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Private Ordering, the Platform Economy, and the Regulatory Potential of Private International Law

Table of contents

1. Introduction

The challenges of the Platform Economy can be addressed in numerous ways. Considering the lack of minimum standards (of transparency, consumer protection, etc), the drafting of new mandatory rules and their international harmonisation seem like obvious solutions. The European Commission, for instance, has recently proposed a new regulation to promote "fairness and transparency for business users of online intermediation services",[1] which would establish "[a] uniform and

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1 Proposal for a Regulation (...) on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final.

targeted set of mandatory rules"[2] to ensure "that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency and effective redress possibilities."[3]

As this proposal shows, the scope of such instruments is necessarily limited, though. Where they do not apply, courts still need to decide which national law(s) to apply. To do so, they will rely on (national or European) rules of private international law, which are, however, often seen as outdated and inflexible. When it comes to new technologies, these rules are regularly seen as an obstacle, rather than a tool for regulation; they are seen as part of the problem, not of its solution.

This paper will offer a more positive vision of private international law that shows how the discipline (and some of its European instruments in particular) can contribute to the effective regulation of the platform economy. For this purpose, the paper will first retrace how the debate about private international law and its ability to address the challenges created by the internet has changed over time (2.), before turning to the more specific challenges of the platform economy and the question of how private international might help to address them (3.).

2. Private International Law and the Internet

2.1. From "Does State Law Apply?" to "Which State Law Applies?"

When the internet first became widely available in the 1990s, it almost immediately triggered a debate among legal scholars (including scholars of private international law), about whether the new medium should be governed by state law at all.[4] Under the impression of states having left its regulation largely within the hands of private actors,[5] some scholars argued that the internet *had* to be self-regulated.[6] In a particularly prominent iteration of this idea, it was argued that the internet should be governed not by the law of one or several states, but by the "law of cyberspace".[7] DAVID R. JOHNSON and DAVID POST, for instance, famously claimed that

2 *Ibid*, Recital (6).

3 *Ibid*, Art 1(1).

4 See SVANTESSON, *Solving the Internet Jurisdiction Puzzle*, 95–96; TSAGOURIAS, The Legal Status of Cyberspace, 16–24. For examples see below, nn. 6–12.

5 See BYGRAVE, *Internet Governance by Contract*, 28–30, 44–46; TAUBMAN, International Governance and the Internet, in L. Edwards & C. Waelde (eds.), *Law and the Internet*, 3rd ed., Oxford 2009, 6–7.

6 See, *eg*, LESSIG, The Path of Cyberlaw, 1744–46; HARDY, The Proper Legal Regime for "Cyberspace", 1053–55.

7 See, *eg*, JOHNSON & POST, Law and Borders – The Rise of Law in Cyberspace, *passim*; KULESZA & BALLESTE, Signs and Portents in Cyberspace: The Rise of *Jus Internet* as a New Order in International Law, 1333–46.

> *"[m]any of the jurisdictional and substantive quandaries raised by border-crossing electronic communications could be resolved by one simple principle: conceiving of Cyberspace as a distinct 'place' for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the 'real world.'"*[8]

They proposed to treat "cyberspace" as a physical space and apply the "law" of that space to the different legal relationships which form within it.[9]

Of course, this argument was readily challenged by others, who claimed that there was no reason to believe that cyberspace could not be governed by state law.[10] JACK L. GOLDSMITH, for instance, argued that

> *"[t]here is no general normative argument that supports the immunization of cyberspace activities from territorial regulation. And there is every reason to believe that nations can exercise territorial authority to achieve significant regulatory control over cyberspace transactions."*[11]

Interestingly, while these authors could have simply challenged the idea of cyberspace being a "place", or this place having a "law", they generally tried to positively show that state-made law was indeed able to regulate it.[12]

This quickly became the majority position,[13] and the debate about whether state law would apply to cyberspace *at all* was replaced by a new debate about *which* state law would apply. How can traditional, often geographically-defined connecting factors solve the conflict of laws in cases involving a medium that is inherently international and non-geographic?

