Check for updates

Case note

MJ

Maastricht Journal of European and
Comparative Law
2018, Vol. 25(3) 374–381
© The Author(s) 2018
Article reuse guidelines:
sagepub.com/journals-permissions
DOI: 10.1177/1023263X18783415
maastrichtjournal.sagepub.com

'What's a consumer?' (Some) clarification on consumer jurisdiction, social-media accounts, and collective redress under the Brussels Ia Regulation

Case C-498/16 *Maximilian Schrems v. Facebook Ireland Limited*, EU:C:2018:37

Tobias Lutzi*

Keywords
Private international law, international jurisdiction, consumer protection, collective redress, social media

1. Introduction

There are few litigants who can claim to have contributed as much to the development of secondary EU law as Maximilian Schrems and Facebook. Schrems brought a first series of complaints against Facebook and the way in which the company uses the personal data of its users in 2011 and 2013, which ultimately led to the annulment of the 'Safe Harbour' framework between the EU and the USA.[1] This litigation is still ongoing (based on a reformulated version of Schrems' complaint) and has recently been referred to the Court of Justice of the European Union (CJEU) for a second time.[2]

1. Case C-362/14 *Maximillian Schrems v. Data Protection Commissioner*, EU: C:2015:650.
2. *The Data Protection Commissioner v Facebook Ireland Limited & Maximilian Schrems* [2017] IEHC 545.

*University of Oxford, Somerville College, Oxford, UK

Corresponding author:
Tobias Lutzi, Somerville College, Woodstock Road, Oxford OX2 6HD, UK.
E-mail: tobias.lutzi@law.ox.ac.uk

Meanwhile, Schrems also rallied support for a 'class action' against Facebook, for which he invited other users to assign him their claims with regard to the company's alleged violations of privacy and data-protection law.[3] After more than 20,000 users had assigned their claims to Schrems, he brought proceedings against Facebook in the courts of his domicile in Austria based on the rights of himself and seven other users. These proceedings, which are formally unrelated to the aforementioned lawsuit, have lead to the decision discussed in this note.

Over the course of these different lawsuits, Schrems built a reputation as a privacy activist. He published two books, gave several talks and lectures, and has recently founded a non-profit organisation that uses 'targeted and strategic litigation' to enforce privacy and data protection laws across Europe. This level of professionalism raised the first of the two questions that the CJEU had to answer: could Schrems still rely on the special rules for consumers provided in (what are now)[4] Articles 17–19 of Regulation No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels Ia') and seize the courts of his own domicile? Were the Court to answer this question in the positive, it would then have to decide whether this forum would only be available for Schrems' own claims or whether it could also be used to bring the different claims that had been assigned to him.

In a nutshell, the CJEU held that although Schrems can still be considered a consumer, the resulting privilege of being able to seize the courts of his domicile would be limited to his own claims. This note will first present the procedural background of the decision in some more detail (Section 2) before critically discussing the two answers given by the Court (Sections 3 and 4). It will come to the conclusion that although these two answers seem to pull into different directions, they both align with the reasons underlying the consumer rules in Articles 17–19 Brussels Ia (Section 5).

2. Background: a 'class action' against Facebook

Under the Brussels Ia Regulation, contractual claims can be brought in the courts of the defendant's domicile (Article 4(1)) and at the place of performance (Article 7(1)(a)), unless otherwise agreed (Article 25). The 'terms of service' of Facebook contain such an agreement, which gives exclusive jurisdiction to certain courts in California.[5] Regardless of the (still surprisingly unclear)[6] degree to which jurisdiction clauses referring to the courts of a non-Member State have a derogatory effect under the Brussels Ia Regulation, such agreements are ineffective in consumer cases. If a consumer contract has been concluded in the context of an activity pursued in, or directed at, the Member State of the consumer's domicile by a professional (Article 17(1)(c)), the consumer always has the option to seize either the courts of the Member State in which the professional is domiciled or the courts of their own domicile (Article 18(1)); alternative fora can only be selected in a small number of cases (Article 19).

