

Banking and Financial Digital Platforms: Conflict of Laws Issues from a European Perspective

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Abstract

Advances in technologies, such as enhanced computing power, cryptography and artificial intelligence, are transforming the way banking and financial services are provided. On the one hand, disruptive disintermediation-enabling technology, belonging to alternative finance forms, is challenging traditional banking intermediaries' role. On the other hand, new intermediaries, whose activities have not traditionally encompassed finance, such as social media companies, are being drawn into the financial industry. Moreover, increased internet speed and easier mobile access are giving rise to rapid growth in the use of banking and financial digital platforms, in particular among consumers, start-ups, SMEs and social enterprises. This trend is also expected to accelerate, as digital platforms reduce costs, facilitate access to financial products and services, and enhance cross-border operations. However, as a consequence, new private international law problems are emerging along with the widespread use of digital platforms. Against this background, this paper, which is informed by a doctrinal legal methodology, addresses the emerging conflict of laws issues European users of banking and financial digital platforms face. For this purpose, it will first set the scene of the relevant EU legal framework in relation to banking and financial digital platforms, categorized, on the basis of the function they perform, as follows: (i) lending and financing fintech platforms, including balance-sheet lending and crowdfunding platforms; (ii) robo advice and algorithmic trading platforms; (iii) digital payment services and e-money; (iv) financial services related to crypto assets. On the basis of the analysis provided, it will finally focus

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on the forum and applicable law issues faced by European users of banking and financial digital platforms.

Keywords

Banking and financial digital platforms; Brussels I bis Regulation; Rome I Regulation; Rome II Regulation

1. Introduction

Increased internet speed and easier mobile access are giving rise to rapid growth in the use of banking and financing digital platforms, particularly among consumers, start-ups and SMEs. This trend is also expected to accelerate, as fintech platforms¹ reduce costs, facilitate access to financial products and services, and enhance cross-border operations.²

In particular, the use of banking and financing digital platforms is widespread both in traditional banking and in alternative finance.³ On the one hand, enhanced computing power, cryptography and artificial intelligence are giving rise to new opportunities for the development of the traditional financial industry, which benefits from such advances in technologies. On the other hand, disruptive disintermediation-enabling technology, belonging to alternative finance forms, is challenging traditional banking intermediaries' role. New intermediaries, whose activities have not traditionally encompassed finance, are being drawn into the financial industry. For instance, common payment platforms have been developed not only by credit institutes but also by major social media companies (so-called Big tech).⁴

In this light, in 2020 the EU adopted a digital finance package, with the ambition to boost Europe's competitiveness and innovation in the financial sector while embracing the digital transition. The package includes a digital finance

1 For the purposes of this paper, the definition of fintech as "technologically enabled financial innovation that could result in new business models, applications, processes or products with an associated material effect on financial markets and institutions and the provision of financial services" provided by the Financial Stability Board (FSB) will be adopted. See FSB, 'Financial stability implications from fintech: supervisory and regulatory issues that merit authorities' attention' (27 June 2017) 1.

2 J Ehrentraud and others 'Policy responses to fintech: a crosscountry overview' (2020) Financial Stability Institute FSI Insights on policy implementation No 23, 11 <<https://www.bis.org/fsi/publ/insights23.pdf>> accessed 30 May 2024.

3 For a definition of alternative finance, see T Ziegler and others, 'The 2nd Global Alternative Finance Market Benchmarking Report' (Cambridge Centre for Alternative Finance 2021), 30 <<https://www.jbs.cam.ac.uk/wp-content/uploads/2021/06/ccaf-2021-06-report-2nd-global-alternative-finance-benchmarking-study-report.pdf>> accessed 30 May 2024.

4 K Crosson and others, 'Platform-based business models and financial inclusion' Bank for International Settlements BIS Working Papers No 986 2022, 23 <<https://www.bis.org/publ/work986.pdf>> accessed 30 May 2024.

strategy,⁵ legislative proposals on crypto-assets (MiCA Regulation)⁶ and digital resilience (DORA),⁷ and a renewed retail payments strategy.⁸ Moreover, in the framework of the Capital Markets Union Action Plan⁹ and of the Fintech Action Plan,¹⁰ the Commission adopted the so-called crowdfunding regulation¹¹ to facilitate the exercise of the freedom to provide and receive such services cross-border in the internal market.

The digitisation of the services offered facilitates the involvement of market players from different jurisdictions, resulting in cross-border banking and financial services among European users. This represents both an opportunity for the EU economy and a new challenge for the EU private international law legal framework, as it means dealing with the peculiarities of the application of conflict of laws rules in two different areas of law, respectively, the digital arena and finance. On the one hand, the internet, which ignores geographical borders, represents a unique challenge for private international law under several profiles,¹² spanning from the protection of personality and intellectual property rights to the prevention of unfair competition, the regulation of parties' agreements, the protection of weaker contract parties and the localisation of the place of damage. On the other hand, the area of finance necessitates some exceptions from the application of the common rules of EU private international law.¹³ Against this background, this contribution addresses emerging conflict of laws issues from a European perspective.¹⁴

After this introduction, section 2 sets the scene of the relevant EU legal framework in relation to fintech platforms, categorized on the basis of the

5 Commission, 'Communication on a Digital Finance Strategy for the EU' [2020] COM (2020) 591 final.

6 Regulation 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L 150 (hereafter, MiCA Regulation).

7 Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 [2022] OJ L 333 (hereinafter, DORA).

8 Commission, 'Communication on a Retail Payments Strategy for the EU Brussels' COM (2020) 592 final.

9 Commission, 'Action Plan on Building a Capital Markets Union Brussels' (Communication) COM (2015) 468 final.

10 Commission, 'Fintech Action plan: For a more competitive and innovative European financial sector' (Communication) COM (2018) 109 final.

11 Regulation (EU) 2020/1503 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 [2020] OJ 2 347/1.

12 D Jerker and B Svantesson, *Private International Law and the Internet* (3rd edn, Wolters Kluwer 2016) 51; P De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar 2020) 409.

13 See M Lehmann, 'Private international law and finance: nothing special?' [2018] NIPR 3.

14 Private international law and conflict of laws are used synonymously in this contribution.

function they perform. sections 3 and 4 focus, respectively, on the forum and applicable law issues. Section 5 completes the analysis addressing choice-of-court and choice-of-law agreements concluded by the parties. To this end, the provisions of Regulation (EU) No 1215/2012 (Brussels I-bis Regulation),¹⁵ the 2007 Lugano Convention¹⁶ and the Hague Convention of 2005¹⁷ on forum law, as well as Regulations (EU) No 593/2008 (Rome I Regulation)¹⁸ and Regulation (EU) No 864/2007 (Rome II Regulation)¹⁹ on applicable law are taken into consideration. Section 6 concludes.

2. Defining banking and financing digital platforms

Digital platforms are a widespread phenomenon in the EU economy, representing an unprecedented opportunity for innovation and growth, particularly for start-ups and SMEs. They cover a wide-ranging set of activities, including ‘online advertising platforms, marketplaces, search engines, social media and creative content outlets, application distribution platforms, communications services, payment systems, and platforms for the collaborative economy’.²⁰

However, given the breadth of use and differing models, there is no single definition of an online or digital platform. Moreover, in the context of a public consultation on the regulatory environment for platforms promoted by the Commission in 2015,²¹ it emerged that the majority of the participating

15 Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L 351 (hereinafter, Brussels I-bis).

16 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2007] OJ L 339 (hereinafter, 2007 Lugano Convention).

17 Hague Convention of 30 June 2005 on Choice-of-court Agreements (hereinafter, 2005 Hague Convention).

18 Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177.

19 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199.

20 Commission, ‘Online Platforms and the Digital Single Market Opportunities and Challenges for Europe’ (Communication) COM (2016) 288 final, 2.

21 Commission, ‘Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy’ (Commission’s public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, opening 24 September 2015) <<https://digital-strategy.ec.europa.eu/en/consultations/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud-computing>> accessed 6 March 2023. In the consultation, the Commission provides an attempted definition of online platform, which reads as follows: ‘an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers’. For an in-depth analysis of the attempted definition provided by the Commission

stakeholders contested the opportunity to provide a possible legal definition of online platforms. In particular, major concerns refer to the feasibility of a ‘one-size-fits-all’ definition, as it is unlikely to be ‘future-proof’ and might overlap with other notions, such as those of online intermediaries and information society service providers.²² In this vein, it is contended that a generic notion of online platforms is too vague to provide a framework that would be fit for the purpose and ensure legal certainty.²³ Along this line, every EU legislative act regulating digital platforms subsequently adopted provides an autonomous definition, relevant to the particular subject matter.²⁴

Such an approach has been adopted also in the fintech area, where different definitions and categorisations of digital and financial platforms have been developed to date.²⁵ Moreover, the taxonomy used within the fintech space gives

in the context of the consultation, see also House of Lords, ‘Online Platforms and the Digital Single Market’ (10th Report of Session 2015–16) 22.

- 22 Commission, ‘Synopsis report on the public consultation on the regulatory environment for platforms, online intermediaries and the collaborative economy’ (Commission’s public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, opening 24 September 2015) <<https://digital-strategy.ec.europa.eu/en/consultations/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud-computing>> accessed 6 March 2023, 6.
- 23 Oxera Consulting LLP, ‘Benefits of online platforms’ (2015), 16 <<https://www.oxera.com/wp-content/uploads/2018/07/The-benefits-of-online-platforms-main-findings-October-2015.pdf.pdf>> accessed 30 May 2024.
- 24 See art 2 lett. *i* of Regulation (EU) 2022/2065 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277; art 2 n 2 of Regulation (EU) 2022/1925 (Digital Market Act); Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 265; art 1 n 1 of the Proposal for a Directive on improving working conditions in platform work COM (2021) 762. Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186, which focuses on one of the different services offered by digital platforms, ie online intermediation services, does not provide a definition of platform. However, recital n 49 refers to the key role played by the group of experts for the Observatory on the Online Platform Economy, established in accordance with the Commission Decision C(2018)2393, in informing the evaluation of this Regulation by the Commission. The Observatory defines online platforms as ‘online spaces where users are brought together by a platform operator in order to facilitate an interaction (exchange of information, a commercial transaction, etc.)’. See PPMI, Open Evidence, Rand Europe, German Economic Institute (IW), ‘Study on Support to the Observatory for the Online Platform Economy’ (Study implemented for the European Commission 3 May 2021) 29.
- 25 Among many, see OICV-IOSCO, ‘Research Report on Financial Technologies (Fintech)’ (February 2017) <<https://www.iosco.org/library/pubdocs/pdf/IOSCOPD554.pdf>> accessed 30 May 2024; P Cipollone, ‘Conference on Digital Platforms and Global Law’ (Banca d’Italia 29 April 2022) <https://www.bancaditalia.it/pubblicazioni/interventi-direttorio/int-dir-2022/en_CIPOLLONE_29_aprile_2022.pdf?language_id=1> accessed 30 May 2024 <<https://www.bancaditalia.it/pubblicazioni/interventi-direttorio/int-dir-2022/>

rise to uncertainty, as often contributors use different terms for the same activity or the same term for different ones.²⁶

Against this background, for the purposes of this contribution fintech platforms are broadly considered as technical infrastructures that enable users to establish banking and financial legal relationships with each other. More precisely, banking and financial platforms are categorized, on the basis of the function they perform, as: (i) lending and financing fintech platforms, including balance-sheet lending and crowdfunding platforms; (ii) robo-advice and algorithmic trading platforms; (iii) digital payment services and e-money and (iv) financial services related to crypto assets.²⁷

2.1. Lending and financing fintech platforms

Lending and financing fintech platforms act as intermediaries for typical activities of the banking and financial sector, such as granting loans or placing financial instruments. It is possible to distinguish between balance-sheet lending and crowdfunding platforms.

