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Capital Markets and the Market for Judicial Decisions:
In Search of Consistency

Table of contents

1. Jurisdictional issues, capital markets, and corporate governance ...................................................... 2

2. The Brussels I default jurisdictional regime on securities litigation ............................................... 3

   2.1. Competing default rules ..................................................................................................................... 3

   2.2. Selecting among competing default rules: the ECJ decision in Kolassa .................................. 4

   2.3. The limits of tortious liability as a criterion for establishing jurisdiction ........................................... 6

3. Jurisdiction agreements: relevance and legal framework ............................................................................ 7

   3.1. The Advocate General’s Opinion in Profit Investment SIM ............................................................. 9

   3.2. The Advocate General’s Opinion in Profit Investment SIM: a critique ............................................ 10

4. An optimal regime for jurisdictional rules .............................................................................................. 13

   4.1. Default rules ........................................................................................................................................ 13

      4.1.1. Professional investors and contractual claims ............................................................................. 14

      4.1.2. Professional investors: place of performance for contractual claims ......................................... 14

      4.1.3. Retail investors: an enhanced protective regime ........................................................................... 15

   4.2. Jurisdiction agreements ..................................................................................................................... 17

5. Conclusions .............................................................................................................................................. 20
1. Jurisdictional issues, capital markets, and corporate governance

Due to its high level of technicality, the allocation of jurisdiction among EU courts often entails complex legal questions. This complexity is exacerbated by the need to have a common set of rules applicable throughout the whole EU in civil and commercial matters, so that the wording of the Brussels I Regulation\(^1\) sometimes refers to legal concepts whose interpretation inevitably varies across different legal traditions.\(\text{ }\)

This paper claims that the recent and prospective ECJ case law on the establishment of jurisdiction may prove problematic for the smooth functioning of capital markets. The analysis focuses on the circulation of financial instruments and how it affects the allocation of jurisdiction should disputes arise between issuers and their investors, whether professional or retail. The scope of the paper covers both securities – such as shares and bonds – and derivative contracts – such as credit default swaps (CDS) or credit linked notes (CLN).\(^2\)

In general, individual investors naturally prefer to file claims at their domicile as this reduces their litigation costs. However, this statement might not hold true from a collective standpoint. If the litigation costs for issuers were excessive, the cost of capital would also increase to the shareholders’ detriment: jurisdictional issues are therefore one element of the broader problem of circularity that typically affects shareholder lawsuits.\(^3\) Similarly, shareholders – a subset of the broader group of investors – may prefer a system where litigation between issuers and bondholders were decided at the issuer’s domicile, in order to increase their return on investment, but this choice might negatively affect the interest rate creditors will demand to cover such risk. Along the same line of reasoning, one may further distinguish between controlling shareholders, who are less likely to be involved in a dispute with the company, and outside investors (being either shareholders or bondholders), who might have different preferences if they were more prone, or simply averse, to litigation risk.

The analysis of the competing interests among shareholders, and between shareholders and other investors (bondholders and bearers of other non-equity securities), can only be sketched out here, but it has relevant consequences for corporate governance. Jurisdictional rules determine the litigation setting and its costs, and are therefore an element issuers and investors consider when deciding the cost of debt and equity capital. Diverging investors’ powers and incentives may suggest default rules on jurisdiction which vary depending on the security holders involved. By the same token, the lack of homogeneity in investors’ preferences may require a tailored set of rules on the possibility to bargain around such default provisions by way of jurisdiction (or choice-of-court) agreements, whether included in the company’s charters or in the securities’ terms and conditions (T&Cs). Overall, a rational system should offer default rules that are likely to be suitable for the majority of

\(^{1}\) Unless otherwise specified, reference is made in this paper to Reg. (EU) No 1215/2012 (Brussels I recast).

\(^{2}\) Whenever a characteristic that is specific to a particular kind of financial instrument or of investor may be relevant for determining a different allocation of jurisdiction, a proper specification is made.

cases, while allowing alternative solutions when this would permit an efficient equilibrium should issuer-specific conditions so require. At the same time, when investors are in special need of protection imperative rules should thwart this liberal approach by curbing contractual freedom. All in all, the market for judicial decisions (or the lack thereof) is a key factor in ensuring investor protection and legal certainty in international capital markets.

2. The Brussels I default jurisdictional regime on securities litigation

2.1. Competing default rules

For certain company law matters – such as the validity of deliberations adopted by the internal bodies and the existence or continuity of the company itself – Brussels I ensures that actions may be brought only in one country. This is the result of exclusive jurisdiction mandated by Art. 24 No 2, which refers to the place of the company’s seat being determined according to the applicable private international law.

Outside matters covered by Art. 24 No 2, the general principle that the defendant’s domicile determines jurisdiction (Art. 4 Brussels I) can also entail some concentration of securities litigation in favour of issuers, as these are in most cases playing the role of defendants challenged by shareholders or other investors.

However, the defendant’s domicile seldom represents, in securities litigation, the relevant head of jurisdiction, other criteria being invoked more often. Investors tend to refer to their consumer capacity (if applicable) in order to attract jurisdiction to their domiciles pursuant to Arts. 17 and 18 Brussels I. When these provisions do not prove helpful because one or more of their requirements is not fulfilled, issuers’ tortious liability is often invoked to achieve a similar result (Art. 7 No 2), as this gives the claimant the opportunity to bring action before the courts where the harmful event has occurred. For establishing jurisdiction, this can be the place where either the wrongful conduct (Handlungsort) or the damage itself (Erfolgsort) has occurred. The ECJ has curtailed the possibility that jurisdiction be established in places where only indirect damages are suffered (Schadensort) such as the domicile of the claimant where her financial assets are concentrated. However, investors can normally rely on the

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5 H. Kronke, The New York Convention Fifty Years on: Overview and Assessment, in N. Port et al. (eds.), Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Alphen aan den Rijn 2010, 16 (Brussels I Regulation is a uniform law instrument “developed to achieve legal certainty within a ‘common market for judicial decisions’”).
6 I.e., according to the law applicable in light of the registered seat of the company, which normally determines the applicable law, including the relevance to be attached to the real seat (see S. Grundmann, European Company Law, Intersentia, Antwerp, 2011, 588 ff.).
7 A notable exception are claims concerning consideration for not fully paid shares (see ECJ, 34/82, Martin Peters, 22 March 1983; C-214/89, Powell Duffryn, 10 March 1992).
8 ECJ, 21-76, Mines de Potasse d’Alsace, 30 November 1976, § 17 ff.
9 ECJ, C-364/93, Marinari, 19 September 1995; C-168/02, Kronhofer, 10 June 2004. See also C-220/88, Dumez, 11 January 1990.
place of the account where the relevant securities are held in book-entry form or, as the case may be, where the money spent to buy such securities comes from.\(^\text{10}\)

Finally, the place of performance of the issuer’s obligations may come into play as a substitute for the defendant’s domicile, too. This head of jurisdiction applies when the relationship between issuer and investor qualifies as “contractual” pursuant to Art. 7 No 1(a) Brussels I. Remarkably, in the absence of a contractual relationship the claim for damages is normally deemed to qualify, for the purposes of establishing jurisdiction, as tortious (\textit{tertium non datur}).\(^\text{11}\) To what extent Art. 7 No 1(a) would bring jurisdiction to the issuer’s domicile is however uncertain, absent clear precedents in the ECJ case law clarifying how to locate the place of performance of obligations constituting a financial instrument.