Although the Brussels Ia Regulation thus protects individual consumers through a favourable regime of jurisdiction, no such rules exist for collective redress. Schrems tried to sidestep this

3. For more details, see the campaign's homepage, fbclaim.com.
4. The decision discussed in this note was made under the predecessor of Regulation No. 1215/2012, Regulation No. 44/2001 ('Brussels I'); the relevant provisions have remained unchanged.
5. Facebook, 'Statement of Rights and Responsibilities', https://facebook.com/legal/terms, s 15(1) (accessed 18 March 2018).
6. See Garcimartin, in A. Dickinson and E. Lein (eds.), *The Brussels I Regulation Recast* (Oxford University Press, 2015), para. 9.13–9.15.

perceived lack of a European 'class action' by trying to consolidate the claims of 25,000[7] Facebook users from all over the world in a single lawsuit, which he brought in the courts of his domicile in Vienna based on Article 18(1) Brussels Ia. Whether these courts would have jurisdiction thus depended on two questions: first, whether Schrems himself could still be considered a consumer, despite the increasing professionalism with which he was litigating against Facebook; and second, whether he could use the jurisdictional privilege of Article 18(1) for claims that had been assigned to him by other consumers.

3. Requirement of the consumer rules: a consumer contract

The CJEU first had an opportunity to define the term 'consumer' in its decision in *Benincasa*.[8] Based on its earlier jurisprudence, according to which the grounds of special[9] and privileged[10] jurisdiction have to be interpreted narrowly,[11] the Court held that whether or not a person could be considered a consumer would depend on the 'position of the person concerned in a particular contract', rather than their 'subjective situation'.[12] The purpose of a particular contract would only be considered to fall outside a person's trade or profession in the sense of Article 17(1) Brussels Ia if it were 'concluded for the purpose of satisfying an individual's own needs in terms of private consumption'.[13]

Although the Court has relied on the distinction between contracts concluded for private purposes and those concluded for professional purposes ever since,[14] the definition has turned out to be difficult to apply to contracts that do not clearly fall into one of the two categories, for example, because the relationship develops over time. Contracts regarding social-media platforms are a particularly topical example for this phenomenon.

A. Article 17 Brussels Ia, dual-purpose contracts, and social-media accounts

As the Advocate General explained in some detail,[15] accounts for social networks like Facebook or Twitter are often used for a variety of purposes. Many are only ever used for private consumption, whereas others are clearly set up for professional uses; between these two extremes, though, there are 'fifty shades of (Facebook) blue'.[16] Many professionals, for instance – including many academics – use their 'private' social-media accounts to promote their professional activities and achievements amongst heterogenic circles of friends and colleagues. What is more, the way in

7. The option to assign a claim to Schrems had been capped at this number.
8. Case C-269/95 *Francesco Benincasa v. Dentalkit Srl*, EU: C:1997:337.
9. Article 7–9 Brussels Ia.
10. Article 10–23 Brussels Ia.
11. See, e.g. Case 189/87 *Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co. et al.*, EU: C:1988:459, para. 19.
12. Case C-269/95 *Francesco Benincasa v. Dentalkit Srl*, para. 16. See also Case C-110/14 *Horaţiu Ovidiu Costea v. SC Volksbank România SA*, EU: C:2015:538 (regarding Directive 93/13), para 21: 'The concept of 'consumer' [is] objective in nature and is distinct from the concrete knowledge the person in question may have, or from the information that person actually has'.
13. Case C-269/95 *Francesco Benincasa v. Dentalkit Srl*, para. 17.
14. See, e.g. Case C-419/11 *Česká Spořitelna, a.s. v. Gerald Feichter*, EU: C:2013:165, para. 34.
15. Opinion of Advocate General Bobek in Case C-498/16 *Maximilian Schrems v. Facebook Ireland Limited*, EU: C:2017:863, para. 44–50.
16. Ibid., para. 46.