For two decades, courts like the ECJ have struggled with this question. Seemingly under the impression of, and in reaction to, the prospect of an unregulated cyberspace,[14] they have tried to ensure that prospective claimants can seek protection in local courts, and under local law, by applying a wide interpretation to traditional connecting factors (such as "place of the damage"),[15] or by introducing completely

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8 JOHNSON & POST, Law and Borders – The Rise of Law in Cyberspace, 1378.

9 See *ibid*, 1378–87.

10 See, *eg*, DAVIS, The Defamation of Choice-of-Law in Cyberspace, 359–62; GOLDSMITH, Against Cyberanarchy, *passim*; STEIN, The Unexceptional Problem of Jurisdiction in Cyberspace, 1170–91.

11 GOLDSMITH, Against Cyberanarchy, 1250.

12 See *ibid*, 1212–39 and 1244–50.

13 See, *eg*, KOHL, *Jurisdiction and the Internet*, 11–13; GÖSSL, *Internetspezifisches Kollisionsrecht?*, 288–90.

14 See SLANE, Tales, Techs, and Territories: Private International Law, Globalization, and the Legal Construction of Borderlessness on the Internet, 141–44.

15 See, *eg*, Case C-618/15 *Concurrence SARL* ECLI:EU:C:2016:976, [32]–[33]; Case C-441/13 *Hejduk* ECLI:EU:C:2015:28, [34]; Case C-170/12 *Pinckney* ECLI:EU:C:2013:635, [44]; Joined Cases C-509/09 and C-161/10 *eDate Advertising* and

new ones (such as the claimant's "centre of interests").[16] While some of these initial decisions have meanwhile been refined,[17] there remain serious problems with the ECJ's current, overly claimant-friendly approach to online torts.[18]

2.2. From Horizontal to Vertical Coordination

This debate ultimately comes down to a rather traditional problem of *horizontal* coordination between different public regulators, *i.e.* national courts and legislators. In recent years, it has become clear, though, that the internet raises equally important questions with regard to the *vertical* coordination between public regulators and private parties.

To be sure, private parties have always played an important role with regard to the internet. From the physical wires connecting individual users to the internet, over the Domain Name System and other routing services that direct them to the content they want to access, to the devices, browsers and apps they are using to actually access it, every element of the internet's infrastructure is provided by private actors.[19]

As mentioned earlier, states were originally happy to leave the regulation of this infrastructure within the hands of these private parties. They could do so because up until the mid-2000s, almost all of them were what LAURA DENARDIS helpfully qualifies as "infrastructure intermediaries".[20] They controlled the technical means by which the users connect to the internet but did not otherwise interfere with the content these users wanted to access. Accordingly, the average user was, at best, indirectly affected by the regulatory function these intermediaries fulfilled.

But with the emergence of interactive websites that allowed users to create and share their own content and engage with each other in a rapidly growing number of ways – the "web 2.0" – a new kind of private actors emerged. These "information intermediaries" are playing a much more active role in the curation, selection and distribution of online content[21] by hosting large interactive platforms through which they can track their users' behaviour, direct their attention to certain content, make it easier for them to use certain products and services – and block others. Within the environment of their platform, they assume many of the functions that have

Martinez ECLI:EU:C:2011:685, [51]. See also LUTZI, Gerichtsstand am Schadensort und Mosaikbetrachtung bei Wettbewerbsverletzungen im Internet, 553–55.

16 See *eDate* (see n. 15), [48].

17 See in particular Case C-194/16 *Bolagsupplysningen* ECLI:EU:C:2017:766, [40]–[43] and [48].

18 See LUTZI, Internet Cases in EU Private International Law – Developing a Coherent Approach, 689–99.

19 See DENARDIS, *The Global War for Internet Governance*, 33–72 and 153–72.

20 *Ibid*, 154.

21 *Ibid*, 155–57.

traditionally been fulfilled by governments and public authorities.[22] They provide substantive rules that purport to govern all interactions involving the platform and offer mechanisms of dispute resolution that are often more accessible, much faster, and almost always much more effective than court proceedings.[23]

It is safe to say that these online platforms have reshaped the internet. Instead of a giant network of interlinked resources that can be passively accessed through a web browser, the internet now appears to many users primarily as a gateway to a series of different platforms and communities. As LEE A. BYGRAVE puts it,