Balance-sheet lending platforms assume credit risk by keeping originated loans on their balance sheet, as they perform credit activity using their own balance sheet in the ordinary course of business to intermediate borrowers and lenders.²⁸ Such platforms, which are widespread in the US, use intermediaries having the necessary authorisations to perform credit activity in the EU.²⁹ This is the case, for example, with the US platforms Kabbage and PayPal Credit, which use the intermediation services of the banking group ING and the Luxembourg-based credit institution PayPal (Europe) S.à.r.l. et Cie S.C.A., respectively.

Crowdfunding (or crowdfunding) platforms are publicly accessible internet-based information systems that match the business funding interests of investors and project owners through a crowdfunding platform.³⁰ They are divided into investment-based or lending-based on the basis of the financial activity they perform. More precisely, in investment-based crowdfunding, investors

CIPOLLONE_29_aprile_2022.pdf; EBA, 'Report on the use of digital platforms in the EU banking and payments sector' (September 2021) EBA/Rep/2021/26.

26 J Ehrentraud and others, 'Policy responses to fintech' (n 2) 6.

27 Such a categorisation lays its foundations on the theorisation of the 'fintech tree' elaborated in J Ehrentraud and others (n 2). However, this contribution will not consider the insurtech sector, mentioned in the 'fintech tree'. Notwithstanding their close relationship, fintech and insurtech lay their foundations on different legal frameworks, which deserves separate legal analysis.

28 *ibid* 8.

29 Art 8 of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176.

30 Art 2(1)(a) of Regulation (UE) 2020/1503.

provide private companies with equity (equity crowdfunding) or debt securities (debt-based crowdfunding). In lending-based crowdfunding, platforms facilitate the credit activity performed among investors and project owners. These include invoice trading and peer-to-peer crowdfunding platforms.

Crowdfunding services have a tripartite structure, involving project owners, investors and crowdfunding service providers, where each of the actors is in a bilateral relationship with the other two. The recently adopted Regulation (EU) 2020/1503 sets out common rules for organising, authorising and supervising crowdfunding service providers that are established in the EU. It applies in the Member States from 10 November 2023.

2.2. Robo-advisors and algorithmic trading platforms

Robo-advisors and algorithmic trading platforms rely on automated or semi-automated systems (algorithm-based tools) with the aim to offer investment services with no or limited human intervention.³¹ While robo-advisors provide investment advice, algorithmic trading platforms make transaction decisions in the financial markets.³²

The MiFID II package requires the implementation of appropriate controls for investment services provided through an automated or semi-automated system activity to mitigate the risks correlated. art 54 and recital n 86 of Regulation (EU) 2017/565,³³ implementing art 25 of Directive 2014/65/EU,³⁴ set out that, where investment advice or portfolio management services are provided through an automated or semi-automated system, the responsibility to undertake the suitability assessment shall not be reduced using an electronic system in making the personal recommendation or decision to trade.

Moreover, art 17 of Directive 2014/65/EU introduces closer regulation and monitoring of algorithmic trading,³⁵ imposing new and detailed requirements on algorithmic traders and trading venues. In this vein, it constitutes an exception to the principle of technology neutrality generally pursued in financial

31 P Maume, *Robo-advisors. How do they fit in the existing EU regulatory framework, in particular with regard to investor protection?* (Publication for the committee on Economic and Monetary Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament 2021) 19.

32 European Supervisory Authorities (ESAs), 'Report on automation in financial advice' (JC SC CP FI/2016/24 2016) 12-15.

33 Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2007] OJ L 87/1.

34 Directive 2014/65/EU on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349.

35 Art 4(1) n 39 of Directive 2014/65/EU (n 34).

regulation.³⁶ Similarly, also high-frequency algorithmic trading, which is a specific subset of algorithmic trading where the trading system analyses data at high speed and sends large numbers of orders within a very short time in response to that analysis, is subject to particular regulatory scrutiny under MiFID II.

2.3. Digital payment and e-money service providers

Digital payment service providers use technology to facilitate payment transactions without the use of physical money. Instead of currency, some providers use e-money, referred to as electronically stored monetary value which represents a fixed value claim on its issuer for the purpose of making payment transactions.³⁷

There is a broad spectrum of payment platforms, which operate at different stages of the payment chain and engage in various payment-related activities.³⁸ Payment services are provided by both credit institutions and alternative intermediaries. The platforms developed by major social media companies, such as Amazon, Apple, Facebook and Google (so-called Big tech), reached an impressive diffusion worldwide.³⁹ Amazon Pay is an electronic money institution that issues e-money to make payments, while Apple Pay, Meta Pay (which replaced Facebook Pay) and Google Pay are e-wallets that store payment information and allow users to securely make a purchase.

The Payment Services Directive (PSD2)⁴⁰ sets out common rules concerning the granting of authorisation to provide and execute payment services throughout the Union. According to art 11 PSD2, the authorisation delivered by the competent authorities of a Member State allows the payment institution concerned to provide the payment services that are covered by the authorisation throughout the EU. E-money service providers must comply also with the requirements of the Electronic Money Directive (EMD2), which lays down the rules for the pursuit of the activity of issuing e-money. For example, the

36 F Annunziata, 'I processi di mercato automatizzati e il trading algoritmico', in M Cian, C Sandei, *Diritto del Fintech* (Cedam 2020) 402.

37 Art 2 n 2 of Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC [2009] OJ L 267.

38 For an attempt to categorize these platforms see J Ehrentraud and others 'Fintech and payments: regulating digital payment services and e-money' (2020) FSI Insights on policy implementation No 33, 10 <https://www.bis.org/fsi/publ/insights33.pdf> accessed 30 May 2024; J Ehrentraud and others (n 2) 22.

39 G7 Working Group on Stablecoins 'Investigating the impact of global stablecoins' (2019) Committee on Payment and Market Infrastructures (CPMI), 28 <https://www.bis.org/cpmi/publ/d187.pdf> accessed 30 May 2024.

40 Directive (EU) 2015/2366 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337/35.

US provider PayPal can pursue its activity in the EU using as an intermediary PayPal (Europe) S.à r.l.et Cie, S.C.A., a Luxembourg-based credit institution.

2.4. Financial services related to crypto assets

Crypto assets, defined as digital representations of value or rights which may be transferred and stored electronically using distributed ledger technology (DLT),⁴¹ can be used to provide different financial services. Likewise, in the operations of initial public offerings of shares of private companies, crypto assets can be offered to the public to raise capital. This operation, called an initial coin offering (ICO), consists of the generation of a certain amount of a new token specifically for the funded business project and their offering in exchange for a certain amount of cryptocurrency or legal tender.⁴²

The rapid spread worldwide of crypto assets in finance has led to the development of numerous international initiatives aimed at integrating these tools into legislative frameworks regarding their regulation, supervision and oversight.⁴³ Along the same line, in 2020 the EU launched two proposals of regulations relevant to the harmonization of rules regarding financial services related to crypto assets. The MiCA Regulation⁴⁴ sets out uniform requirements for the offering and placing on the market of crypto assets. The DORA (Digital Operational Resilience Act)⁴⁵ establishes an oversight framework for critical ICT third-party providers, including crypto assets providers. The Commission also

41 Art 3(1) n 2 MiCA Regulation

42 P Ortolani, 'Civil and Commercial Jurisdiction in Crowdfunding-Related Litigation', in P Ortolani, M Luoisie (eds), *The EU Crowdfunding Regulation* (OUP 2021) 120. Initially, the term ICOs was exclusively associated with the issuance of cryptocurrencies (eg bitcoin or ether), whereas it is currently used to identify any token offerings. Different terms have emerged depending on the type of crypto assets offered: UTOs (utility token offerings), STOs (security token offerings), which in turn can be distinguished into ETOs, if it concerns the offering of venture capital (equity token offerings) and ICCOs, if it concerns the offering of tokens convertible into shares (initial convertible coin offerings).

43 FSB, 'Regulation, Supervision and Oversight of "Global Stablecoin" Arrangements: Final Report and High-Level Recommendations' (2020) <<https://www.fsb.org/wp-content/uploads/P131020-3.pdf>> accessed 30 May 2024; BCBS, 'Prudential treatment of cryptoasset exposures' (Consultative Document 2021; CPMI-IOSCO, 'Prudential treatment of cryptoasset exposures' (2021) <<https://www.bis.org/bcbs/publ/d545.pdf>> accessed 30 May 2024; IOSCO, IOSCO decentralized finance report (March 2020) OR01/2022; OECD, 'Crypto-Asset Reporting Framework and Amendments to the Common Reporting Standard' (2022).