which these accounts are used can change significantly over time, although still being based on the same initial contract. Finally, in the specific case of Facebook, things are further complicated by the fact that it offers different kinds of profiles: 'accounts' that are clearly linked to one person and 'pages' that can be managed by numerous accounts. Although Schrems has both, an 'account' that he has been using for seemingly private purposes since 2008 and a somewhat more professional 'page' that he had set up in 2011, it is not quite clear whether these different profiles are part of the same contractual relationship or governed by two separate contracts.[17]

The CJEU first had an opportunity to interpret what is now Article 17 Brussels Ia with regard to dual-purpose contracts in *Gruber*.[18] It held that a contract concluded for a combination of private and professional purposes could only fall under the exception if 'the link between the contract and the trade or profession of the person concerned was so slight as to be marginal'.[19]

On this basis, AG Bobek argued, first, that for the sake of foreseeability, it should be assumed that the purpose for which a contract has *originally* been concluded would be decisive; considering the variety of contractual relationships, the possibility should not be completely excluded, however, that the status of a party may change '[i]f, and only if, it is clearly shown on the facts of the case that that assumption no longer holds'.[20] In the case of Schrems' contractual relationship with Facebook, he argued, second, that if the 'account' and 'page' were considered to be based on two separate contracts, Schrems could easily be qualified as a consumer with regard to his account (which would arguably be enough to confer jurisdiction on the Austrian courts); but even if both were considered to be elements of a single contractual relationship, it should still be seen as a consumer contract because any 'immediate commercial impact' would be negligible in the sense established in *Gruber*.[21]

B. A purposive interpretation of the rules on consumer jurisdiction

Surprisingly, the Court did not engage with this well-developed analysis at all. It acknowledged that the use of a social-media platform may change over time and that the user of such a platform may only rely on the consumer exception 'if the predominately non-professional use [. . .], for which the applicant initially concluded [the contract], has not subsequently become predominately professional';[22] but in the following paragraph, the Court ruled out any possibility that Schrems might have lost his consumer status, holding that 'neither the expertise which that person may acquire in the field [of social-media services] nor his assurances given for the purposes of representing the rights and interests of the users of those services can deprive him of the status of a "consumer".[23]

This understanding seems to be based on a purely purposive approach to Article 17 Brussels Ia – which the Court confirmed in the next paragraph.

17. See ibid., 51–53.
18. Case C-464/01 *Johann Gruber v. Bay Wa AG*, EU: C:2005:32.
19. Ibid., para. 39.
20. Opinion of Advocate General Bobek in Case C-498/16 *Maximilian Schrems v. Facebook Ireland Limited*, para. 41.
21. Ibid., para. 55–60.
22. Case C-498/16 *Maximilian Schrems v. Facebook Ireland Limited*, para. 38.
23. Ibid., para. 39.

> Indeed, an interpretation of the notion of "consumer" which excluded such activities would have the effect of preventing an effective defence of the rights that consumers enjoy in relation to their contractual partners who are traders or professionals, including those rights which relate to the protection of their personal data. Such an interpretation would disregard the objective set out in Article 169(1) TFEU [Treaty on the Functioning of the European Union] of promoting the right of consumers to organise themselves in order to safeguard their interests.[24]

In other words, anyone who enters into a contract for an online service as a consumer does not lose this status for the sole reason that they use their account to defend their own (and other consumers') rights against the service provider, regardless of how 'professional' they become in this endeavour. Considering the Court's reference to the objective of promoting consumer rights enshrined in Article 169(1) TFEU, its decision might have been the same even if the claimant had entered into the contract for an online service with the sole intention of enforcing the rights of its users through litigation.

Be that as it may, the Court's approach certainly aligns well with other recent decisions in which the CJEU has put an emphasis on the need for consumer protection when interpreting rules of private international law.[25] And yet, the present decision feels like a missed opportunity. Even though the Advocate General ultimately came to the same conclusion as the CJEU, the Court barely touched upon his nuanced analysis of the complex contractual situation between Facebook and its users,[26] let alone his wider observations as to the variety of purposes for which a single social-media account can be used. Despite the growing importance of these contracts, and the growing number of dual-purpose cases and 'mixed' statuses in general, the leading authority remains the case of a farmer buying tiles for the roof of his farm.[27]

4. Scope of the consumer rules: privileged jurisdiction (only) for the consumer's own claim

Although the Court considered Schrems to (still) be a consumer, this did not necessarily mean that he could rely on Article 18(1) Brussels Ia, second alternative, to bring all claims that had been assigned to him in the courts of his own domicile.