2.2. Selecting among competing default rules: the ECJ decision in Kolassa

The previous analysis shows that the default heads of jurisdiction may sometimes ensure that the allocation of the power to adjudicate is clearly identified in advance (as is the case for consumer’s domicile), or at least that it is sufficiently recognizable once litigation has commenced (as is the case for the place where the damage occurred, in tort claims). To the contrary, applying default rules to financial market transactions may prove difficult in other circumstances, namely when the need arises to locate the place of performance in claims pertaining to a contractual matter. This Section will analyse the interpretation the ECJ has recently adopted in the \textit{Kolassa} case when selecting the applicable default rules among those listed in Sec. 2.1.

The dispute in \textit{Kolassa} arose out of a financial scam uncovered in Germany in 2009. In 2005, the British bank Barclays allotted through its German branch some certificates – qualified as bearer securities under paras 793 ff. of the German BGB – to some institutional investors. Far from being restricted to the placement, the same certificates were also offered to the public on the basis of a base prospectus, which shows the non-equity nature of such securities.\(^\text{12}\) The prospectus was approved by the German BaFin and subsequently published in other countries, including Austria – Mr Kolassa’s home country – under the passport regime of Directive 2003/71/EC. DAB Bank AG, a German bank, bought some of the certificates and endorsed them in favour of its Austrian subsidiary, direktanlage.at AG. In turn, direktanlage.at entered into a contract with Mr Kolassa, a retail investor domiciled in Austria, who thereby had the right to receive payments on the basis of the certificates’ cash flow. Direktanlage.at held the certificates in its own name on a securities account opened in Munich, operating as a trust in favour of Mr Kolassa, who had the right to receive the securities’ cash flow.

\(^{10}\) See ECJ, Kronhofer, cit. See also ECJ, C-375/13, \textit{Kolassa}, 28 January 2015, § 55.
\(^{12}\) Art. 5(4) Dir. 2003/71/EC.
As the value of the assets underlying the bearer securities plummeted, Mr Kolassa filed a lawsuit in Austria against Barclays claiming damages on the basis of both contractual and tort liability. In the plaintiff’s opinion, contractual liability was grounded on the violation of the certificates’ T&Cs and on the breach of precontractual duties of care and information, while tortious claims hinged upon prospectus liability (for false information and breach of control obligations).

In its reasoning, the Court excluded Mr Kolassa from taking advantage of the Brussels I consumer protection regime, as this would require that a contract be concluded between Mr Kolassa and Barclays. The facts clearly showed that Mr Kolassa was not the bearer of the bond, which prevented him from qualifying as a bondholder vis-à-vis the issuer. This specificity of the case at hand stems from the holding technique typically adopted by Austrian banks for foreign securities and might have been sufficient to exclude applicability of Art. 17 Brussels I. While in some countries intermediaries holding securities on behalf of the accountholder often operate as mere custodians without any property interest in the registered securities, in other jurisdictions they may have some legal entitlements on securities held on behalf of investors, so that the holding chain creates multi-tiered entitlements on the same financial instruments: this latter is especially the case when the legal regime governing the relationship between custodians (or between the investor and a custodian) follows the rules of trust as inspired by the Anglo-Saxon tradition. In this context, while the beneficial owner retains the equitable interest linked to her economic exposure, the custodian at the top of the chain has the formal legal ownership vis-à-vis third parties, including the issuer. Although the custodian model prevails in continental Europe, the holding in trust model may also be adopted in civil law countries on a case-by-case basis, as Kolassa shows.

Rather than directly refer to the holding technique adopted by direktanlage.at, the ECJ noted that “the requirement of a conclusion of a contract with the professional” is not matched “when there is a chain of contracts through which certain rights and obligations of the professional in question are transferred to the consumer.” Although not necessary to rule out the Art. 17 consumer protection regime (Mr Kolassa was not in any event the bearer of the bonds), this reference to the chain of contracts seems crucial in excluding that the action could be considered as pertaining to a contractual matter under Art. 7 No 1. The ECJ case law is consistent in requiring, for such purpose, that the claim be grounded on an obligation freely assumed by a party with respect to another. According to the ECJ, however, no “legal obligation freely consented to by Barclays Bank with respect to Mr Kolassa” existed, “even if, under the national law applicable, Barclays Bank [had] certain obligations towards Mr Kolassa.”

The decision is not crystal clear in grounding such statement. There are indeed two reasons why no contractual relationship could be identified between Mr Kolassa and Barclays: one

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13 ECJ, Kolassa, cit., § 26.
15 ECJ, Kolassa, cit., § 30.
16 ECJ, Kolassa, cit., § 40.
relates to the circulation of shares on the market, the other to the holding system adopted by direkstanlage. If the reference is to the fact that bonds were handed over through one or more other transactions before reaching the litigant bondholder, it would appear that no purchase carried out on the secondary market can ever entail a contractual relationship between issuers and investors. If the ECJ were instead considering the holding chain though which the securities were held, then final investors would be denied a direct contractual claim towards issuers only when, being deprived of legal ownership, they qualify as mere beneficial owners, as was the case Kolassa.

An authoritative answer to such question has been recently provided in the Profit SIM case by Advocate General Bot, who reads Kolassa in the sense that a direct contact is needed between the two parties for a contractual claim to arise. This is prevented by transfers taking place on the secondary market even in cases where investors do not hold financial instruments in an (intermediated and) indirect form. Hence, the first alternative would appear to be correct, and negotiations on secondary market would represent an insurmountable obstacle to applicability of Art. 7 No 1 Brussels I.