> *"[w]e have gone from a phase in which the Internet was exclusively reserved for the scientific and academic community of the Western world, along with US military institutions, to become a global medium for electronic transactions, and then to morph into a complex congeries of intranets, many of which operate with their own rules, procedures, and cultures. Facebook is one such intranet. Indeed, for many people, Facebook has become, in practice, well nigh the Internet."*[24]

This phenomenon seems to go hand in hand with a changing expectation of internet users as to who effectively regulates these online communities. A growing number of cases involving private parties using an online platform are being litigated between the aggrieved party and the platform host, with the former claiming that the latter was supposed to sanction the other party or otherwise remedy the wrong committed by them.[25]

This raises the question if, and, if so, how, private international law can take the practical importance of the platform hosts – and the resulting expectations of platform users – into account. If private international law is, in the words of PIERRE MAYER, a "*droit de la coordination des ordres juridiques*",[26] and if the category of *ordres juridiques* is not strictly limited to national legal systems,[27] there is no reason why it should not. In fact, private international law has a long history of accommodating instances of private ordering such as choice-of-court, choice-of-law, and,

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22 See MURRAY, Nodes and Gravity in Virtual Space, 197–98; RYNGAERT & ZOETEKOUW, The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era, 193–95.

23 See KATSH & RABINOVICH-EINY, *Digital Justice*, 3, 15; VAN LOO, The Corporation as Courthouse, [2018] 33 *Yale Journal on Regulation* 566–68, 573.

24 BYGRAVE, *Internet Governance by Contract*, 87.

25 For a recent example that was ultimately referred to the ECJ, see *Concurrence* (see n. 15). For national court cases, see, *eg*, *CG v Facebook Ireland* [2016] NICA 54; *Camille Saskia Richardson v Facebook, Google (UK) Limited* [2015] EWHC 3154 (QB).

26 MAYER, Le phénomène de la coordination des ordres juridiques étatiques en droit privé, [360].

27 See *ibid*, [38], [52]–[55].

in particular, arbitration agreements[28] – and of coordinating the corresponding claims to regulatory authority between public regulators and private actors.

3. Private International Law and the Platform Economy

The fact that the hosts of private online platforms exercise more and more crucial regulatory functions might be taken into account in two ways. First, one could use the increasing sophistication of this regulation as an opportunity to consider the platform as a "legal system" and apply its "law" to all cases that involve it (3.1). Alternatively, one could take individual parts of the platform contract into account when determining the applicable law (3.2).

3.1. Treating the Platform as a Legal System

The proposition to treat the platform as a separate legal system strongly resonates with the aforementioned proposition to apply the "law of cyberspace" to internet cases. Finally, one might say, cyberspace has become a sufficiently well-defined "place" (or, rather, numerous places), and developed a sufficiently sophisticated "law" (or, rather, numerous laws) to govern it.

This has, in fact, been considered with regard to the notoriously difficult area of violations of personality rights committed through social media.[29]

> *"In order to avoid the apparent arbitrariness of applying territorial rules, and the 'mosaic effect' of potentially having to apply a large number of national laws to the communication, it might be suggested that the 'realm' of social media could itself be conceptualised as a distinct political community or social ordering. To put this another way, if the law of defamation is partially involved in protecting public interests, could we consider adopting a non-territorial state conception of the relevant 'public' within which a reputation exists and has allegedly been damaged?"*[30]

Instead of trying to localise these torts in any particular country, it is proposed to consider them to have happened within the (online) community where the victim's reputation has been tarnished.

This proposition is undeniably intriguing, not least because it could be seen as a practical application of the "cosmopolitan pluralist conception of jurisdiction"

[28] See MILLS, The Principled English Ambivalence to Law and Dispute Resolution Beyond the State, 341.

[29] MILLS, The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in "Facebookistan"?, 29–34.

[30] *Ibid*, 30.

famously advocated by PAUL SCHIFF BERMAN,[31] who challenged the reliance of assertions of international jurisdiction on an overly narrow definition of community that focuses only on the territorial borders of sovereign nation-states but ignores other meaningful forms of community affiliation.[32]

For at least three reasons, such a far-reaching change of paradigms still appears neither desirable nor realistic.