44 Regulation 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L 150.

45 Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 [2022] OJ L 333.

launched the Anti-money laundering and countering the financing of terrorism legislative package,⁴⁶ which includes legislative initiatives recognising crypto assets service providers among the entities required to adopt specific measures to prevent money laundering and terrorist financing.⁴⁷

To date, there is no common taxonomy of crypto assets. However, based on the function they perform, it is possible to identify specific subcategories of crypto assets, namely payment or currency tokens (cryptocurrency), utility tokens, investment or security tokens.⁴⁸ Payment or currency tokens are digital representations of value that are not issued or guaranteed by a central bank or public authority, are not necessarily attached to a fiat currency but are used by natural or legal persons as means of exchange and can be transferred, stored, or traded electronically.⁴⁹ According to the Court of Justice (CJEU), they are ‘a contractual means of payment’;⁵⁰ unlike e-money, for cryptocurrencies, the funds are not expressed in traditional accounting units, such as in euro, but in virtual accounting units, such as the bitcoin. Stablecoins are cryptocurrencies which sought a stable value.⁵¹ Under the MiCA Regulation, stablecoins are distinguished between asset-referenced token, which aims at maintaining a stable value by referencing several currencies that are legal tender, one or several commodities, one or several crypto-assets, or a basket of such assets, and e-money-token, which are purports to maintain a stable value by referring to the value of a fiat currency that is legal tender. Utility tokens have non-financial purposes, as they are intended to provide digital access to a good or service, available on DLT, and that is only accepted by the issuer of that token. Unlike cryptocurrency and utility tokens, security tokens are excluded from the scope of the MiCA Regulation.⁵² As digital forms of traditional financial instruments such as stocks, bonds, or other securitized assets, they are the only form of crypto

46 Commission, ‘Towards better implementation of the EU’s anti-money laundering and countering the financing of terrorism framework’ (Communication) COM (2019) 360 final.

47 Regulation 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849 [2023] OJ L 150.

48 EBA, ‘Report with advice for the European Commission on crypto-assets’ (EBA Report 2019) 7.

49 EBA, ‘Opinion on virtual currencies’ (2014) EBA/Op/2014/08. More recently, see art 3 n 18 of Directive (EU) 2018/843 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43.

50 Case C–264/14 *Skatteverket v David Hedqvist* [2015] ECLI:EU:C:2015:718, para. 42.

51 D Arner, R Auer, J Frost, ‘Stablecoins: risks, potential and regulation’ (2020) BIS Working Papers No 905, 6; FSB, ‘Addressing the regulatory, supervisory and oversight challenges raised by “global stablecoin” arrangements: Consultative Document’ (14 April 2020), 8 <https://www.fsb.org/wp-content/uploads/P140420-1.pdf> accessed 30 May 2024.

52 Art 2(2)(a) MiCA Regulation.

assets capable of being classified as financial instruments under art 4(1) n 15 of MiFID II.

3. Forum law issues

Along with increasing cross-border provision of banking and financial services among European users, fintech platforms are also facilitating the emergence of new litigation scenarios involving forum law issues. In particular, this contribution focuses on the most common hypothesis involving a European user of banking and financial platforms, where the investor (payee in payment services) brings a claim against the service provider.

Crowdfunding and ICOs (initial coin offerings) platforms are exceptional, as they have a tripartite structure. Therefore, in the analysis below, some clarifications will be provided about such platforms, where two scenarios will be considered. In the first one, the investor brings a claim against the service provider. In the second one, the investor brings a claim against the project owner of the crowdfunding service or the issuer of the ICOs.

When the service provider is domiciled in a Member State, the provisions of the Brussels I-bis Regulation are applicable. The domicile is identified, in compliance with art 63, at the place where it has its statutory seat, central administration, or principal place of business.

In case the defendant is not domiciled in a Member State, the jurisdiction is not determined by the provisions of Brussels I-bis Regulation, but by the law of the courts of that Member State.⁵³ However, when the investor is a consumer, Brussels I-bis Regulation applies regardless of whether the defendant is domiciled in a third State.⁵⁴ When a European user brings a claim against a service provider domiciled in a State party of the 2007 Lugano Convention,⁵⁵ namely Norway, Iceland and Switzerland, the 2007 Lugano Convention applies.⁵⁶ Its rules are mostly similar to those provided by Brussels I-bis Regulation.

53 Art 6 Brussels I-bis Regulation (EU) 2020/1503 requires that crowdfunding services can only be provided by legal entities established in the EU (art 3). Accordingly, this Regulation does not apply to platforms domiciled in a third State.

54 Art 18(1) Brussels I-bis

55 2007 Lugano Convention (n 16).

56 The convention entered into force on 1 January 2010 in the EU and Norway, while on 1 January 2011 in Switzerland and on 1 May 2011 in Iceland. The convention was also signed by the Kingdom of Denmark. However, Denmark has by letter of 20 December 2012 notified the Commission of its decision to implement the contents of Regulation Brussels I-bis. This means that the provisions of Regulation Brussels I-bis will be applied to relations between the Union and Denmark. See the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2013] OJ L 79/4.

Art 4 Brussels I-bis establishes, as a general rule, the jurisdiction of the courts of the defendant's place of domicile. However, art 7 gives the claimant the option to sue him before the courts of a different Member State in special hypotheses. The relevant ones for the purposes of this contribution refer to contractual matters, torts, and disputes arising from the operations of a branch. Moreover, when the investor can be qualified as a consumer, as he is automatically considered the weaker party of the dispute, according to art 17, a partially different regime applies. Further analysis of contractual, consumer and tort jurisdiction will be provided in the subsections below.

Moreover, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction, certain rules of jurisdiction should apply regardless of the domicile of the parties. In this line, 'in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs' the courts of the Member State of incorporation (*lex societatis*) has exclusive jurisdiction according to art 24 No 2. Such a hypothesis may occur in equity-based crowdfunding and ETOs (equity token offerings) platforms, which both concern the offering of venture capital.

3.1. Contractual jurisdiction

In matters relating to a contract,⁵⁷ Brussels I-bis Regulation gives the investor the option to sue the service provider before the courts of the place of performance of the obligation in question, as long as this is located in a Member State. Art 7(1)(b) Brussels I-bis clarifies that in the cases of the sale of goods and of the provision of services the place of performance is in a Member State where, under the contract, respectively, the goods were delivered, and the services were provided. This special forum often coincides with the domicile of the investor, who will therefore have an interest in bringing proceedings before the court thus identified.

Regarding the first hypothesis, it is crystal clear that financial transactions which involve the transfer of tangible goods in exchange for units of a cryptocurrency might be classified as a contract for the sale of goods under art 7(1)(b) Brussels I-bis. To contrast, it is questionable whether a contract requiring the transfer of tangible goods in exchange for units of a cryptocurrency fits in the

⁵⁷ Contractual matters cover situations in which there is an obligation freely assumed by one party towards another. Among many, see Case C-26/91, *Handte v TMC S* [1992] ECR I-3967; Case C-548/12, *Marc Brogitter v Fabrication de Montres Normandes EURL, Karsten Fräßdorf* [2014] ECLI:EU:C:2014:148, paras 23–25; Case C-196/15, *Granarolo SpA v Ambrosi Emmi France SA* [2016] ECLI:EU:C:2016:559, paras 21–27; Case C-59/19, *Wikingerbhof GmbH & Co. KG v Booking.com BV* [2020] ECLI:EU:C:2020:950, para 32.

same qualification, as, in the absence of any judicial decision confirming this point, there remains some doubt about such a classification.⁵⁸

The second hypothesis of art 7(1)(b) Brussels I-bis, regarding the provision of services, embraces numerous scenarios. In general, it might refer to the duties of information to the client that falls on the service provider, according to the investor protection discipline of different legal instruments. Art 19 of Regulation 2020/1503 requires that crowdfunding platforms provide a series of information to investors, while art 20 of the same regulation imposes the annual disclosure of the default rates of the crowdfunding projects offered on their crowdfunding platform.⁵⁹ Likewise, art 24 of MiFID II provides similar obligations to investment advisors, including robo-advisors. Art 52 of PSD2 lays down a long list of information and conditions which should be provided by the payment service provider to the user. Moreover, art 89 PSD2 clarifies that the payee's payment service provider shall be liable to the payee for the correct execution of the payment transaction.

Finally, according to art 7(5) Brussels, when the dispute arises out of the operations of a branch, agency or other establishments of the service provider, jurisdiction lies also in the courts for the place where the branch, agency or other establishment is situated.

3.2. Consumer jurisdiction

Brussels I-bis Regulation lays down rules of jurisdiction more favourable to the interests of consumers, who are considered weaker parties in the dispute. In this vein, pursuant to art 18(1), a consumer may bring proceedings either in the courts of the Member State in which the service provider is domiciled or,

58 A Dickinson, 'Cryptocurrencies and the Conflict of Laws', in D Fox, S Green (eds), *Cryptocurrencies in Public and Private Law* (OUP 2019) 98. On the one hand, to support the qualification as contract for the sale of goods under art 7(1)(b) Brussels I-bis, it is possible to infer that the CJEU case law adopted a flexible approach focussing on the contract's characteristic performance rather than the promised counter-performance (Case C-381/-08, *Car Trim GmbH v KeySafety Systems Srl* [2010] ECR I-1255). This is also in line with the CJEU case law on VAT legislation affirming that 'the 'bitcoin' virtual currency has no purpose other than to be a means of payment and that it is accepted for that purpose by certain operators': see *Skatteverket v David Hedqvist* (n 50). On the other hand, to contrast such a qualification, it is also worth mentioning that the same CJEU case law affirmed that the characterization of a transaction for VAT purposes is not necessarily to be carried across to the EU private international law instruments (Case C-533/07, *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhors* [2009] ECR I-3327, paras 37-40).

59 The mere circumstance that a certain Member State has been indicated by the crowdfunding service provider for the purposes of art 18(1)(a) of Regulation (EU) 2020/1503 is not sufficient to establish jurisdiction in the courts of that Member State, in the absence of any concrete territorial link between that State and the facts of the case. See P Ortolani (n 42) 330.

regardless of the defendant's domicile, in the courts for the place where the consumer is domiciled.

The investor can be qualified as a consumer if three conditions are met. First, the investor is acting in a context which can be regarded as being outside his trade or profession. Second, the contract between a consumer and a professional has actually been concluded. Third, in compliance with art 17, such a contract “has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities”.⁶⁰

Concerning the first condition, only natural persons acting in a context which can be regarded as being outside their trade or profession can qualify as consumers. Therefore, investors who are legal persons, such as SMEs or start-ups, are automatically excluded.