Having ruled out the applicability of the consumer protection regime and of the rules concerning matters relating to a contract, the only remaining alternative, and the one the ECJ goes for, was therefore to qualify the claim as tortious, as per Art. 7 No 2. This gives the plaintiff the opportunity to bring action, at her choice, before the courts of the country where either the harmful event or the damage has occurred. It goes without saying that, in the vast majority of the cases, claimants will find it convenient to opt for the latter location, as this is normally closer to their domiciles.

2.3. The limits of tortious liability as a criterion for establishing jurisdiction

Albeit clear in referring to tortious liability as the preferential qualification of disputes like the one at stake, Kolassa leaves some questions open and might leave some room for uncertainty in the future.

The decision does not clearly answer the question whether the relevant account to be considered, when identifying the place where the damage occurred, is the securities account where the financial instruments are registered or the bank account from where the money spent for the acquisition of the certificates originates. As the ECJ seems to concede that Austrian tribunals have jurisdiction, one can assume the second alternative, as the relevant securities were held in a German securities account while the money paid for consideration

17 I have elsewhere referred to this perspective as the “horizontal dimension” of securities trading; see M. Gargantini, Jurisdictional Issues in the Circulation and Holding of (Intermediated) Securities: The Advocate General’s Opinion in Kolassa v. Barclays, Riv. dir. int. priv. e proc., 2014, 1097.
18 This being a “vertical” dimension of securities holding: ibid, 1097 f.
19 Case C-366/13, Profit Investment SIM, Opinion of AG Bot, 23 April 2015.
20 See AG Opinion in Profit Investment SIM, cit. § 51 and fn. 34.
21 The alternative reading is suggested in Gargantini, cit.
22 See supra fn. 8 and accompanying text.
was probably transferred out of an Austrian bank account. However, such a solution would seem at odds with the importance the ECJ attached to the place of the security account in Kronhofer. To be sure, cases where securities and bank accounts are located in different countries might not be too common, and in the vast majority of cross-border investments the Kolassa ruling will provide clear guidance in spite of its ambiguities. On top of such shortcomings, however, Kolassa’s major drawback seems to be in excluding that claims based on bonds’ T&Cs fall within contractual matters. As long as the plaintiffs invoke a violation of the prospectus rules, there is no doubt that tortious liability may represent the proper qualification of the claim. However, the exclusion of claims directly based on a violation of securities’ T&Cs from contractual matters can have relevant practical shortcomings.

Claimants’ litigation strategy may focus on violation of securities’ T&Cs, for instance, where no evidence of false or misleading statements in the prospectus is available. More importantly, this may be the case where a prospectus was not published at all, especially because the original offer was a private placement or it fell under any of the exceptions under Art. 4(1) Prospectus Directive. Reference to tortious liability under Art. 7 No 2, as suggested in Kolassa, would cause in such scenario a multiplication of the competent fora even where issuers never accepted the risk of being sued in other countries, as opposed to what happens when they request the notification of a prospectus to a specific country in order to enjoy the passport regime set forth by Art. 17 Prospectus Directive. Such a dispersion of lawsuits throughout the European Union in the absence of any activity addressed abroad makes litigation costs less predictable for issuers, as they have no control on the circulation of securities and cannot therefore guess where investors may suffer alleged damage. This outcome is far from satisfactory, if one considers that predictability of jurisdiction is one of the guiding principles of the Brussels I framework (Recital 15). However, jurisdiction agreements may represent a viable private ordering solution to such problems.

3. Jurisdiction agreements: relevance and legal framework

The previous analysis has shown that rules on jurisdiction do not always ensure predictability of litigation venues and that, from the point of view of corporate governance, this lack of legal certainty may affect the allocation of litigation costs among stakeholders.

23 The German legal doctrine, supported by national case law, has however advocated a flexible interpretation of Kronhofer in order to allow establishment of jurisdiction at the investor’s domicile: J. von Hein, Anmerkung zu EuGH, 28.1.2015, Rs. C-375/13, Kolassa J. Barclays Bank plc., 70 Juristenzeitung 946 (2015), 948 f. See also M. Lehmann, Where Does Economic Loss Occur?, Journal of Private International Law, 2011, 545 (place of the account to which money has been sent may establish jurisdiction, but only if such transfer was made intentionally and consciously). For a more restrictive interpretation of Kronhofer see the Advocate General Opinion in the Melzer case: A.G. Opinion, case C-228-11, 29 November 2012, §§ 31 f. (financial damages occur where securities are located, not where the money originates from).

Drawbacks affecting the current regulatory framework and its interpretation might be reduced if the parties could easily contract out of default rules and devise the jurisdiction framework that best suits them. As the Coase theorem suggests, low transaction costs make the initial allocation of rights less important, because private incentives will tend to redistribute rights in a more efficient fashion. This shows the importance of jurisdiction agreements and of their legal regime in enabling private ordering solutions to unsatisfactory default rules.

In Brussels I, jurisdiction agreements are also subject to some stringent limits. For consumers, prorogation of jurisdiction may deviate from the special protection regime only by way of an agreement entered into after the dispute has arisen (Art. 19 Brussels I). Remarkably, such limitations do not apply to jurisdiction agreements addressing consumers that cannot take advantage of Art 17 protection regime.

For other investors – and for consumers not enjoying Art. 17 protection regime – jurisdiction agreements can predate litigation, but they must be either in writing (or evidenced in writing, including in electronic form through a durable medium) or in a form which complies with international trade usages (Art. 25(1)(a) and (c)).

Unfortunately, interpretations of what “written form” exactly means for the purpose of jurisdiction agreements diverge, partially because the function of the requirement is debated. Although the law accepts mere written evidence as a ground for jurisdiction agreements’ validity, formal requirements are often understood as a legal device aimed to ensure an actual and genuine agreement between the parties. This makes it quite difficult to understand when the condition is fulfilled through standard contract terms – as is substantially the case for securities T&Cs – because there is no easy way to assess whether both parties have actually agreed on each of the clauses in a form that includes a jurisdiction agreement. A precise reference to the jurisdiction agreement is required in case it is contained in T&Cs detached from the document signed by the parties, but less clear is whether a specific signature or at least a separate mention of the jurisdiction agreement are needed.

Furthermore, different standards can apply in this respect to jurisdiction agreements, on the one hand, and to the rest of the contract, on the other hand. A choice-of-court agreement which is part of a contract shall indeed be treated independently from the other terms of the agreement.