First, as of now, platform rules (or mechanisms of platform dispute resolution) rarely purport to replace state law (or the court system).[33] They are referenced in the platform contracts concluded between the hosts and individual platform users, which also contain clauses designating the otherwise competent courts and the otherwise applicable law.[34] Applying these rules instead of the applicable law would not only give them greater weight than they claim themselves but also conflict with their inherently limited material scope. These rules are not designed to answer any legal question that may arise in connection with the online platform, but to modify and adapt the applicable law where it is too unspecific or otherwise unsuited for the purposes of the platform. Accordingly, hosts and users alike will expect that platform to be governed by a combination of a general applicable (state) law and more specific platform rules.

Second, treating online platforms as "places" for the purposes of private international law would create many new uncertainties. While it might increase legal certainty in cases that are clearly linked to a particular platform that is governed by a sophisticated framework of substantive rules, it would raise new questions in many others. At what point is a community organised enough to be considered a "place"? Are platforms that are widely accessible to everyone (such as *Facebook* or *Twitter*) a community in this sense? What level of sophistication is required before the rules of a platform can be considered the applicable law? What kind of claims and relationships could be considered to be governed by them? Can we extend rules that have been drafted in view of the "vertical" relationship between host and user to the "horizontal" relationships between different users at all?

Third, any attempt to give greater weight to privately drafted platform terms at the expense of public regulation would be very difficult to defend politically. Not only would it go very much against the current political climate, in which national and

[31] BERMAN, The Globalization of Jurisdiction, 490–542. See also RYNGAERT & ZOETEKOUW, The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era, 192–93.

[32] BERMAN, The Globalization of Jurisdiction, 441–90.

[33] RYNGAERT & ZOETEKOUW, The End of Territory? The Re-Emergence of Community as a Principle of Jurisdictional Order in the Internet Era, 194.

[34] See, *eg*, Facebook's Terms of Service, available at facebook.com/terms (28.7.2018), s 4.4.

supra-national legislators try to tighten the grip of state law on seemingly unregulated online platforms;[35] it would also be subject to more fundamental concerns. Even though the models of governance evidently differ between online platforms, most sets of platform rules are set unilaterally by the platform host, who usually is a private for-profit company. As ALEX MILLS acknowledges,

> *"[i]t is not self-evident that the benefits of recognising non-state community standards [...] outweigh the seemingly alarming consequences of the fact that this would empower corporations such as Facebook or Twitter to determine the limits of free speech on their platforms (or rather enhance the extent to which they already do so in reality), displacing norms which may be generated through more participatory and democratic processes."*[36]

3.2. Taking the Platform Contract into Account

There may however be more nuanced ways for private international law to take the important role of online platforms that are effectively regulated only by their hosts into account.

As a starting point, it must be kept in mind that the platform hosts' prerogatives are derived from the platform contracts that the hosts conclude with individual users.[37] These contracts contain substantive rules that specify how the platform may be used and how potential disputes will be solved; they also contain clauses designating the competent (state) courts and the applicable national law.

It is submitted that private international law can fulfil its coordinating function by taking these elements of the platform contract into account when determining the applicable law. It will be shown that European instruments of private international law such as the Rome I[38] and Rome II[39] Regulation do, in fact, already offer a number of gateways for such a consideration, the availability and potential of which differ depending on the particular legal relationship in question.

3.2.1. The Host/User Relationship

In light of the difficulties to determine the applicable law to online cases,[40] most platform contracts contain choice-of-law clauses, which aim to submit all

35 See, *eg*, the proposal for an EU regulation discussed above, sub 1.

36 MILLS, The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in "Facebookistan"?, 33.

37 See BYGRAVE, *Internet Governance by Contract*, 95, 102; DENARDIS, *The Global War for Internet Governance*, 156.

38 Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

39 Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations.

40 For EU private international law, see LUTZI, Internet Cases in EU Private International Law – Developing a Coherent Approach, 689–99.

relationships between host and users to a single applicable law, thus contributing to the creation of a coherent regulatory framework that applies across the platform.

The Rome I Regulation generally gives effect to these clauses. According to Art. 3(1) Rome I,

> *"[a] contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract."*

Regarding the existence and validity of this choice, Art. 3(5) Rome I refers to Art. 10(1) Rome I, according to which

> *"[t]he existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid."*

The validity of a choice-of-law clause will thus usually depend on the law chosen through the clause.