In addition, rules of jurisdiction referring to consumers do not apply to equity-based crowdfunding and ETOs (equity token offerings) platforms, whereas, as a matter of principle shareholders are not consumers.⁶¹ To contrast, such rules may apply to investors of, for instance, debt-based crowdfunding, ICOs (initial coin offerings) or lending-based crowdfunding platforms, as long as holders of securities other than shares may qualify as consumers.⁶²

Moreover, the distinction between the term ‘consumer’ under Brussels I-bis Regulation and ‘retail client’ under MiFID II needs clarification. In *Petruchová*,⁶³ the Court of Justice specified that those two concepts pursue different objectives. The classification as retail client seeks to protect an investor, in particular as regards the scope of the information that the investment firm is required to provide to him, while the qualification as a consumer affords protection when the court competent to rule on a dispute is determined. Therefore, a person's status as a retail client within the meaning of MiFID II is irrelevant for classifying him as a consumer within the meaning of art 17(1) Brussels I-bis. Analogous reasoning applies also to the relationship between the concept of ‘consumers’ under Brussels I-bis Regulation and ‘non-sophisticated investors’ of crowdfunding platforms introduced by Regulation (EU) 2020/1503, as the definition of non-sophisticated investors builds upon the notion of retail clients established in MiFID II.⁶⁴ Therefore, the notion of ‘non-sophisticated’

60 Among many, see Case C-375/13 *Harald Kolassa v Barclays Bank plc* [2015] ECLI:EU:C:2015:37, para 23.

61 M Gargantini, ‘Prospectus Liability: Competent Courts of Jurisdiction and Applicable Law’, in D Busch, G Ferrarini, JP Franx (eds), *Prospectus Regulation and Prospectus Liability* (OUP 2020) 459–460.

62 *ibid.*

63 Case C-208/18, 3 *Jana Petruchová v FIBO Group Holdings Limited* [2019] ECLI:EU:C:2019:825.

64 Recital n 42 of Regulation (EU) 2020/1503.

investor under Regulation is essentially unrelated to the notion of ‘consumer’ under Brussels I-bis Regulation.⁶⁵

Regarding the second condition, since the dispute should concern a contract actually concluded between the parties, subsequent acquisitions of the same financial instrument are excluded. Therefore, financial transactions established in the primary market between issuer and underwriter fall under this hypothesis, while contracts concluded between issuer and subsequent investors intervened in the secondary market are not relevant. Moreover, contracts concluded in the secondary market between financial intermediary and investor may fall within the scope of art 17.⁶⁶ Moreover, it implies that consumer jurisdiction does not apply in matters relating to torts; the only exception refers to an action in tort brought by a consumer that is indissociably linked to the contract actually concluded between that consumer and the seller or supplier.⁶⁷ However, this requires direct communication between the parties, where the professional makes misleading representations to induce the consumer to enter into a contract. In the case of standard communications to the market, as in the case of the publication of the key investment information sheet of the crowdfunding platforms, the provision of misleading, inaccurate, or incomplete information should not be considered indissociably connected with the conclusion of a contract.⁶⁸

With reference to the third condition, art 17 requires that the service provider pursues its activities in the Member State of the consumer’s domicile or, by any means, directs them to that Member State, and the contract falls within the scope of such activities (so-called ‘targeting activity test’). As clarified by the CJEU in *Pammer and Alpenhof*,⁶⁹ the mere accessibility of the trader’s (in this case, the service provider’s) or the intermediary’s website in the Member State in which the consumer is domiciled is not sufficient. Other pieces of evidence from which it may be concluded that the service provider’s activity is targeted to the Member State of the consumer’s domicile are required.⁷⁰ Elements which might be relevant for fintech digital platforms are, for instance, the use of the language and the payment currency of the Member State of the consumer’s domicile, as well as the direction of online marketing to the users of that country. For instance, an ICO might be considered as directing its activities towards a Member State on the basis of the language employed in the white paper, on

65 P Ortolani, (n 42).

66 Harald Kolassa (n 60) para 28. See P Ortolani (n 42) 332; I Kunda, ‘Crowdfunding in the EU: private international law issues by design’ in E Macchiavello (ed), *Regulation on European Crowdfunding Service Providers for Business* (Edward Elgar 2022) 537.

67 Case C–500/18, *AU C Reliantco Investments LTD e Reliantco Investments LTD Limassol Sucursala Bucuresti* [2020] ECLI:EU:C:2020:264, para 73.

68 P Ortolani (n 42) 332–333.

69 Joined Cases C-144/09 and C-585/08, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG and Hotel Alpenhof GesmbH v. Oliver Heller* [2010] ECR I-12527, para 69.

70 *ibid* para 93.

the currency used to buy tokens, and on the languages or extensions used by the website on which the white paper is published.⁷¹ To contrast, digital platforms may put in place technical measures with the aim to restrict the territories to which their activities are directed, for instance by disabling the registrations or transactions of users from certain countries on the basis of the IP address used.⁷² The targeting activity test is simpler with reference to crowdfunding platforms, as art 14 of Regulation (EU) 2020/1503 establishes a register of all crowdfunding service providers, with the indication of a list of the Member States in which the service provider has notified its intention to provide its activities. Henceforth, such a list precisely identifies the Member States where the crowdfunding service providers direct their activities for the purposes of art 17 Brussels I-bis Regulation. As a side effect, crowdfunding platforms might strategically exclude certain Member States from the list to avoid being sued before their jurisdiction (eg, by negatively assessing the length of proceedings).⁷³

3.3. Tortious jurisdiction

In matters relating to tort, delict or quasi-delict,⁷⁴ art 7(2) Brussels I-bis Regulation gives the investor the option to sue the service provider before the courts of the place where the harmful event occurred or may occur (*locus damni*). Whether the place of the happening of the event which may give rise to liability and the place where that same event results in damage are not identical, according to established CJEU case law, the harmful event is deemed to take place both in the place where the damage occurs and in the place where the events giving rise to that damage took place.⁷⁵ This hypothesis might occur when the information provided in the key investment information sheet pursuant to art 23 of Regulation (EU) 2020/1503 is allegedly misleading, incorrect, or incomplete, or in cases involving, for instance, alleged fraudulent misrepresentations inducing a transfer of crypto assets.⁷⁶

71 Some uncertainties might raise when, as often happens, the white paper has been written in English only, published on a common website extension (like .com), and the ICO presupposes an exchange among crypto tokens, not involving fiat currency. See I.M. Barsan, 'Legal Challenges of Initial Coin Offerings (ICO)' [2017] *Revue Trimestrelle de Droit Financier* 54, 64; B Steinrötter, 'International Jurisdiction and Applicable Law', in P Maume, L Maute, M Fromberg (eds), *The Law of Crypto Assets. A Handbook* (Beck Hart Nomos 2022) 71, 79.

72 I Kunda (n 66) 538.

73 *ibid* 329.

74 The concept of matters relating to tort, delict or quasi-delict within the meaning of art 7(2) Brussels I-bis covers all actions which seek to establish the liability of a defendant and are not matters relating to a contract. Among many, see Case C-167/00, *VKI v Karl Heinz Henkel* [2002] ECR I-08111, para 36.

75 Case 21/76, *Handelskvekerij G. J Bier BV v Mines de Potasse d'Alsace SA* [1976] ECR I-1735.

76 The pseudonymity of users on the DLT system does not hinder the identification of the *locus damni*. Even though the place where the events giving rise to the damage took place remains

On several occasions, the CJEU has been called to clarify what is the place where the damage occurs in case of financial loss. Nonetheless, the identification of the *locus damni* still leaves many questions unanswered.⁷⁷ First, the Court pointed out that this term cannot be interpreted “so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere”.⁷⁸ In this vein, it does not refer to the place where the claimant is domiciled or where his assets are concentrated by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Member State (*Kronhofer*).⁷⁹ The mere fact that the applicant has suffered financial consequences does not justify the attribution of jurisdiction to the courts of the applicant’s domicile if both the events causing damage and the damage itself occurred in the territory of another Member State. Such an attribution of jurisdiction is justified if the claimant’s domicile is in fact the place in which the events giving rise to the damage took place or the damage occurred, namely the place where his bank account is established (*Kolassa*).⁸⁰ Nonetheless, in the absence of any other connecting factor, the place where the harmful event occurred ‘may not be construed as the place in a Member State where the damage occurred, when that damage consists exclusively of financial damage which materializes directly in the applicant’s bank account and is the direct result of an unlawful act committed in another Member State’ (*Universal Music*).⁸¹ Lastly, in a prospectus liability case, the Court identified some of the relevant circumstances that also contribute to attributing jurisdiction to the court of the place where is located the investor’s bank account. These are, for instance, the fact that the claimant, in connection with the financial transaction at issue, had dealings only with banks located in the same Member State, that the relevant prospectus had been notified to the supervisory bank of the same Member State, as well as that she signed in the same Member State the contract obliging her to make the investment, which has resulted in a definitive reduction in her assets (*Löber*).⁸²

unknown as the identity of the users, however the place where the damage occurs can be easily identified by the claimant.

77 Commission, Directorate-General for Justice and Consumers, Rass-Masson and others, *Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation): Final Report*, (Publication Office of the European Union 2023), 274.

78 Case C-364/93, *Marinari* [1995] ECR I-2719, para 14.

79 Case C-168/02, *Rudolf Kronhofer v Marianne Maier and Otet al* [2004] ECR I-06009.

80 *Harald Kolassa* (n 60).

81 Case C-12/15, *Universal Music International Holding BV v Michael Tétréault Schilling, Irwin Schwartz, Josef Brož* [2016] ECLI:EU:C:2016:449.

82 Case C-304/17, *Helga Löber v Barclays Bank PLC* [2018] ECLI:EU:C:2018:701.

The circumstances identified by the CJEU case law on prospectus liability may be considered relevant also in crowdfunding-related disputes regarding allegedly misleading, incorrect, or incomplete information provided in the key investment information sheet. Unlike the prospectus, the key investment information sheet is not subject to verification or approval by competent authorities. Nonetheless, it must be made available ‘in at least one of the official languages of [the Member State where the investor is domiciled] or in a language accepted by the competent authorities of that Member State’ (art 23(3) of Regulation (EU) 2020/1503). This circumstance, together with the location of the investor’s bank account and the language used in the document, may be invoked to establish jurisdiction on the basis of art 7(2) Brussels I-bis.⁸³

4. Applicable law issues

Disputes arising from the cross-border provision of banking and financial services among European users generally fall under the scope of, respectively, Rome I Regulation on contractual obligations and Rome II Regulation on non-contractual obligations.⁸⁴ Both Regulations have similar limitations in material scope referring to financial instruments and the law of companies. Nonetheless, these exceptions, analysed below, have limited significance in relation to the identification of the law applicable to banking and financial platforms.

First, according to art 1(2)(d) Rome I Regulation and art 1(2)(c) Rome II Regulation, they do not apply to, respectively, contractual and non-contractual obligation ‘arising under bills of exchange, cheques and promissory notes and other negotiable instruments’, but only ‘to the extent that the obligations under such other negotiable instruments arise out of their negotiable character’. As a result, for negotiable instruments, such as stocks and bonds in the financial market, the exclusion only applies with regard to obligations arising out of their negotiable character. Furthermore, neither the contracts pursuant to which such instruments are issued nor contracts for the purchase and sale of such instruments are excluded.⁸⁵

Second, according to art 1(2)(f) Rome I and art 1(2)(d) Rome II Regulations, they do not apply to ‘questions governed by the law of companies and other bodies’. As a result, the law that is applicable to the rights and obligations arising from shares is not determined by the Regulations, since it is part of the

83 P Ortolani (n 42) 335.

84 Both Rome I and Rome II Regulations have universal application, meaning that the law they identify shall be applied whether or not it is the law of a Member State: see arts 2 Rome I and 3 Rome II.