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26 The Hague Convention of 30 June 2005 on Choice of Court Agreements is not taken into account, as this paper is only concerned with disputes between parties having habitual residence in the EU (see Art. 26 of the Convention; F. Garcimartin, Prorogation of Jurisdiction, in Dickinson and Lein, cit., 283 f.).
27 This is reflected in the abovementioned prospectus practice limiting the effect of jurisdiction agreements to non-consumers only: see supra fn. 44 and accompanying text.
28 Less relevant for this analysis is the possibility for the parties to set, by way of a framework contract, the form for future jurisdiction agreements (Art. 25(1)(b)).
30 ECJ, C-24/76, Estasis, 14 December 1976.
31 According to A. Briggs, Agreements on Jurisdiction and Choice of Law, Oxford, OUP (2008), 253 f., the answer to such question is not entirely immune from the law governing the (rest of the) contract.
32 Ibid., 240 ff. and 258 ff. (Art 25 does not require a contractual agreement, it rather being grounded on the need to ascertain a common understanding by the parties).
same contract, so that its validity cannot be challenged on the mere basis that the contract is invalid under the applicable national law (Art. 25(5) Brussels I).

3.1. The Advocate General’s Opinion in Profit Investment SIM

In Profit Investment SIM, the request for a preliminary ruling brought before the ECJ concerned, among other matters, the possibility that a choice-of-court agreement included in a financial instrument’s T&Cs bound subsequent holders of such financial instrument. In the case, Commerzbank had issued, in the form of notes, credit derivatives linked to underlying bonds issued by E3, an entity incorporated in Luxembourg. Profit Holding SIM, an Italian investment firm, purchased such credit linked notes through a UK-based investment firm (Redi). The T&Cs of the notes contained a clause stating that the UK court had jurisdiction over every dispute concerning, or arising out of, the notes themselves.

After E3 defaulted, Profit Investment SIM challenged before the Milan court the validity of the notes for lack of consideration. Commerzbank contested that such court had jurisdiction, and invoked the choice-of-court agreement. The seized judge stayed the proceeding and referred a request for a preliminary ruling to the ECJ in order to ascertain whether the requirement that a jurisdiction agreement be in written form (Art. 25(1)(a) Brussels I) is satisfied where such an agreement is inserted into the offering document unilaterally created by a bond issuer, so that the prorogation of jurisdiction be made applicable to disputes involving future purchasers. The same court also asked whether, in case this question was answered in the negative, the insertion of a choice-of-court agreement into the offering document can be considered as a form which accords with usages in international trade or commerce under Art. 25(1)(c) Brussels I.

The Advocate General opinion recalled that the formal requirement for choice-of-courts agreements are aimed at avoiding that weak parties are unaware of any modification to default jurisdictional rules. Therefore, in his opinion, the requirement is not met when the agreement is included in securities T&Cs, unless the intermediary entrusted with securities placement takes care to refer to such agreement when bargaining with the purchaser. Nor can the agreement simply be imposed on subsequent holders, as Kolassa excludes – according to the Advocate General’s argument – that a contractual relationship exists between the two parties of a financial instrument. It makes no difference that the remaining T&Cs’ clauses are binding for the parties, because severability of jurisdictional agreements (Art. 25(5) Brussels I) allows a separate assessment grounded on the special need to ascertain actual consent of the parties.

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33 The description of the facts does not clearly determine whether Redi was operating as operating as a broker or as a dealer.
34 Opinion of AG Bot in Profit Investment SIM, cit., § 43 ff.
35 Ibid., § 51.
36 ECJ, C-269/95, Benincasa, 3 July 1997, § 29.
37 Opinion of AG Bot in Profit Investment SIM, cit., § 53.
Finally, the Advocate General dismissed the possibility that choice-of-court agreements can circulate along with the financial instrument as is the case with bills of lading and shares. The relevant case law—Tilly Russ for bills of lading and Powell Duffryn for company’s charters shares—is deemed inapplicable because bills of lading are based on a trilateral relationship that allow ownership of commodities to circulate along with a negotiable instrument, while shares incorporate a residual claim on company’s assets: neither corresponds to non-equity securities, where only two parts are involved and holders have a pure credit towards the company. Therefore, the Advocate General differentiated between bondholders and shareholders, positing that only these latter could be bound by a jurisdiction agreement (embedded in the company’s charters), while limits to the circulation of such agreements among sub-buyers of goods should apply to bondholders in line with the Refcomp decision.

3.2. The Advocate General’s Opinion in Profit Investment SIM: a critique

The Advocate General’s Opinion excludes that a jurisdiction agreement contained in bond T&Cs can bind subsequent purchasers of the bonds, as opposed to what happens for similar provisions embedded in a company’s charters, which are deemed to bind shareholders. This interpretation has a weak basis. The ranking of the claims defines, in itself, only the content of the financial rights attached to a security, and it is difficult to understand why a residual claim should be compatible with the existence of an agreement between the security holder and the issuer, while a fixed claim should not.

To have a clear understanding of the Opinion, as well as of the criticisms expressed in this essay, one should separately focus on the classification of investors as “consumers”, and on the existence of a genuine consent on a jurisdiction agreement between the disputing parties.

Classifying investors as consumers affects the possibility that investors be bound by jurisdiction agreements within company’s charters (shareholders) or securities T&Cs (holders of non-equity securities; parties of derivative contracts). While profit-seeking activities do not prevent individuals that carry them out form qualifying as consumers, whether investors can qualify as consumers under Art. 17 when holding financial instruments outside their trade or profession remains partially an open question. Kolassa answers in the positive for bondholders, and common drafting of (base) prospectuses for non-equity securities.

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40 ECJ, case C-543/10, Refcomp, 7 February 2013.
41 Such a differentiation (rectius, the differentiation between the administrative rights of shares and bonds) might on the contrary be relevant in cases where issues concerning the circulation of the security and its validity are at stake. See infra text accompanying fn. 55.
42 Brussels I does not explicitly state that only individuals are protected under the consumer regime. However, legal entities are normally excluded (P. Nielsen, Art. 15, in Magnus and Mankowski, cit., 376; for companies, this opinion may be justified on the assumption that whichever act performed should fall, either directly or indirectly, within the statutory objects of the company).
43 See Kolassa, cit., §§ 23 f.
confirms this as the possibility that investors are “consumers” is explicitly taken into account by jurisdictional clauses, whose applicability is restricted accordingly. In contrast, some scholars – and the prospective case law to date – exclude that shareholders can qualify as consumers by reason of the unique features of company’s membership, so that the protective regime laid down in Art 19 could not apply.