While this mechanism seems to further a high degree of uniformity and predictability, this aim is somewhat undermined by Art. 6(1), (2) Rome I. According to Art. 6(1),

> *"a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:*
>
> *(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or*
>
> *(b) by any means, directs such activities to that country or to several countries including that country,*
>
> *and the contract falls within the scope of such activities."*

Art. 6(2) Rome I allows the parties to choose a different applicable law but provides that

> *"[s]uch a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1."*

As most online platforms target consumers in a wide range of countries, the effects of many choice-of-law clauses will inevitably differ from one country to another. In addition, the ECJ has recently decided[41] that a clause that does not itself point out

[41] Case C-191/15 *Verein für Konsumenteninformation (VKI)* ECLI:EU:C:2016:612, [69]–[71].

this limitation may be found to be intransparent in the sense of Art. 5 of Directive 93/13/EC.[42]

To the extent that the applicable law has validly been chosen, one might expect it to apply not only to contractual but also to non-contractual claims between the host and the user. Indeed, Art. 4(3) Rome II provides that

> *"[w]here it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in [the previous paragraphs], the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."*

Unfortunately, though, the provision is unavailable in almost all practically relevant cases as violations of personality rights, acts of unfair competition, and infringements of IP rights are all either governed by more specific provisions that do not contain a similar escape clause[43] or excluded from the Regulation entirely.[44] What is more, the ECJ seems to have recently added an additional question mark to the proposition that Art. 4(3) Rome II might be used to extend a platform choice of law to non-contractual claims when it held (*obiter*)[45] in the context of an action brought by a consumer protection association that the law chosen for individual contracts "cannot legitimately constitute [...] a closer connection [in the sense of Art. 4(3) Rome II]"[46] because

> *"[i]f it were otherwise, a professional [...] would de facto be able, by means of such a term, to choose the law to which a non-contractual obligation is subject, and could thereby evade the conditions set out in that respect in Article 14(1)(a) of the Rome II Regulation."*[47]

3.2.2. The User/User Relationship

While the applicable law in the relationship between host and user ultimately depends on rather orthodox questions of private international law and party autonomy, the question of how the platform contract might influence the legal relationships between individual users enters less well-charted terrain.

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[42] Art 5 Directive 93/13/EC: "In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. [...]"

[43] See Art. 6, 8 Rome II (unfair competition and IP rights).

[44] See Art. 1(2)(g) Rome II (personality rights).

[45] In the case in question, Art 4(3) Rome II was not available anyway, as the concerned an act of unfair competition: *VKI* (see n. 41), [45].

[46] *Ibid*, [46].

[47] *Ibid*, [47].

The reason why it seems worth considering the possibility of the platform contract influencing the applicable law in this relationship is twofold. First, it would respect the users' expectation that their behaviour on the platform is primarily governed by the platform contract.[48] Second, supporting the platform hosts in their attempts to create a uniform legal framework on their platform might contribute to reducing the remaining uncertainties about the applicable law(s) in internet cases and enhance legal certainty.

3.2.2.1. Extending a Platform Choice of Law

A first way to achieve this would consist in extending the choice-of-law clause that is part of almost every platform contract to the relationships between individual users. Although less radical than considering the platform itself as a "legal system",[49] this could similarly be justified by the idea that the relevant environment in which a party has intentionally acted actually is the online platform itself. Where all users of an online platform have agreed to the same set of rules and the same choice-of-law clause, it appears justified to take this clause into account when determining the applicable law between them. And although not all of these clauses reflect a clear intention of the platform host to extend the reach of the platform host to influence the applicable law between users, this should not prevent their extension where it appears appropriate in light of the individual users' expectations and the claim in question.

Under the relevant EU instruments, such an extension could be achieved, first, through an implicit choice of law between the parties, which both Art. 3(1) Rome I and Art. 14(1) Rome II allow. However, both provisions require an implied choice to be demonstrated "clearly" (Art. 3(1) Rome I) or "with reasonable certainty" (Art. 14(1) Rome II), with Art. 14 containing further significant limitations.[50] Accordingly, both provisions may be unlikely to apply in these situations.

Instead, a better way may consist in giving effect to the close link between cases involving two platform users and the law chosen in the platform contract.