85 M Giuliano, P Lagarde, ‘Report on the Convention on the law applicable to contractual obligations’ [1980] OJ C 282.

internal organization of the company. The conflict of laws rules of the law of the issuing company (*lex societatis*) apply. This might be the case with equity-based crowdfunding and ETOs (equity token offerings) platforms.

4.1. Contractual obligations

Rome I Regulation determines the law applicable to contractual obligations in situations involving a conflict of laws.⁸⁶ As the Regulation promotes party autonomy and freedom of choice, art 3(1) provides that ‘a contract shall be governed by the law chosen by the parties’. In the absence of a choice-of-law agreement,⁸⁷ art 4 lays down the criteria to determine the applicable law.

As most of the scenarios involving fintech platforms shall be generally qualified as provision of services, according to art 4(1)(b), the law of the country where the service provider has his habitual residence applies.⁸⁸ This is the case of the duties of information to the client that falls on the service provider. For instance, in relation to crowdfunding platforms, art 19 of Regulation 2020/1503 requires that crowdfunding platforms provide a series of information to investors, while art 20 of the same regulation imposes the annual disclosure of the default rates of the crowdfunding projects offered on their crowdfunding platform. Moreover, it might also refer to the duty to properly undertake the suitability assessment of investment services or financial instruments in investment advice or portfolio management services that fall on investment firms. According to art 54 of Regulation (EU) 2017/565, such responsibility shall not be reduced by the use of an electronic or AI system, as occurs in robo-advisor platforms.⁸⁹

86 As most of litigation scenarios involving fintech platforms does not refer to the content of the financial instrument, but on proprietary issues, namely who is the owner of the instrument, Rome I is generally applicable. See M Lehmann (n 13) 8.

87 On this point, see s 5 below.

88 As specified in recital n 17 of Rome I, ‘the concept of “provision of services” and “sale of goods” should be interpreted in the same way as when applying art 5 of Regulation (EC) No 44/2001 [Regulation Brussels I]’, now repealed by Brussels I-bis.

89 According to art 31 of Commission Delegated Regulation (EU) 2017/565 as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2016] OJ L 87, service provider’s civil liability is independent by the development of the algorithm in house or in outsourcing. This provision offers a strengthen protection to the investor, who, in case of outsourcing, shall not bring a tortious claim against the AI developer. Moreover, it overcomes the issues related to non-contractual civil liability claims for damage caused by AI-enabled products and services. On this point, see the proposal for a directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) [2022] COM(2022) 496 final. However, for a peculiar example of non-contractual obligation involving a robo-advisor platform (called AFTAS) and a discussion of possible solutions, see British Institute of International and Comparative Law (BIICL), ‘Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations’ (2021) 79.

A different regime applies to contracts concluded within a ‘multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments’ (multilateral trading facility or MTF). To ensure uniformity in the terms and conditions of an issuance or an offer on such systems, art 4(1)(h) lays down the applicability of the same law that governs the MTF. This might be the case of robo advisors offering investment advice on financial instruments traded in an MTF system.

However, irrespective of the law applicable to the contract under the Regulation, art 9(1) imposes the application of ‘provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation’.⁹⁰ This provision might be of some relevance for fintech platforms, as financial markets are subject to rules that serve important public interests, such as preventing risks to the stability of the financial system. Examples of overriding mandatory provisions in finance are rules prohibiting money laundering, terrorism financing or tax evasion,⁹¹ as well as the financial market discipline regulated by the national rules implementing MiFID II.⁹²

4.1.1. Consumer contracts

For the purposes of the Rome I Regulation, financial services provided by a professional to a consumer (the investor) are subject to art 6, according to which the contract is governed by the law of the country where the consumer has his habitual residence.⁹³ The same conditions set out in art 17 Brussels I-bis Regulation for the consumer protection rule applies.⁹⁴

According to art 6(2), as Rome I Regulation promotes party autonomy and freedom of choice, the parties may freely choose another law applicable to the contract. However, such a choice may not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law of the country where the consumer has his habitual residence. This is the case of the information and exploration duties in relation to investment services under MiFID II.⁹⁵ In this connection, the national pro-

⁹⁰ See also *Unamar* (n 152).

⁹¹ M Lehmann, ‘Private international law and finance: nothing special?’ [2018] NIPR 3, 15.

⁹² M V Benedettelli, ‘Profili internazionalprivatistici della disciplina comunitaria dei mercati finanziari: la Direttiva MIFID tra conflitti di legge e conflitti di giurisdizione’ (2010) *Rivista di diritto societario*, 63.

⁹³ Recital n 26 of Rome I, which also specifies that ‘when a reference is made to terms and conditions governing the issuance or offer to the public of transferable securities or to the subscription and redemption of units in collective investment undertakings, that reference should include all aspects binding the issuer or the offeror to the consumer, but should not include those aspects involving the provision of financial services’.

⁹⁴ Recital n 24 of Rome I. See also s 3.2.

⁹⁵ M Lehmann (n 13) 15.

visions sanctioning a violation of the duties in art 24 MiFID II in relation to investment advice (including robo advisors) are mandatory provisions of the State of habitual residence of the investor-consumer. As a result, they may not be derogated by the choice of the parties.

Nonetheless, the consumer protection rule often does not apply to fintech platforms, due to the exceptions laid down in art 6(4). On the one hand, art 6(4) (e) excludes the application of consumer law to contracts concluded within an MTF system. On the other hand, art 6(4)(d) sets out that rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts. The aim is to avoid the application of different laws to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering.⁹⁶ In this vein, the special consumer regime is not applicable for investment and utility tokens with an investment focus.⁹⁷ However, the exclusion refers to the financial instrument itself and not to other contracts whose object is the financial instrument. In this vein, contracts for the purchase of financial instruments are not covered by this exclusion and are, therefore, subject to art 6.⁹⁸ Moreover, the same provision excludes the application of the consumer law to ‘rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service’, to preserve the uniformity in the terms and conditions of an issuance or an offer. This might be the case with an ICOs (initial coin offerings) platform.

4.1.2. *Applicable law in financial services related to crypto assets: a conundrum?*

Major issues arise in determining the law applicable in financial services related to crypto assets, as transfers in DLT systems challenge the traditional concepts and methods of conflict of laws.⁹⁹ Crypto assets are intangible, have different financial features evolving in parallel with technological developments, have more than one usage spanning from payment to investment services, and have a cross-border reach, involving in the blockchain a multitude of anonymous actors.¹⁰⁰ In addition, conflict of laws norms operate principally on the

96 Recital n 28 of Rome I.

97 B Steinrötter (n 71) 71, 81.

98 FJ Garcimartín Alférez, ‘The Rome I Regulation: Exceptions to the Rule on Consumer Contracts and Financial Instruments’ [2009] JPIL 85, 90.

99 To date, ‘the analysis of the conflict of laws implications of crypto assets’ transactions is still in its infancy’: see B Steinrötter (n 71) 71, 72.

100 A Dickinson, ‘Cryptocurrencies and the Conflict of Laws’, in D Fox and S Green (eds), *Cryptocurrencies* (n 58) 94, 97; C Bell and J Cainer, ‘Decrypting the Situs Conflicts of Laws Challenges in Cryptoasset Litigation’ (*Outer Temple Chamber*, 20 October 2020), 2-3 <<https://>

basis of territorial connecting factors, which presupposes the possibility of precisely locating acts and actors within the territory of a particular legal system.

The first point to consider relates to the question of the internationality of crypto assets transfers on the blockchain for private international law purposes. In particular, it is debated whether such transactions should be considered to be ‘intrinsically transnational’,¹⁰¹ or whether this should be verified on a case-by-case basis. In the latter case, a private international law analysis in all cases would be a costly and time-consuming exercise. In addition, the criteria traditionally used in private international law, such as the place of residence of the parties, have limited utility due to the anonymity of the actors operating on the blockchain. Furthermore, the identification of pre-set and precisely criteria of internationality does not suit the blockchain universe, which is characterised by its flexible and fast-evolving nature.¹⁰²

Moreover, there is no uniformity in the classification of crypto assets. First, it is debated whether crypto assets that are used in contractual relations as remuneration could be classified as currency for the purposes of private international law. Consequently, the *lex monetae* (law of the Country issuing the currency) would apply, thus raising some difficulties, as crypto assets are normally not issued by States.¹⁰³ Second, digital assets have been considered as a ‘distinct third category of personal property’,¹⁰⁴ leading to the application of the connecting factor used in the area of international property law, namely the *lex situs* (law of the country where the property is located).¹⁰⁵ However, this solution collides with the difficulties in localisation of the crypto asset in DLT systems, deriving

www.outertemple.com/wp-content/uploads/2020/10/Decrypting-the-Situs.pdf> accessed 30 May 2024.

101 On the international nature of the blockchain, see F Guillaume, ‘Aspects of private international law related to blockchain transactions’, in D Kraus, T Obrist, O Hari (eds), *Blockchains, Smart Contracts, Decentralized Autonomous Organizations and the Law* (Edward Elgar 2019) 59.

102 B Yüksel Ripley, ‘When is a cryptocurrency transfer international in distributed ledger technology-based systems?’ (2023) EU and Comparative Law Issues and Challenges Series (ECLIC) 196.

103 F Krysa, ‘Taxonomy and Characterisation of Crypto Assets’, in A Bonomi, M Lehmann, S Lalani (eds), *Blockchain and Private International Law* (Brill 2023) 203. Nonetheless, El Salvador and the Central African Republic recently adopted the bitcoin as a legal tender. See B Yüksel Ripley, ‘The Law Applicable to Crypto Assets: What Policy Choices Are Ahead of Us?’, in A Bonomi, M Lehmann, S Lalani (eds), *Blockchain and Private International Law* (Brill 2023) 266 ff.