The residual claims shareholders are entitled to and the powers they enjoy in the company’s governance can therefore represent a sign that equity investors partake in the common undertaking. The general framework sketched in Sec. 1 demonstrates that weaker safeguards for shareholders are not necessarily inefficient because, from a substantive point of view, residual claimants are always on both sides of the dispute, and enhanced protection of shareholders as plaintiffs inevitably results in higher litigation costs for the company. However, distinguishing on the basis of investor claims’ ranking may once again be over-inclusive or under-inclusive. On the one hand, jurisdiction agreements bind small shareholders who have no possibility to influence the management of the company, while a large bond fund will always enjoy protection even when ex ante private bargaining through jurisdiction agreements may prove helpful to all the parties.

The ranking of the claim determines the intensity of investor participation to the entrepreneurial risk, so it could be relevant, in principle, when it comes to classifying investors as consumers or non-consumers. However, the Opinion in Profit Investment SIM relies on such element for answering the different question of whether genuine consent exists between a professional investor and its counterparty in a derivative contract. Here, the point is to understand whether (i) securities T&Cs fulfil the requirement of written form (or written evidence of a pre-existing agreement) and, if so, (ii) whether such original agreement also involves subsequent holders of the financial instrument. All in all, the different claims bondholders and shareholders are entitled to (fixed and residual, respectively) do not seem to justify uneven treatment for the ascertainment of a genuine consent, nor does their different voting power.

As for the fulfilment of the written form (i), the Opinion stresses that a narrow interpretation is needed to ensure that the weak party is protected. Therefore, the mere inclusion of a jurisdiction agreement is not deemed sufficient unless the national judge can ascertain that the investment firm entrusted with security placement had made express reference to it in its contract with the buyer. Whether this conclusion can be effectively drawn from the ECJ case law might be debatable, but the drawbacks of the Opinion are evident, as it interprets severability of jurisdiction agreements from the rest of the contract and autonomous

44 See e.g. Commerzbank, Base Prospectus Relating to Italian Certificates (filed with BaFin), 23 July 2014, 230 (Frankfurt am Main court has exclusive jurisdiction, but only for merchants and public law entities); Banca IMI, Prospetto di Base Relativo al Programma di Offerta e/o Quotazione di Obligazioni (filed with Consob), 2 April 2015, 67 f. (Milan court has exclusive jurisdiction, but consumer’s domicile prevails); UniCredit, Prospetto di Base 2015-2015 Relativo al Programma di Offerta e/o Quotazione di Prestiti Obligazionari (filed with Consob, 10 July 2014, 46 f. (same).

45 Advocate General’s Opinion in Profit Investment SIM, cit., § 48.


47 See supra fn. 3 and accompanying text.
interpretation of the “written form” in a way that enables the transfer of claims but not prorogation of jurisdiction.

Remarkably, the reading proposed by the Advocate General applies to contracts that are normally concluded – either by electronic means or with written confirmation – on the marketplace even between professionals, as in the case in Profit Investment SIM, and hence even when there is no weak party in need of protection. In its inability to distinguish between consumers and professional investors, this line of reasoning may generate a situation where a structured exotic financial instrument binds its owner as for its very complex payoff – often displaying mathematical formulas – but not for the jurisdiction agreement, while the relative importance of the two clauses would rather suggest the opposite.

Furthermore, connecting prorogation of jurisdiction to the behaviour of the investment firm entrusted with placing the financial instruments – either when it operates as underwriter or where it does not – may be reasonable on the primary market, where investment firms can qualify as issuers’ agents in some circumstances, but it would be unworkable for subsequent transfers. Why should a seller having no fiduciary relationship with the issuer bother reminding the buyer that the securities T&Cs include a jurisdiction agreement?

This brings us to the question whether jurisdiction agreements bind subsequent parties (ii). Here, one does not see why the transfer of a share determines the accession of the new holder to the pre-existing company’s contract while the same cannot apply, with regard to the original loan or derivative contracts, when bonds or other financial instruments are handed over. The nature of the main claim does not say anything, indeed, on the ability of the remaining elements of the bundle of rights (and obligations) that constitute a financial instrument to circulate among new investors.

Most importantly, the ECJ precedents would permit a different reading. Powell Duffryn and Tilly Russ, on the one hand, and Refcomp, on the other, are not at odds. Rather, they simply refer to different facts. In Powell and Russ, the Court addressed the question whether the terms set forth by a company’s charter and, respectively, a bill of lading could circulate along with the company’s shares and, respectively, the bill itself. In contrast, Refcomp related to a case where a physical good (an air-conditioning device) circulated with no accompanying document. The reason why no contractual relationship was identified – and rightly so – in Refcomp is that in such case the parties to the dispute were not the same parties of the contractual relationship invoked, nor such contractual relationship had been assigned to any

48 The French version of Art. 25 Brussels I requires that the jurisdiction agreement is entered into “par écrit ou verbalement avec confirmation écrite” (Gaudemet-Tallon, cit., 134).
49 ECJ, Profit Investment SIM, cit., § 45.
50 Facts on the point are not clear in Profit Investment SIM.
51 For a restrictive interpretation see however the ECJ ruling in Kolassa, § 33, where applicability of Maletic is excluded (in Maletic, contractual relationship between a tour operator and a consumer was grounded on qualification of the travel agent as agent: see ECJ, C-478/12, Maletic, 14 November 2013).
of them. On the contrary, securities and other negotiable instruments are structurally aimed at allowing assignment of contracts with no requirement of further approval by their issuers.

All in all, the Advocate General’s interpretation prevents issuers from concentrating litigation in the same venue whenever the disputed matter falls outside the scope of exclusive jurisdiction set forth by Art. 24 No 2 Brussels I, unless the relevant dispute involves shareholders. Furthermore, as jurisdiction agreements included in T&Cs of non-equity securities or in other financial instruments would not be enforceable against investors on the secondary market, classification of investors as professionals or consumers as per Art 19 or 25 Brussels I retains its relevance only for the very limited scope of primary market transactions. On the secondary markets, however, all investors would receive the same treatment, and professional entities – such as Profit Investment SIM – may enjoy the privilege of litigating at their domiciles in spite of jurisdiction agreements meant to circulate along with the rest of the financial instrument T&Cs.

4. An optimal regime for jurisdictional rules

4.1. Default rules

A proper combination of law-making and judicial interpretation should ideally meet two conditions, one concerning investors that do not deserve special protection from the risk of litigating abroad, and the other applicable to weak investors (for which such risk would easily result in under-enforcement of individual rights).