A. Article 18 Brussels Ia and assigned claims

In fact, the CJEU has repeatedly made clear that the consumer forum is only available to claimant consumers who are themselves party to the contract in question. Thus, if a consumer assigns their claim to a legal person, who then tries to enforce it, the latter cannot bring the claim in the courts of the consumer's domicile.[28] By the same token, an organisation that tries to prevent the use of certain terms in consumer contracts cannot avail itself of the privilege of Article 18(1) Brussels Ia.[29]

24. Ibid., para. 40.
25. See Case C-191/15 *Verein für Konsumenteninformation v. Amazon EU Sàrl*, EU: C:2016:612, para. 59, 69–71; Case C-478/12 *Armin Maletic et al. v. lastminute.com GmbH et al.*, EU: C:2013:735, para. 30.
26. See Case C-498/16 *Maximilian Schrems v. Facebook Ireland Limited*, para. 34–36.
27. Case C-464/01 *Johann Gruber v. Bay Wa AG*.
28. Case C-89/91 *Shearson Lehmann Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen GmbH*, EU: C:1993:15, para. 23–24.
29. Case C-167/00 *Verein für Konsumenteninformation v. Karl Heinz Henkel*, EU: C:2002:555, para. 33.

Conversely, the CJEU has held (in the context of Article 7(2) Brussels Ia) that the assignment of numerous claims to a single claimant cannot be used to establish the jurisdiction of the courts of a Member State that did not have jurisdiction for the individual claims before they were assigned.[30]

B. A restrictive interpretation of the rules on consumer jurisdiction

It is hardly surprising that the Court extended this line of reasoning to the claims brought by Schrems. Pointing out, first, that the rules on privileged jurisdiction for consumer apply 'only to an action brought by a consumer against the other party to the contract'[31] and, second, that 'the jurisdiction of courts other than those expressly referred to by [the Regulation] cannot be established through the concentration of several claims in the person of a single applicant',[32] the Court held that (what is now) Article 18(1) Brussels Ia,

> (. . .) must be interpreted as meaning that it does not apply to the proceedings brought by a consumer for the purpose of asserting, in the courts of the place where he is domiciled, not only his own claims, but also claims assigned by other consumers domiciled in the same Member State, in other Member States or in non-member countries.[33]

Consequently, jurisdiction based on the second alternative of Article 18(1) is only available to each individual claimant consumer, in the courts of their own domicile. Because Article 18(1) does not only contain a rule on international jurisdiction but also regulates local (internal) jurisdiction (by referring to 'the *place* where the consumer is domiciled'),[34] the Court's interpretation has the somewhat unfortunate side effect of even preventing the consolidation of the claims brought by Austrian consumers.[35]

If the claimants want to bring their actions in a single court they will have to seize the courts of the Member State in which the professional is domiciled, which may then consolidate the actions according to its national procedural law. Their jurisdiction can either be based on the first alternative of Article 18(1) for users who bring their own claims, or on Article 4(1) Brussels Ia for users who have assigned their claims (assuming that the CJEU's decision has to be understood as ruling out both alternatives of Article 18(1) for assigned claims).[36]

Although the claimants will understandably feel aggrieved by the decision,[37] the CJEU's restrictive interpretation of Article 18(1) Brussels Ia does not only appear as a straightforward

30. Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel NV et al.* EU: C:2015:335, para. 35–36.
31. Case C-498/16 *Maximilian Schrems v. Facebook Ireland Limited*, para. 45.
32. Ibid., para. 48.
33. Ibid., para. 49.
34. See Bonomi, in A. Dickinson and E. Lein (eds.), *The Brussels I Regulation Recast*, para. 6.67. See also Case C-478/12 *Armin Maletic et al. v. lastminute.com GmbH et al.*, para. 24.
35. AG Bobek proposed that an additional forum in which such consumer claims could be consolidated could be made available under national law (Opinion of Advocate General Bobek in Case C-498/16 *Maximilian Schrems v. Facebook Ireland Limited*, para. 117); it remains unclear how this could be reconciled with the wording of Article 18(1).
36. Even in this case, it would certainly be surprising if the jurisdiction of the courts of the Member State in which the professional is domiciled could be excluded through a jurisdiction clause.
37. See the press statement released by Schrems immediately after the decision had been published: www.europe-v-facebook.org/sk/CJEU_en.pdf (accessed 18 March 2018): 'a very extreme ruling'; 'Companies can continue to "divide and conquer" and block enforcement of consumer rights'.

application of the Court's earlier case law, it is also justified by important practical considerations. Allowing consumers to assign their claims to others, so that the latter can bring them in the (seemingly more favourable) courts of their domicile would provide a serious incentive for 'forum shopping' and undermine the foreseeability of the rules on jurisdiction. This would be as problematic for the affected courts, which might not be equipped to deal with thousands of assigned claims, as it would be for the defendant professionals. Although it is true that the Brussels Ia Regulation expects a professional to accept the risk of being sued by a consumer in their Member State of domicile – provided that the professional pursues a commercial activity in this country or directs such activities there – this risk is always limited to the specific consumers who are domiciled in this Member State at the time the action is brought.[38]

5. Conclusion: a nuanced approach to the consumer exception

The answers given by the CJEU to the questions referred seem to pull into two different directions: although the Court has given a wide interpretation to the term 'consumer' in Article 17(1) Brussels Ia, it has applied a restrictive understanding to the consumer forum of Article 18(1) Brussels Ia. Still, both answers are very much in line with the rationale underlying the consumer rules in Article 17–19 Brussels I.

Although the reasons given for the first answer may appear academically unsatisfying, an understanding of the term 'consumer' that also covers private users who have become professional litigants seems well in line with the aim of protecting the *structurally* disadvantaged party[39] in a contractual relationship. And although any extension of the category might appear burdensome to professional parties, it should be noted that the latter can limit the scope of the consumer-protection provisions by directing their commercial activities to a limited number of Member States in the sense of Article 17(1)(c) Brussels Ia.

In the same vein, allowing the claimant consumer to use the courts of his or her domicile to bring an effectively unlimited number of assigned claims would arguably have been at odds with the idea of protecting the individual consumer 'in so far as he personally is the plaintiff or defendant in proceedings'[40] by enabling him 'to sue the other party as close as possible to his home'.[41]

Of course, there may be good arguments for allowing consumers who are affected by the same set of facts to consolidate their claims and sue a professional together in the same forum, especially where the amount of every individual claim would not justify the time and expense of a lawsuit. Yet, nothing in the Court's decision prevents the claimant(s) from pursuing all assigned claims at the defendant's domicile.[42] Creating an *additional* forum, which would constitute another exception to Article 4(1) Brussels Ia and the principle of actor sequitur forum rei, however, would appear

38. As to the relevant point in time, see Bonomi, in A. Dickinson and E. Lein (eds.), *The Brussels I Regulation Recast*, para. 6.66.
39. On the theoretical underpinnings of the consumer rules, see G. Rühl, 'The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy', 10 *Journal of Private International Law* (2015), -p. 335, 342–346.
40. Case C-89/91 *Shearson Lehmann Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen GmbH*, para. 23.
41. *Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, COM(1999) 348 final, Explanatory Memorandum, para. 4.5, Article 16.
42. See above, 4.B.

to fall outside the mandate of the CJEU. Instead, it would be for the European legislator to create such a forum, potentially in a broader instrument for collective redress, which could then clarify where, and under what circumstances, collective redress would be available. Unfortunately, the different attempts that the Commission has made in this regard have so far been of limited success.[43]

ORCID iD

Tobias Lutzi http://orcid.org/0000-0003-4272-5686

43. See, most recently, the report published by the Commission on 25 January 2018, COM(2018) 40 final.