated as structurally decisive in EU private international law.

There are several preliminary rulings delineating the parameters of the 'place where the damage occurred' for the purposes of Article 4(1) of Rome II, and yet the CJEU saw fit to propose a specific sub-connecting factor within the umbrella of Article 4(1), for claims brought by the players of games offered by gambling companies. The sub-connecting factor identified essentially reproduces the one in Article 6 of Rome I for consumer claims in contract: the habitual residence of the consumer.

The outcome may be defensible from a consumer-protection perspective, but it raises questions of doctrinal coherence and legal certainty. Once the Court characterises the claim as non-contractual, the consequences of that classification should follow. Consumer protection under Article 6 Rome I is not triggered by consumer status alone, but by participation in a consumer contract meeting specific conditions. Its rationale – derogation from general connecting factors in favour of the consumer's habitual residence – is inseparable from the existence of a contractual relationship with a professional acting in the course of its business.

Rome II, by contrast, contains no equivalent consumer-specific rule, suggesting a deliberate legislative choice not to extend such protection to non-contractual obligations. Applying that logic here might have prompted closer engagement with the reliance on a conflict rule whose rationale depends on the existence of a contract in the absence of one.

6. Veil-Piercing Through Conflict-of-Laws

While the Court insists that the imputation of liability is a matter for the applicable tort law rather than the *lex societatis*, the choice-of-law outcome itself has unmistakable substantive consequences.

By designating the consumer's habitual residence as the applicable law, the Court enables claimants to:

- bypass the insolvent company,
- sue directors personally, and
- subject them to a foreign legal system with which their corporate conduct may have only an indirect connection.

This functionally might be compared to a form of veil-piercing, where the corporate shield of separate juridical personality is not pierced by substantive company law doctrines, but by re-characterising managerial conduct as 'external' to company law for the purposes of Rome II. The result may be an expansion of directors' personal exposure as a by-product of the determination of applicable law.

7. Conclusion

The judgment in *Wunner* undoubtedly strengthens consumer protection and curtails the avoidance of host-state gambling controls through cross-border structuring. Yet it does so by drawing a distinction that is debatable. Do directors decide whether the company should hold a licence as private individuals, or as corporate officers?

Treating these decisions as external to company law risks blurring the boundary between corporate responsibility and personal liability, and in doing so, transforms Rome II from a neutral conflict-of-laws instrument into a powerful substantive lever. Whether this functional carve-out can be confined to gambling cases, or will spill over into other regulated sectors, remains an open and

important question.

Directors of gaming companies should therefore carefully assess their personal and corporate risk profile when deciding which jurisdictions to offer online games in, as jurisdictional and applicable law rules may result in implications well beyond traditional frameworks.