As for the first condition, non-consumer claims stemming from a violation of securities T&Cs should be considered contractual for the purposes of Art. 7 No 1, so as to avoid dispersion and unpredictability of litigation. Furthermore, a clear stance should be taken on the place of execution of issuers’ financial obligation.

As for the second condition concerning weak investors, they should have the right to bring an action against an issuer in their own jurisdiction provided that a prospectus was passported there, and irrespective of the qualification of the claim and of the intensity of the contractual privity between the parties of the dispute. This would be more efficient than simply relying on tortious liability (which could bring similar results on the assumption that the relevant bank or securities account is likely to be in the country of the consumer’s domicile), as professional investors could not take advantage of the same benefit by default. Furthermore, the proposed criterion would ensure predictability for issuers, as the publication of a prospectus in a specific country perfectly matches the requirement set forth by Art. 17(1)(c) Brussels I that a commercial or professional activity be directed to the Member State of the consumer’s domicile in order for the consumer protection regime to apply. Whether such

52 The two definitions are not equivalent (F. Villata, Gli strumenti finanziari nel diritto internazionale privato, Cedam, Padua, 54 and 154), but this has limited effects for our purposes as both legal tools perform a similar economic function.

53 Advocate General Opinion in Profit Investment SIM, cit., § 51.
investors underwrote securities on the primary market or bought them from intermediaries belonging to the underwriting syndicate, and whether they hold their securities through a direct or an indirect holding system, should play no role in this respect.

4.1.1. Professional investors and contractual claims

The Brussels I Regulation and its interpretation in ECJ case law clearly fall short of delivering the optimal default jurisdictional regime sketched out in Sec. 4.1. Tortious liability, on which the ECJ heavily relies, can be either overprotective for professional investors – at the expense of issuers and non-litigating shareholders – or excessively punitive for consumers whenever the relevant bank or security account is not at their domiciles.\(^{54}\)

The very reason why securities – and more broadly financial instruments – are created is to allow the circulation of contracts (or of the contractual claim they entail, as the case may be) on secondary markets, because the possibility to divest is key in lowering investors’ risks in the first place. In setting up the conditions for developing a secondary market, issuers of transferable securities freely accept that, before payment is due, the identity of the creditor may vary. Where a contractual obligation circulates with a security a general consent to its tradability is actually given, at the very moment the security is created, so to say, in \textit{incertam personam}. Instead of identifying the counterparty of a contract (e.g., the creditor) by her name, reference is made to the legal requirements the bearer must meet, according to the \textit{lex tituli}, in order to enjoy a claim whose conditions are reported (or incorporated by reference) in the security T&Cs or equivalent instrument. This does not preclude that a legal obligation is freely consented to by the issuer with respect to the bearer:\(^{55}\) the traditional definition of “matter relating to a contract” as per Art. 7 No 1 is therefore met, as opposed to what \textit{Kolassa} maintains – at least in the Advocate General’s interpretation expressed in \textit{Profit SIM}.\(^{56}\)

4.1.2. Professional investors: place of performance for contractual claims

Moving default litigation on contractual matters away from professional investor’s domicile would only be a first step, though. The potential effects of Art. 7 No 1 on securities litigation are indeed uncertain.

The identification of the place of performance of the obligation falls into the purview of the national judge’s competence in the light of the applicable national law.\(^{57}\) For pecuniary obligations, substantive rules may broadly diverge, and a uniform solution at EU level can hardly be found, \textit{de lege lata}. Even in national systems the identification of the place of

\(^{54}\) In a system that encourages cross-border provision of banking and custodian services (see Art. 33 Dir. 2013/36/EU (CRD IV) and Art. 34 Dir. 2014/65/EU (Mifid 2)), the duty to litigate in another country represents a hidden cost consumers might not be aware of.

\(^{55}\) See correctly M. Lehman, Special Jurisdiction, in Dickinson and Lein, cit., 144, with reference to bills of exchange as an example of unilateral engagement.


\(^{57}\) ECJ, C-12/76, \textit{Tessili}, 6 October 1976.
performance may prove particularly difficult when securities are issued in dematerialized or immobilized form at a central security depository. Furthermore, when the financial instrument entails (monetary) obligations for both issuers and investors there might be more than one relevant place of performance. While Brussels I avoids such consequence for the sale of goods and the provision of services (Art. 7 No 1(b)), obligations circulating with financial instruments do not enjoy such rule, so that reference should be made to the place of performance of each of the disputed obligations (as per Art. 7 No 1(a)). For derivatives like credit default swaps (CDS), there can therefore be more than one place of performance, namely one for each of the two obligations of the parties.

A proper normative solution to all these problems might be to identify the place of performance – hence establishing jurisdiction – as where the CSD or the CCP has its central administration whenever securities are issued in dematerialized or immobilized form or, respectively, derivative financial instruments are centrally cleared.\(^{58}\) When issuers do not request any centralized clearing or custody of the relevant financial instruments, the place of performance of their obligations towards professional investors should instead be located at their central administration.\(^{59}\) Finally, if financial instruments are traded on an organized trading venue with issuer’s approval, the central administration of the company running the trading venue would represent a viable alternative for secondary market purchases performed on such platform.

### 4.1.3. Retail investors: an enhanced protective regime

Fulfilling an efficient regime for weak investors protection – the second condition for an efficient regime submitted in Sec. 4.1 – is even more difficult under Brussels I, both because Art. 17 requires a contractual privity between the parties,\(^{60}\) and because of the applicable definition of “consumer”. As opposed to Art. 7 No 1, an obligation freely assumed by the defendant towards the claimant does not suffice to derogate Art. 4 Brussels I.\(^{61}\) To this end, a contract must instead be concluded between a consumer and a professional. While a sufficient contractual privity is normally found between an investor and an entity providing investment services (an investment firm or a bank pursuant to Arts 4 and 5 Dir. 2004/39/EC – MiFid; see also Arts 4 and 5 Dir. 2014/65/EU – MiFid 2), this is normally excluded in securities litigation between issuers and investors,\(^{62}\) at least when securities are purchased on the secondary market. Furthermore, ECJ case law to date has not yet had the opportunity to unambiguously clarify whether investors are consumers, although some obiter dicta and scholarly interpretation tend to confine such qualification to bondholders only.\(^{63}\)