104 Law Commission, *Digital assets: Consultation paper* (Law Com, No 256, 28 June 2022) 69.

105 This is the approach adopted by English scholars; among many, see Financial Markets Law Committee (FMLC), ‘Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty’ (2018) <http://fmlc.org/wp-content/uploads/2018/05/dlt_paper.pdf> accessed 3 July 2023, paras 4.4–4.8; UK Jurisdiction Taskforce, ‘Legal statement on crypto-assets and smart contracts’ (*Tech Nation*, November 2019), 49–57; A Dickinson, ‘Cryptocurrencies and the Conflict of Laws’, in D Fox and S Green (eds), *Cryptocurrencies* (n 58) 94, 126.

from their decentralised and distributed nature.¹⁰⁶ Similar issues emerge also in relation to other types of intangibles with no physical location, such as money debts, shares, rights of action, and intellectual property. In these cases, conflict of laws solutions have been developed ascribing them to an artificial or fictional legal situs where they can be pursued or enforced. Nonetheless, such a solution has not been developed yet for crypto assets.¹⁰⁷ Finally, it has been argued that crypto assets could be assimilated into a form of intangible property, which consists of a ‘bundle of ‘entitlements’ arising by reason of participation’ in the blockchain.¹⁰⁸ In this vein, entitlements established between the participants of the blockchain (assignors) and investors (transferees) for the assignment of crypto assets might fall under the conflict of laws rules on assignments. Unfortunately, the scope of application of the blockchain is much wider than that of assignment, as the transfer of intellectual property rights or transfer physical assets, whether movables or immovables, through tokenization.¹⁰⁹

As a result, the existing private international law legal framework does not fit for the purpose of ensuring legal certainty in the determination of applicable law related to crypto assets.¹¹⁰

Such a conundrum also afflicts the EU private international law legal framework. Whilst the possibility to encompass a unitary approach through the

106 Financial Markets Law Committee (FMLC), ‘Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty’ (2018) <http://fmlc.org/wp-content/uploads/2018/05/dlt_paper.pdf> accessed 3 July 2023, paras 6.1–6.28.

107 B Yüksel Ripley, ‘The Law Applicable to (Digital) Transfer of Digital Assets: The Transfer of Cryptocurrencies via Blockchains?’ in MM Fogt (ed), *Private International Law in an Era of Change* (Edward Elgar 2024); F Villata, L Válková, ‘Property Rights Over Cryptocurrencies: A Conflict-Of-Laws Perspective’ (2023) EU And Comparative Law Issues and Challenges Series 53ff.

108 This is the approach taken in the Swiss Federal Act to Adapt Federal Law to Developments in Distributed Ledger Technology (‘DLT Act’), see *Bundesgesetz zur Anpassung des Bundesrechts an Entwicklungen der Technik verteilter elektronischer Register vom 25. September 2020*, RO 2021 33.

109 M Lehmann, ‘Who Owns Bitcoin? Private Law Facing the Blockchain’ (2019) EBI Working Paper Series No 42, 17 <Lehmann, Matthias, Who Owns Bitcoin? Private Law Facing the Blockchain (June 11, 2019). 21 Minn. J.L. Sci. & Tech. 93 (2019), European Banking Institute Working Paper Series 2019 – no. 42, <<https://ssrn.com/abstract=3402678>> accessed 30 May 2024; C Bell and J Cainer (n 100), 13.

110 In January 2023, the International Institute for the Unification of Private Law (UNIDROIT) launched a public consultation regarding a set of ‘Draft Principles and Commentary on Digital Assets and Private Law’, UNIDROIT 2023 Study LXXXII – PC; for a preliminary overview, see M Lehmann, ‘Private International Law in the Proposal by the UNIDROIT Working Group on Digital Assets’ (*EAPIL blog*, 1 February 2023) <https://capil.org/2023/02/01/private-international-law-in-the-proposal-by-the-unidroit-working-group-on-digital-assets/> accessed 30 May 2024. Moreover, in March 2023, a joint project among the Hague Conference of Private International Law and UNIDROIT on this topic has been launched; see HCCH Council of General Affairs and Policy, ‘HCCH-UNIDROIT Project on Law Applicable to Cross-Border Holdings and Transfers of Digital Assets and Tokens’ (March 2023) prel doc No 3C.

adoption of a single law to the DLT system would have solved the problem at its roots,¹¹¹ however, this option cannot arise from the application of the rules of the Rome I Regulation. The single law applicable to MTF systems according to art 4(1)(h) cannot generally operate in relation to the blockchain.¹¹² Eventually, it applies to the operation of a trading platform for crypto-assets, as it is deemed equivalent to the operation of a multilateral trading facility.¹¹³ Therefore, under the Rome I Regulation, different conflict of laws norms apply on the basis of the type of transaction under analysis.

Financial transactions which involve the transfer of tangible goods in exchange for units of a cryptocurrency might be classified as a contract for the sale of goods under 4(1)(a) Rome I.¹¹⁴ As a result, the law of the country where the seller has his habitual residence applies. In this vein, the use of cryptocurrency as the medium of exchange does not present particular difficulties in terms of the identification of applicable law.¹¹⁵

Greater concerns emerge in the remaining hypotheses. The criteria of the law of the habitual residence of the service providers, laid down by art 4(1)(b), leaves uncertainty, due to the multiple service providers, spread in different countries, participating in the blockchain. The same issues arise in relation to art 4(2), according to which, where the contract is not covered by art 4(1), the ‘law of the country where the party required to effect the characteristic performance of the contract has his habitual residence’ applies, and art 4(4), according to which ‘the law of the country with which it is most closely connected’ applies.¹¹⁶

111 To contrast, for the applicability of a unitary approach (‘one-system-one-law’) to permissioned cryptocurrency systems, see B Yüksel Ripley, ‘Cryptocurrency Transfers in Distributed Ledger Technology-Based Systems and Their Characterisation in Conflict of Laws’, in J Borg-Barthet and others (eds), *From Theory to Practice in Private International Law* (Bloomsbury Publishing 2024); the Author investigates on the applicability of a unitary approach (‘one-system-one-law’) to permissioned cryptocurrency systems, and of a segmented approach for permissionless in an analogy to EFTs (electronic funds transfers). For a scholarly suggestion for applying the *lex fori* as an option in the absence of a better solution, see F Guillaume, ‘Aspects of private international law related to blockchain transactions’, in D Kraus, T Obrist, O Hari (eds), *Blockchains, Smart Contracts, Decentralised Autonomous Organisations and the Law* (Edward Elgar 2019) 49, 79.

112 A Dickinson, ‘Cryptocurrencies and the Conflict of Laws’, in D Fox and S Green (eds), *Cryptocurrencies* (n 58) 94, 111.

113 Art 60(3)(b) MiCA Regulation.

114 The same considerations apply with regards to art 7(1)(a) Brussels I-bis, in relation to the identification of forum law.

115 A Dickinson, ‘Cryptocurrencies and the Conflict of Laws’, in D Fox and S Green (eds), *Cryptocurrencies* (n 58) 93, 98; G Rühl, ‘Smart (legal) contracts, or: Which (contract) law for smart contracts?’, in B Cappiello and G Carullo (eds), *Blockchain, Law and Governance* (Springer 2020) 170.

116 A Dickinson, ‘Cryptocurrencies and the Conflict of Laws’, in D Fox and S Green (eds), *Cryptocurrencies* (n 58) 93, 112. Regarding the opportunity to apply the escape clause of art 4(3) Regulation Rome I, see B Steinrötter (n 71) 71, 83.

4.2. Non-contractual obligations

Rome II Regulation applies to cross-border disputes arising from non-contractual obligations, as in the case of alleged violations of prospectus rules.¹¹⁷ For instance, in crowdfunding platforms, this hypothesis might occur when the information provided in the key investment information sheet pursuant to art 23 of Regulation (EU) 2020/1503 is allegedly misleading, incorrect, or incomplete. The Regulation has also been applied in a situation involving the fraudulent transfer of millions of dollars worth of cryptocurrency performed by hackers against a cryptocurrency exchange.¹¹⁸

In the absence of a choice-of-law agreement,¹¹⁹ the general rule laying down the criteria to determine the law applicable to a non-contractual obligation arising out of a tort applies. However, Regulation Rome II does not provide special conflict of laws rules for financial torts, leaving many questions on the law applicable to this matter still unsolved.¹²⁰

According to art 4(1), this is the law of the country in which the damage (namely, the financial loss) occurs, ‘irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur’. This provision shall be interpreted consistently with art 7(2) Brussels I-bis, referring to tortious jurisdiction,¹²¹ and the related CJEU case law.¹²² As mentioned before,¹²³ the Court identified the country where the financial loss occurred on the basis of ‘a combined multifactor test with variable criteria’,¹²⁴ depending on circumstances linked to each individual investor. Such an approach favours flexibility to the detriment of legal certainty, as makes potential liability unforeseeable for the tortfeasor.¹²⁵

117 Arguing that investment tokens can be classified as securities and, as a consequence, EU initial disclosure regulation applies to ICOs, requiring the issuer to draw up a prospectus, see P Maume, ‘Initial Coin Offerings and EU Prospectus Disclosure’ [2020] 185, 191.

118 *LMN v. Bitfyer Holdings Inc and others* [2022] EWHC 2954 (Comm), 29 November 2022.

119 On this point, see s 5 below.

120 On the opportunity of reforming Rome II so as to add a special conflict rule for financial torts, see M Lehmann (n 13) 25; F Rieländer, ‘Financial torts and EU private international law: will the search for the place of “financial damage” ever come to an end?’ [2022] JPIL 28, 53; British Institute of International and Comparative Law (BIICL), ‘Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations’ (2021) 33.

121 Recital n 7 of Rome II.

122 *Universal Music* (n 81); Case C-304/17, *Helga Löber v Barclays Bank PLC* (n 82).

123 See para 3.3.

124 M Lehmann (n 13) 18.

125 Art 4(1) has been also applied in a situation involving the fraudulent transfer of millions of dollars-worth of cryptocurrency performed by hackers against a cryptocurrency exchange. The High Court of Justice of England and Wales identified the *locus damni* in England, as this was the place where the relevant cryptocurrencies were located at the time of the hack, as this is the place of incorporation of the exchange damaged and where it conducts its main

The application of art 4(2) causes another issue. It sets out that, if both parties have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. This provision might give rise to a distortion that contrasts with the principle of equal investor treatment.¹²⁶ Therefore, the application of this norm is not appropriate for a harmonized internal capital market.¹²⁷

art 4(3) states that, if the tort is manifestly more closely connected with a country other than that determined through arts 4(1) or 4(2), the law of that other country shall apply. On first scrutiny, this provision seems to overcome fragmentation issues and legal uncertainty by applying the same law to all financial torts committed by the same issuer or on the same market. However, it is not the proper device for achieving such a goal. On the one hand, as an exception clause, this norm should not be used to regulate an entire category of torts, such as financial torts.¹²⁸ On the other hand, the criterion of close connection gives rise to different interpretations, spanning from the law of the country where the issuer has its registered office to the law of the place where the relevant market is located, or, where relevant, the home country as defined under the rules for prospectus approval.¹²⁹

It is disputed in legal doctrine whether prospectus liability might be qualified as *culpa in contrahendo*, regulated by art 12 Rome II. On the one hand, recital n 30 Rome II seems to support this position as qualifies ‘the violation of the duty of disclosure’ as pre-contractual liability. The advantage of such a characterization is that the conflict rules for contractual relationships would be applicable. On the other hand, the text of art 12 Rome II does not fit with prospectus liability cases, as refers to obligations arising out of ‘dealings prior to the conclusion of a contract’. Generally, the issuer and the investor have no contact before the acquisition of the security.¹³⁰

5. Agreements on jurisdiction and applicable law

In the vast majority of cases, the general terms and conditions of banking and financial platforms include choice-of-court and choice-of-law clauses. Such

business. In addition, this is also where the financial loss took place, as the cryptocurrencies was taken from the exchange’s control See *LMN v. Bitfyer Holdings InC and others* [2022] EWHC 2954 (Comm), 29 November 2022, par. 20.