For *contractual* relationships, this could be achieved through Art. 4(3) Rome I, which is worded similarly to Art. 4(3) Rome II and carves out an exception from the default mechanism of Art. 4(1), (2) Rome I for cases

[48] See above, at n. 25.

[49] See above, sub 3.1.

[50] Art 14(1) Rome II: "The parties may agree to submit non-contractual obligations to the law of their choice: (a) by an agreement entered into after the event giving rise to the damage occurred; or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties."

"where it is clear from all the circumstances [...] that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2."

For a platform choice of law to be extended, the provision essentially requires two things: first, that the platform contract creates, through its choice-of-law clause, a close connection to a particular country; and second, that this connection is manifestly closer than the connection between the contract and the country referred to in Art. 4(1), (2).

The first requirement may be fulfilled, in particular, by a close relationship with other contracts.[51] In principle, it should be fulfilled for every clause that refers to the law of a country, although the closeness of the particular relationship thus created may depend on additional factors (such as the wording and scope of the clause and whether the country whose law has been selected also has other ties to the contract in question, eg by being the seat of the platform host).[52]

The second requirement may be more difficult to fulfil as it requires it to be "clear from all circumstances" that the country in question is "manifestly more closely connected" to the contract. One of the central problems for private international law when it comes to the internet, though, is the difficulty of traditional, geographically-defined connecting factors to create meaningful connections between individual countries and these cases. Even though this difficulty is less pronounced in cases governed by Art. 4(1), (2) Rome I, which refer to the habitual residence of the characteristic performer of the contract in question, the connection can still be very tenuous. For instance, where the parties entering into a transaction only know each other through the synonym or avatar they are using (eg in a video game)[53] and, accordingly, have no idea where the other party is habitually resident, the connection between the contract and either parties' country of habitual residence may appear completely arbitrary. In such a case, applying the law of the country clearly selected in a platform contract, especially where this country also is otherwise connected to the online platform, may be perfectly in line with the "proximity principle"[54] on which Art. 4(3) Rome I is based.[55]

The unifying potential of this provision is, of course, once again limited by the special protection of consumers guaranteed by Art. 6 Rome I.[56] Invariably submitting consumer contracts to the law of the consumer's habitual residence, this

[51] See recital [20] Rome I Regulation.

[52] See MAGNUS, in MAGNUS & MANKOWSKI, *Rome I Regulation*, Art. 4, [191].

[53] See LUTZI, Aktuelle Rechtsfragen zum Handel mit virtuellen Gegenständen in Computerspielen, 2072.

[54] MCPARLAND, *The Rome I Regulation on the Law Applicable to Contractual Obligations*, [10.354].

[55] See also LEIBLE, in HÜßTEGE/MANSEL, *NomosKommentar BGB. Rom-Verordnungen*, Art. 3 Rom I, [117], referring to auction platforms.

[56] See above, sub 3.2.1.

provision may create a situation in which a professional who enters into a contract on an anonymous online platform may reasonably expect the law selected in the platform contract to apply, unless where the anonymous counter-party happens to be a consumer, in which case the law of the consumer's (entirely unforeseeable) habitual residence will apply. However, this will only be the case where the consumer's country of habitual residence has been targeted in the sense of Art. 6(1)(b) Rome I. Indeed, one might question if someone who professionally offers goods in the virtual environment of an online game does direct their activity to every country in which a potential buyer could be resident.

For *non-contractual* relationships, Art. 4(3) Rome II seems to provide a similar gateway for a platform choice of law, which seems even more on point than its counter-part in the Rome I Regulation as it explicitly refers to "a pre-existing relationship between the parties". Moreover, the connection between an online tort and the *locus damni* (to which Art 4(1) Rome II refers) is often particularly weak, with the latter regularly being understood as every place in which online content can be accessed.

As explained above, most practically relevant cases are however excluded from the scope of the provision.[57] In addition, any reliance on it in the context of a platform choice of law might conflict with the ECJ's *obiter dictum* in *VKI*,[58] according to which a platform host cannot use Art. 4(3) Rome II to rely on a choice-of-law clause that they had themselves entered into the contract, at least to the extent that this would undermine the requirements of Art 14(1) Rome II.[59] While this restriction of Art. 4(3) Rome II does not necessarily extend to the relationship between two individual users, the escape clause is – *de lege lata* – only helpful in a small number of cases.