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58 Reference to the central administration as opposed to the principal place of business avoids uncertainties in cases where IT infrastructures of CSDs, CCPs and trading venues are moved for efficiency reasons.
59 For the reciprocal case of investors’ duties towards issuers see supra, fn. 7.
60 See e.g. ECJ, Kolassa, cit., §§ 28 f. and 38.
61 See C-375/13, Kolassa, Opinion of AG Szpunar, 3 September 2014.
63 See supra, fn. 45 and accompanying text.
Retail investors – whether shareholders or not – should enjoy strengthened protection when they purchase financial instruments on the primary market, either directly from the issuer or from an investment firm operating on its behalf, as this would provide an adequate response to the selling pressure that often affects this market context. In the context of a public offer of securities, this will also ensure protection to consumers who are solicited to invest, rather than actively searching for investment opportunities. Hence, a protective system modelled on Arts 17 and 18 Brussels I should apply whenever issuers (or offerors) passport and publish a prospectus in the Member State of the consumer’s domicile and securities are bought during the period when the offer is open. In this respect, no differentiation should be made between cases where securities are bought (from the offeror) or subscribed (vis-à-vis the issuer), on the one hand, and cases where securities are bought from intermediaries charged with the placement, on the other hand. Notwithstanding the restrictive interpretation of Maletic the ECJ has provided in Kolassa, reselling of financial instruments by intermediaries operating as agents of the issuer or the offeror should not prevent application of such protective regime. Hence, jurisdiction should be established at a consumer’s domicile also when a syndicate of financial intermediaries facilitates securities placement by way of firm commitment – which entails underwriting (or buying) securities from the issuer (or the seller) and subsequently reselling them to the investors that have placed their orders on the primary market – just like when placement is performed by way of strict underwriting syndicates, where intermediaries only step in if securities are not underwritten or bought on the market. For public offers of securities, any transaction included in a retail cascade should therefore be considered as directly performed by the issuer or the offeror, as the case may be, when the placement of securities is carried out through financial intermediaries (Art. 3(2)(2), last sentence, Prospectus Directive). Of course, actions based on tort, such as those invoking false or misleading information in the prospectus, would still be treated according to current rules on (non-contractual) claims.

As for the secondary market, admission to negotiations in regulated markets, MTFs or OTFs should be considered as a proxy for issuer willingness (or at least acceptance of the risk) that retail investors may have easy access to the relevant financial instruments. This presumption should only apply when issuers request or have requested or approved admission of their financial instruments to trading on such trading venues (see Art. 17(1)(3) Reg. No 596/2014 – Market Abuse Regulation). Hence, where securities are negotiated on a trading platform without issuer approval, the consumer would not be able to take advantage of a protective regime issuers have never accepted to grant, and general rules on jurisdiction should apply. This excludes, for derivatives, that concentration of negotiations on a trading venue mandated according to Art. 32(4) Reg. (EU) No 600/2014 (Mifir) – i.e., concentration taking place after issuance – changes the rules originally applicable to jurisdiction even in the (admittedly uncommon) case that a consumer enters such derivatives. Where consumer protection would

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64 Direct selling of own financial instrument on the primary market qualifies as execution of orders on behalf of clients as per Art. 4(5) dir. 2014/65/EU (Mifid II).
not apply, actions on violation of securities T&Cs should be brought before the court competent for contractual claims.\textsuperscript{67} Once again, claims alleging violation of ongoing disclosure duties – both ad hoc\textsuperscript{68} and periodical\textsuperscript{69} – might well instead qualify as tortious in line with the general approach in ECJ case law.

This extension of consumer protection to financial instruments bought on the secondary market might appear excessive. However, such impression should be balanced with other considerations. First, the regime resulting from \textit{Kolassa} has similar implications in allowing dispersion of litigation at the consumer’s domicile, so that the hypothetical default regime devised here would be at worst equivalent to the status quo. Second, the possibility exists to exclude such risk by preventing retail investors from having access to financial instruments, also on the secondary market. This result can be achieved not only by the law,\textsuperscript{70} but also through private ordering solutions such as T&Cs banning purchases of financial instruments by investors not domiciled in issuers’ Member States\textsuperscript{71} or by retail investors (within or outside a trading venue),\textsuperscript{72} as well as per stock exchange regulation for bonds negotiated in a market segment reserved to professionals. Third and foremost, jurisdiction agreements may calibrate the litigation setting while avoiding exclusion of retail investors from investment opportunities: such legal tools are therefore crucial in completing the picture.

4.2. Jurisdiction agreements

Sec. 4.1 has sketched out some possible improvements to the current framework for the allocation of jurisdiction. The proposal is based on a personal assessment of the average preferences of issuer and investors,\textsuperscript{73} but it might well not reflect the actual needs of stakeholders in all circumstances. For instance, some issuers may deem that the benefits granted to professional investors as a consequence of their ability to bring disputes at their domiciles will overall exceed the costs stemming from increased risks of litigating in a number of unforeseeable foreign fora. If both such risks and benefits are accurately reflected in the cost of equity capital or in the bond interest rates, enabling litigation at professional investors’ domiciles may prove efficient.

While \textit{Kolassa} favours dispersion of litigation across different countries and reduces predictability of jurisdiction for issuers, the Opinion rendered in \textit{Profit Investment SIM} might

\textsuperscript{67} On the identification of the place of performance see supra, text accompanying fn. 11 and Sec. 4.1.2.
\textsuperscript{68} See Art. 17 Market Abuse Regulation.
\textsuperscript{69} See e.g. Arts 4 and 5 Directive 2004/109/EC (Transparency Directive).
\textsuperscript{70} In Italy, bonds issued in excess of the maximum leverage threshold may be subscribed only by professional investors, and these are \textit{ex lege} responsible for corporate insolvency in case they resell such bonds to retail investors (Art. 2412(2) Civil Code). The rule does not apply if bonds are traded in regulated markets or MTFs (Art. 2412(5) Civil Code).
\textsuperscript{71} See Arons, cit., 380.
\textsuperscript{72} See TerniEnergia, Admission Document to the Trading of Financial Instruments Called “TerniEnergia 2019” on the Professional Segment (ExtraMOT PRO) of the ExtraMOT managed by the Italian Stock Exchange, 2015, § 3 (“the Notes shall be exclusively placed to, and successively held by and retransferred to, Qualified Investors”).
\textsuperscript{73} See supra fn. 4.
hinder, if confirmed by the Court, private ordering solutions to such problems. Relying on usages, along with an auspice expressed by the same Advocate General, would allow differentiating between consumers and professionals, as only the latter would be bound by jurisdiction agreement, but it would be a second best solution in other respects.