126 M Lehmann (n 13) 18.

127 B Steinrötter (n 71) 71, 101.

128 M Lehmann (n 13) 23.

129 Among many, see M Lehmann, ‘Prospectus Liability and Private International Law Assessing the Landscape after the CJEU’s Kolassa Ruling (Case C-375/13)’ [2016] JPIL 318, 325–326; M Gargantini, ‘Prospectus Liability’ (n 61) 453–454.

130 M Lehmann, ‘Prospectus Liability’ (n 129) 338; M Gargantini, ‘Prospectus Liability’ (n 61) 454.

clauses provide legal certainty and foreseeability on the service provided, with mutual benefits for the parties. Moreover, as national legal systems adopt significantly different regimes on banking and financial matters, these agreements might ensure that potential disputes are decided by the court and on the basis of the law which is better equipped to deal with that particular type of legal relations.

5.1. Choice-of-court agreements

The parties, irrespective of their domicile, can determine the jurisdiction of ‘a court or the courts of a Member State’ by concluding a choice-of-court agreement. In this case, according to art 25 Brussels I-bis, the jurisdiction shall be exclusive unless the parties have agreed otherwise. An additional advantage of choice-of-court agreements is the derogation from the *lis pendens* mechanism so that the chosen court, according to art 31(2), will not have to stay the proceedings, even when it is not the court first seized.¹³¹

To meet the formal requirements listed in art 25(1) Brussels I-bis, the contract signed by the parties shall contain an express reference to those general conditions and shall be checked by a party exercising reasonable care.¹³² This is possible also using ‘a communication by electronic means which provides a durable record of the agreement’. This is the case of jurisdiction clauses included in the general terms and conditions of a contract concluded by ‘click-wrapping’, as often happens in digital platforms. As clarified by the CJEU, this method fulfils the in-writing requirement of art 25(1)(a) Brussels I-bis when it makes it possible to print and save the text of those terms and conditions before the conclusion of the contract.¹³³ Crowdfunding platforms deserve a different analysis, as jurisdiction agreements are generally included in the key investment information sheet that the crowdfunding service provider is obliged to publish, according to art 23 of Regulation 2020/1503. Whether considering the key investment information sheet analogous to the prospectus, the CJEU case law on jurisdiction clauses contained in the prospectus applies. In *Profit Investment*,¹³⁴ the CJEU stated that where the choice-of-court clause is included in the prospectus concerning the issue of bonds, the in-writing requirement is met only if the contract signed by the parties on the primary market expressly mentions the acceptance of that clause or contains an express reference to that prospectus. In crowdfunding, this would require that the contract concluded between the

131 P Ortolani (n 42) 337.

132 Case 24/76, *Estasis Salotti di Colzani Aimo et Gianmario Colzani v Riiwa Polstereimaschinen GmbH* [1976] ECR I-1832.

133 Case C-322/14, *El Majdoub v CarsOnTheWeb* [2015] ECLI:EU:C:2015:334, para 40; for similar conclusions on art 23(1)(b) and (c) of the 2007 Lugano Convention, see Case C-358/21, *Tilman SA v Unilever Supply Chain Company AG* [2022] ECLI:EU:C:2022:923, para 59.

134 Case C-366/13, *Profit Investement v Ossi et al* [2016] ECLI:EU:C:2016:282.

investor and the project owner should contain an express reference to the jurisdiction clause in the key information sheet.¹³⁵ In the absence of this condition, it is not excluded that the insertion of a jurisdiction clause into a prospectus (ie the key investment information sheet in crowdfunding platforms) concerning the issue of bonds may be regarded as a form which accords with a usage in international trade or commerce, for the purpose of art 25(1)(c) Brussels I-bis.¹³⁶ Hence, two conditions are required. First, such conduct must be generally and regularly followed by project owners in the same sector. Second, the parties must have previously had financial relations between themselves or with other parties, or the conduct in question must be sufficiently well known to be considered an established practice. The latter hypothesis might apply to crowdfunding platforms as well.

Jurisdiction agreements choosing the court of a third State are outside the scope of Brussels I-bis Regulation. Whether a European user is involved, and the choice falls on a court of Iceland, Norway or Switzerland, the rules of the 2007 Lugano Convention apply. In the same vein, the jurisdiction agreement is governed by the provisions of the Hague Convention of 2005 when it identifies the courts of Mexico, Montenegro, Singapore or the United Kingdom. However, this convention does not apply to consumer contracts.¹³⁷ In the remaining hypotheses, the private international law norms of the court in which the action is brought (*lex fori*) apply.

5.1.1. Restrictions to jurisdiction agreements

Party autonomy is not without limitation, as art 25(4) Brussels I-bis lays down restrictions to the legal force of jurisdiction agreements in specific cases. In particular, the provisions referring to exclusive jurisdiction and consumer contracts might be relevant for fintech digital platforms.

On the one hand, choice-of-court clauses have no legal force if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of art 24. Such a hypothesis may occur in equity-based crowdfunding and ETOs (equity token offerings) platforms, which both concern the offering of venture capital.

On the other hand, a special procedural regime applies to consumer contracts. Art 19 Brussels I-bis limits party autonomy to avoid the choice-of-court clause derogating the rules of jurisdiction more favourable to the interests of consumers, who are considered weaker parties in the dispute. Jurisdiction agreements are admitted in three hypotheses, which drastically restrict the scope of application of such norms to Fintech digital platforms. First, according to art

¹³⁵ I Kunda (n 66) 535–536.

¹³⁶ *Profit Investment* (n 134) para 50.

¹³⁷ Art 2(1)(a) of the 2005 Hague Convention.

19(1)(a), the jurisdiction agreement shall be entered into after the dispute has arisen. As this means the consumer gives up the more favourable jurisdiction of the court of the Member State where he is domiciled, this case has limited practical application. Second, according to art 19(1)(b), the agreement allows the consumer to bring proceedings in courts other than those indicated in the Regulation. However, this would be in clear contrast with the interest of the professional (the service provider), who might aim at concentrating all litigations in a single forum.¹³⁸ Third, according to art 19(1)(c), the agreement chooses the law of the Member State where both the parties are, at the time of conclusion of the contract, domiciled or habitually resident.

The restrictions related to jurisdiction agreements in consumer contracts might also derive from consumer protection law, namely Directive 93/13/EEC (Unfair Contract Terms Directive or UCTD).¹³⁹ Art 3(1) UCTD establishes that ‘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’. This also includes clauses restricting the consumer’s right to take legal action, such as a choice-of-court agreement which establishes the exclusive jurisdiction of the service provider’s domicile. Hence, such an agreement obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile, making it difficult for him to enter an appearance.¹⁴⁰ The national court in which the action is brought is required to examine, of its own motion, the unfairness of a contractual term with an assessment on a case-by-case basis.¹⁴¹ Consequently, it has been contended that, if the unfairness of the jurisdiction clause is established, the choice-of-court clause is invalid while the default rule of art 18(1) Brussels I-bis applies.¹⁴² Such a position seems to be in line with the Court of Justice ruling *DelayFix*, according to which the substantial validity of a jurisdiction clause is to be assessed in the light of the national law of the court designated in the jurisdiction clause interpreted in accordance with the Unfair Contract Terms Directive.¹⁴³

138 P Ortolani (n 42) 322.

139 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95.

140 Joined Cases C–240/98 and C–244/98, *Océano Grupo Editorial SA* [2000] ECR I-4963, para 22.

141 Case C-243/08, *Pannon GSM Zrt. v Erzsébet Sustikéné Gyórfi* [2009] ECLI:EU:C:2009:350, para 35.

142 A Bonomi ‘Jurisdiction over consumer contracts’ in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (OUP 2015) 236. A similar position seems to be at the basis of the analysis presented in I Kunda (n 66) 539. A different position affirms that the UCTD takes priority over the Brussels I-bis Regulation according to art 67 Brussels I-bis: see P Mankowski ‘Article 19’ in P Mankowski and U Magnus (eds), *Brussels Ibis Regulation: Commentary* (Otto Schmidt 2023) 522.

143 Case C–519/19 *Ryanair DAC* ECLI:EU:C:2020:933, para 49 ff.

However, such a position has been criticized, as it has been argued that the *DelayFix* case does not define the relationship between the regime of consumer jurisdiction in the Brussels I-bis Regulation and consumer protection resulting from the Unfair Contract Terms Directive. Hence, the circumstances of the case, which refers to a contract of carriage, are outside the scope of application of the art 17 Brussels I-bis. In this vein, the Court did not intend to justify that the jurisdiction clause in a consumer contract will always be subject to double limitations, both under procedural law (Brussels I-bis Regulation) and substantive law (Unfair Contract Terms Directive). On the contrary, it was the impossibility to apply the guarantees provided by the Brussels I-bis Regulation for consumer contracts in that specific case, ie a contract of carriage, that justified examination of the substantive validity of the jurisdiction clause contained in a consumer contract in the light of the Unfair Contract Terms Directive, as a sort of last safeguard.¹⁴⁴

5.2. Choice-of-law agreements

According to art 3 and art 14 Rome II Regulation, choice-of-law agreements might refer also to the law of a third State, due to the universal application of both Regulations. Hence, any law chosen shall be applied whether or not it is the law of a Member State. The agreement can be expressed or tacit. According to art 3(1) Rome I Regulation, a tacit agreement exists for contractual matters if clearly demonstrated by the terms of the contract or the circumstances of the case, and, according to art 14(1) for non-contractual matters if demonstrated with reasonable certainty by the circumstances of the case. While the chosen law usually applies in contractual matters, however, this rarely happens in non-contractual matters, as the event giving rise to the damage is usually unpredictable and fortuitous.