3.2.2.2. Applying Platform Rules as Fact

Additionally, the Rome II Regulation may allow for a limited consideration of substantive platform rules through Art 17 Rome II, which provides that

> *"[i]n assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability."*

The provision codifies the idea that the law of the place of conduct may be taken into account as "data" when assessing a tortfeasor's conduct even if this law is not the *lex causae*[60] and counter-balances the claimant-centred default rule in Art 4(1)

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57 *Ibid.*

58 *VKI* (see n. 41), [46]–[47].

59 See above, sub 3.2.1.

60 See DORNIS, Local Data in European Choice of Law: A Trojan Horse from across the Atlantic, 307, 312.

Rome II[61] by protecting the defendant's justified expectations to be judged according to the standards of the place in which they acted.[62] In the context of torts committed on online platforms, it might be used to take individual norms of conduct into account when assessing the defendant's behaviour on an online platform.

This raises the question, though, whether such standards can qualify as "rules of safety and conduct". While this category is not necessarily limited to norms of public origin,[63] its wording might still indicate a somewhat restrictive reading when it comes to privately drafted norms and provisions. Yet, Art 17 Rome II ultimately seems to do nothing more than to express a more general principle according to which the application of a given substantive law does not preclude the consideration of other norms, which are not themselves part of this law, where these are contextually relevant and not specifically excluded by the *lex causae*.[64] Thus, where the applicable law requires an assessment of the party's behaviour that is clearly linked to an online platform and its normative framework, nothing should prevent a court from taking the standards and norms of this platform into account when making this assessment.

3.2.3. The User/Non-User Relationship

Finally, one might inquire if these considerations can also be applied to the relationship between platform users and third parties. While it is hard to imagine a contractual claim between two parties only one of whom uses an online platform but which still involves the platform to a degree that one might attach some significance to its legal setup, such a scenario is certainly conceivable for non-contractual claims. Where a party uses an online platform to commit a tort that happens to (also) affect non-users, it might indeed be appropriate to give (some) effect to its legal framework.

Prima facie, though, the above arguments appear hardly transferable to this situation; a claimant who does not use the online platform seems to have no reason to expect its norms to have any bearing on their claim against someone who happens to use it to commit a tort. Yet, from the platform user's point of view, the application of platform norms may indeed be expected, and it may not matter very much if the victim of the tort happens to also use the platform or not.

[61] See recital (34) Rome II.

[62] VON HEIN, Die Behandlung von Sicherheits- und Verhaltensregeln nach Art. 17 der Rom II-Verordnung, 139–41, 143, 152.

[63] See recital (34) Rome II. See also Dickinson, *The Rome II Regulation*, [15.32], who also refers to case law, customs, and business practices.

[64] See also Case C-135/15 *Nikiforidis* ECLI:EU:C:2016:774, [51] (by analogy).

Against this backdrop, it is suggested that the arguments made for user/user relationships can, in principle, be extended to user/non-user relationships but that the threshold to take any aspect of the platform contract into account must be even higher and limited to cases in which a clear link between the platform and the tort in question can be established.

Given the already limited scope of application of Art. 4(3) Rome II, there may be few cases in which a platform choice of law can be extended to a non-contractual claim by a non-user. As the link between the tort and the country the law of which applies according to Art. 4(1) Rome II will often be rather weak, it is not completely impossible to think of such cases, though. For instance, where someone posts misleading information on a social network that is clearly supposed to defraud other users of that network but which happens to also cause loss to a third party who reads it and acts accordingly, the country most closely connected to the claim might indeed be the one whose law has been selected in the platform contract, especially where it coincides with other relevant connections (*e.g.* by being the seat of the platform host).

Similarly, Art. 17 Rome II might occasionally be used to take individual norms of conduct that are clearly established on a platform into account where a case is particularly closely linked to it.

4. Conclusion

What these examples show is how EU instruments of private international law, which are often criticised as being overly technical and blind towards their substantive effects and political implications, can nonetheless contribute to the regulation of the platform economy. To do so, private international law has to abandon neither its methodological neutrality nor its focus on state law. Instead, existing instruments already provide a framework of rules and exceptions that is flexible enough to coordinate different claims to regulatory authority, including those made by private actors.

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