First, ascertaining whether the form expressing a contractual clause corresponds to a well-established usage may not be easy. Although the ECJ has stated that repeated challenges to the validity of such forms do not necessarily mean a usage is no longer in force, assessing through litigation whether a practice is regularly observed would easily be prone to circularity.

Second, market usages require widespread acceptance and would hardly seem compatible with a flexible system where securities T&Cs – normally incorporated by reference in the negotiable instrument – include jurisdiction agreements only when this accords to the economic transaction underlying the financial instruments and the needs of the parties thereof. On the contrary, rules on parties’ leeway should be clear from the outset. Not surprisingly, participants in international markets seldom refer to market practices when they are given the opportunity to do so, and rather prefer to unambiguously select a national law that governs the contract.

Third, reference to practices known to the parties would normally prevent jurisdiction agreements from binding consumers, as only persons acting for professional purposes can be bound by jurisdictional agreements entered into in a form which accords with international market practices. An efficient regulatory framework should allow instead for more flexibility in the application of jurisdiction agreements to consumers. In theory, Brussels I could allow some calibration in that Art. 19 bans jurisdiction agreements predating litigation only to the extent that a contract is concluded as per Art. 17 (which requires contractual privity), but not if consumers and professionals are merely bound by obligations pertaining to contractual matters (Art. 7 No 1) in the absence of contractual privity. However, once Kolassa – as interpreted by the A.G. Opinion in Profit Investment SIM – held that issuers and bondholders are not parties to a contractual relationship, one cannot but exclude that jurisdiction agreements in securities T&Cs can bind the holders of a debt instrument, be they either professionals or consumers.

By combining in different fashions all the variables (e.g., nature of the investor, issuer role in soliciting investments, trading in an organized venue, and so on), a proper regulatory framework may calibrate different levels of protection depending on the specific context. For

74 Advocate General Opinion in Profit Investment SIM, cit., §§ 57 ff.
75 See T. Arons, cit., 382 f.
76 ECJ, C-159/97, Castelletti, 16 March 1999, § 29.
77 Incorporation by reference is not deemed sufficient for jurisdictional agreements to circulate with bills of lading in international market practices: R, Hausmann and I Queirolo, Art. 23, in T. Simons and R. Hausmann, cit., 505 f.
78 G. Cuniberti, Three Theories of Lex Mercatoria, 52 Columbia Journal of Transnational Law 101 (2014) (modern lex mercatoria hardly meets the needs of international merchants, and empirical evidence shows that they rarely choose its application).
79 U, Magnus, Art. 23, in Magnus and Mankowski, cit., 491.
instance, the European legislator might design default rules protecting retail investors (or consumers) in a primary market – or in any event in the context of security offerings – as mandatory. Exclusive jurisdiction at investors’ domiciles would correspond to issuer capacity to determine whether an offer is also addressed to consumers, on the one hand, and to higher legal (and financial) risks normally associated with the lack of a market price for the shares, or with the impact of the new issue on market prices, as the case may be.

A more lenient approach could be taken for jurisdiction agreements involving consumers that have bought financial instruments outside security offerings. Such case corresponds to the set of contractual obligations Brussels I does not protect with limitations to jurisdictions agreements predating the dispute even when these are addressed to consumers, for lack of contractual privity. Overall, such set of contractual obligations would therefore be subject to a more protective regime than the one currently in place for equivalent consumer contracts. For over-the-counter transactions on secondary markets, however, the regime would remain the same, as justified by the absence of any issuer activity aimed at promoting financial instruments among retail investors. When financial instruments are traded on a trading venue (regulated market, MTF or OTF) with the issuer’s consent, an equally liberal approach to jurisdiction agreements would also be accompanied by a consumer-friendly default rule.

A summary of the possible normative regime submitted above can be found in the following table.

<table>
<thead>
<tr>
<th></th>
<th>D.J.R. for retail investors</th>
<th>J.A. for retail investors</th>
<th>D.J.R. for professional investors</th>
<th>J.A. for professional investors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary market*</td>
<td>Investor’s domicile</td>
<td>No</td>
<td>CSD or issuer’s domicile</td>
<td>Yes</td>
</tr>
<tr>
<td>Secondary market with issuer consent**</td>
<td>Investor’s domicile</td>
<td>Yes</td>
<td>CSD or trading venue</td>
<td>Yes</td>
</tr>
<tr>
<td>Secondary market without issuer consent***</td>
<td>CSD or issuer’s domicile</td>
<td>Yes</td>
<td>CSD or issuer’s domicile</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Key to symbols. D.J.R. = head of jurisdiction according to default regime; J.A. = possibility to enter jurisdiction agreements predating litigation; * = including retail cascades and placement of financial instrument through firm commitment syndicates; ** = secondary market purchases on regulated markets, MTF or OTF where financial instruments are traded upon issuer request or approval; *** = secondary market purchases outside regulated markets, MTF or OTF or on regulated markets, MTF or OTF where financial instruments are traded without issuer request or approval.

See supra Sec. 4.1.2.

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5. Conclusions

The allocation of jurisdiction in securities litigation is a key factor in ensuring investor protection and legal certainty in international capital markets. Jurisdictional rules determine the litigation setting and its costs, and are therefore an element issuers and investors consider when deciding the cost of debt and equity capital. Ideally, such rules should be based on grounds of efficiency and predictability and should specify when the parties are free to deviate from them. This would allow understanding to what extent jurisdiction agreements can contribute the development of a market for judicial decisions and when, on the contrary, imperative rules protecting weak parties thwart this result by prohibiting a more liberal approach.

Unfortunately, recent ECJ cases show that the EU regime on jurisdiction falls short of delivering this scenario for securities litigation. As for the default heads of jurisdiction, ECJ rulings and AG opinions stick to a formalistic interpretation of market transactions that does not draw any distinction between retail investors (or consumers) and professional investors, thereby harming issuer confidence at the indirect expense of non-litigating shareholders. As for opt-outs, a misguided concept of the economic function performed by tradable securities and other financial instruments extends the scope of mandatory provisions, thus curbing the possibility of contracting around default rules. This prevents issuers and (even professional) investors from ensuring predictability through private ordering solutions and from tailoring jurisdictional rules according to their own preferences.

All in all, the legal framework rules out the opportunity to develop a market for judicial decisions even when this would be beneficial to issuers and investors alike, and is therefore likely to increase the cost of capital. This paper submits an alternative regulatory system where retail investors (or consumers) enjoy better protection, while professionals can play by their own rules. Although proper interpretation could in principle reach such an outcome de lege lata, consolidated CJEU case law makes some legislative amendments essential to ensure efficiency.