Rome I Regulation expressly promotes party autonomy and freedom of choice, whether art 3(1) provides that ‘a contract shall be governed by the law chosen by the parties’. That choice can either refer to ‘the whole or to part only of the contract’.

Rome II Regulation allows the parties to submit non-contractual obligations to a chosen law in two different hypotheses, which drastically restrict the scope of application of this norm to fintech digital platforms. On the one hand, according to art 14(1)(a), the agreement shall be concluded after the event giving rise to the damage occurred. Although it is not excluded that a subsequent agreement might intervene between the parties, such a hypothesis is destined to have limited practical application. On the other hand, according to art 14(1)(b), the agreement shall be concluded also before the event giving rise to the

¹⁴⁴B Wołodkiewicz ‘The Enforceability of a Jurisdiction Clause against an Assignee’ (2021) *Journal of European Consumer and Market Law* 210.

damage occurred, but at the double condition that all the parties are pursuing a commercial activity and the agreement has been freely negotiated. Such conditions rarely apply to fintech platforms. First, this hypothesis does not apply to consumer contracts, as both actors must pursue a commercial activity. Second, digital platforms generally include choice-of-law clauses in general terms and conditions' standard documents. This does not automatically exclude that the clause has been freely negotiated by the parties; however, it must have been the specific object of negotiations among the parties.¹⁴⁵ A similar hypothesis is very unlikely in fintech platforms, where disintermediation prevails.¹⁴⁶

5.2.1. Restrictions to applicable law agreements

Limitations to party autonomy touch upon both contractual and non-contractual matters. General restrictions refer to the applicability of the mandatory provisions of the law of the country with which it is most closely connected with the obligation, or the traditional private international law limitations to protect the public interest, namely overriding mandatory rules and public policy.

On the one hand, the choice of the parties does not prejudice the application of the mandatory provisions of the law of the country with which the situation is most closely connected with the obligation.¹⁴⁷ As a result, a choice-of-law clause cannot deprive the investor of the protections afforded by the mandatory provisions of the State of his habitual residence. The same principle applies when all the elements relevant to the situation are located in the EU, but the parties have chosen the law of a third country. In such cases, the choice of the parties does not prejudice the application of the mandatory provisions of EU law.¹⁴⁸ In crowdfunding platforms, this might be the case of the right of the non-sophisticated investor to revoke his offer to invest during a pre-contractual reflection period established by art 22 of Regulation 2020/1503, which purports to strengthen the protection for non-sophisticated investors.¹⁴⁹

On the other hand, overriding mandatory norms and public policy of the forum justifies the disapplication of the law identified by the provisions of Rome I and Rome II Regulations, including the law chosen by the parties. More precisely, overriding mandatory provisions are norms of the law of the forum which are applicable to any situation falling within their scope, irrespective of

145 M Magnus and P Mankowsky (eds), *Rome II Regulation: Commentary* (Verlag Dr. Otto Schmidt 2019), 502.

146 In particular, with reference to ICOs, see FJ Garcimartín Alférez and S Sánchez Fernández, 'Is private international law tech-proof? Conflict of laws and FinTech: selected issues', in T John, R Gulati, and B Koehler (eds), *The Elgar Companion to the Hague Conference on Private International Law* (Edward Elgar 2020) 406, 415.

147 Arts 3(3) Rome I and 14(2) Rome II.

148 Arts 3(4) Rome I and 14(3) Rome II.

149 I Kunda (n 66) 544.

the law otherwise applicable to the contract.¹⁵⁰ Their conceptualisation should be construed more restrictively than that of mandatory provisions, as their respect is ‘regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation’.¹⁵¹ It is for the national court hearing the case ‘to take account not only of the exact terms of that law, but also of its general structure and of all the circumstances in which that law was adopted in order to determine whether it is mandatory in nature in so far as it appears that the legislature adopted it in order to protect an interest judged to be essential by the Member State concerned’.¹⁵² Examples of overriding mandatory provisions in the area of finance are rules prohibiting money laundering, terrorism financing or tax evasion.¹⁵³ The overriding mandatory provisions of the forum State are applicable in both contractual and non-contractual matters, according to arts 9(2) Rome I Regulation and 16 Rome II Regulation. To contrast, such rules of the law of the country of the place of performance are applicable only in contractual matters, according to art 9(3) Rome I. Moreover, the public policy mechanism allows the national court to refuse the application of a provision of the law of any country specified by the Regulations. Arts 21 Rome I Regulation and 26 Rome II Regulation condition this refusal to the manifest incompatibility with the public policy of the forum, meaning that the provision infringes a fundamental principle of the law of the forum.

Finally, special restrictions apply to consumer contracts. As analysed above, art 6(2) Rome I Regulation establishes that the choice of the parties may not deprive the consumer of the protection afforded to him by the mandatory provisions of the law of the country where the consumer has his habitual residence. In addition, in *VKI v. Amazon*,¹⁵⁴ the CJEU clarified that a choice-of-law clause inserted in the general terms and conditions, which has not been individually

150 Member States’ national courts have adopted different approaches on the distinction between overriding rules and non-derogable rules. Among many, see M Wilderspin, ‘Overriding Mandatory Provisions’, in J Basedow and others (eds), *Encyclopedia of Private International Law* (Edward Elgar 2017) 1331–1332.

151 Art 9(1) Rome I. According to the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) COM (2005) 650 final, 7, this definition is based on a judgment of the CJEU, namely Joined Cases C–369/96 and C–376/96, *Arblade* [1999] ECR I-8498, para 30.

152 Case C–184/12, *United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare* [2013] ECLI:EU:C:2013:663, para 50, with reference to art 9 Rome I; Case C–149/18, *Agostinho da Silva Martins v Dekra Claims Services Portugal SA* [2019] ECLI:EU:C:2019:84, para 31, with reference to art 16 Rome II.

153 M Lehmann (n 13) 15. On the opinion that an overriding mandatory provision which aims to protect the stability of a financial system is different from other overriding mandatory provisions, see AJ Berends, ‘Why overriding mandatory provisions that protect financial stability deserve special treatment’ [2014] NILR 69.

154 Case C–191/15, *Verein für Konsumenteninformation (VKI) v Amazon EU Sàrl* [2016] ECLI:EU:C:2016:612, para 71.

negotiated by the parties, shall inform the consumer that under art 6(2) he also enjoys the protection of the mandatory provisions of the law of his habitual residence. Otherwise, it is considered unfair under the Unfair Contract 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. *De facto*, the CJEU, in a criticised expression of so-called judicial activism,¹⁵⁵ introduced a duty to inform the consumer about the more favourable law principle enshrined in art 6(2), which has limited practical relevance. Hence, the consumer would rarely rely on the unfairness (and consequent invalidity) of the choice-of-law clause, which deprives the consumer of any possibility of relying on a chosen law that is more favourable to him than the law of his habitual residence.¹⁵⁶

6. Conclusion

Analysing the cross-border provision of banking and financial services through digital platforms means dealing with the peculiarities of the application of conflict of laws rules in two different areas of law, respectively, the digital arena and finance. As a result, the application of the existing EU private international law legal framework presents multiple layers of difficulties.

First, it is necessary to contemporary consider the specificities of the EU conflict of laws rules in both the digital realm and the financial market. A paradigmatic example is the application of the consumer regime to fintech platforms' users, in particular, the issue of qualification of the investor as a consumer. On the one hand, the EU private international law legal framework has not been adapted to the digital environment but has remained technologically neutral. As a result, the task to adjust the traditional EU conflict of laws rules to the specific problems of online platforms fell upon the CJEU.¹⁵⁷ On the other hand, in relation to financial contracts, the fungibility of financial instruments as a necessary condition for trading and the principle of investor equality requires the application of a single law to all the transactions entered into on an exchange. The same principles also exclude the operability of the consumer regime to financial instruments, as this would lead to a fragmentation of

155 G Rühl, 'The unfairness of choice-of-law clauses, or: The (unclear) relationship Between Article 6 Rome I Regulation and the Unfair Terms in Consumer Contracts Directive: VKI v. Amazon' (2018) CMLRev 220.

156 P Mankowski, 'Just how free is a free choice of law in contract in the EU? (2017) JPIL 248; G-P Calliess and M Renner (eds), *Rome Regulations: Commentary* (Wolters Kluwer 2020) 98.

157 J Hörnle and I Revolidis, 'Civil and Commercial Cases in the EU: Jurisdiction, Recognition, and Enforcement, Applicable law – Brussels Regulation, Rome I and Rome II Regulations', in J Hörnle, *Internet Jurisdiction Law and Practice* (OUP 2021) 264; P Franzina, 'Promoting Fairness and Transparency for Business Users of Online Platforms', in I Pretelli (ed), *Conflict of Laws in the Maze of Digital Platforms / Le droit international privé dans le labyrinthe des plateformes digitales* (Schulthess 2018) 147.

applicable law depending on the investor's habitual residence. Hence, the latest developments of the relevant CJEU case law on consumers in the digital market and the special rules of Brussels I-bis Regulation related to the financial market likewise apply to fintech platforms.

Second, in both areas, some critical issues are still unsolved, leaving space for legal uncertainty for European users. Therefore, even though the CJEU case law offers some guidance, some grey zones remain. This is the case, for instance, of the identification of applicable law to financial services related to crypto assets.

Third, the intersection of these two areas, ie the digitalisation of the financial market, adds new complexity to pre-existing conflict of laws issues. This applies to the localisation of purely financial loss in torts, where the dematerialisation of the place of damage poses new challenges in the application of (*per se* still problematic) traditional private international law rules. Hence, the Rome II Regulation's regime, which favours the application of the law of the place of the damage and of the common domicile of the tortfeasor and victim, is now considered ill-fitted for the securities context. Therefore, the absence of a special conflicts rule for financial torts, able to tie private liability to the market affected, raises major concerns.

In conclusion, the current EU private international law legal framework is gradually adapting to the new challenges of technological progress in digital finance, in the attempt to guarantee the reasonable foreseeability of forum and applicable law issues emerging from the widespread diffusion of fintech platforms among European users. Major issues refer to still existing legislative gaps referring to the absence of special conflicts rule for financial torts, as well as to legal uncertainties referring to crypto assets. Nonetheless, greater caution is needed with reference to the adoption of specific legislative reforms dedicated to private international law norms in digital finance. As technology progresses much faster than law, in this sector legal interventions risk becoming obsolete before their own entry into force, thus undermining legal certainty instead of ensuring it.