Fifty Shades of (Facebook) Blue – ECJ Renders Decision on Consumer Jurisdiction and Assigned Claims in Case C-498/16 Schrems v Facebook

Written by Tobias Lutzi, DPhil Candidate and Stipendiary Lecturer at the University of Oxford.

Yesterday, the ECJ has rendered its decision in Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited*. The case will be of interest to many readers of this blog as its facts are not only closely linked to the ECJ's well-known decision in Case C-362/14 *Schrems* but also could have come straight out of a conflict-of-laws textbook.

Maximilian Schrems has been litigating against Facebook and the way in which the company uses the personal data of its users since 2011, when he first submitted a range of complaints to the Irish Data Protection Commissioner. In 2013, he submitted another complaint, which ultimately lead to the annulment of the 'Safe Harbour' framework between the EU and the US in the aforementioned decision; the proceedings continued with a reformulated version of this complaint and have recently been referred to the ECJ for a second time. Over the course of this litigation, Schrems built a reputation as a privacy activist, publishing two books, giving talks and lectures, and founding a non-profit organisation that uses 'targeted and strategic litigation' to enforce privacy and data protection laws across Europe.

The proceedings that gave raise to yesterday's decision by the ECJ are formally unrelated to the aforementioned litigation.

In 2014, Schrems set out to bring a 'class action' against Facebook for numerous violations of privacy and data protection laws. For this purpose, 25,000 Facebook users assigned their claims to him. Only eight of these claims, regarding Schrems' own Facebook account and Facebook 'page' as well as the accounts of seven other users from Austria, Germany, and India, formed the object of the present proceedings. The claims were brought at Schrems' domicile in Vienna, Austria, based on the special head of jurisdiction for consumer contracts in Art 16(1) Brussels I (= Art 18(1) of the recast Regulation).

The proceedings raised two separate questions, which the Austrian *Oberster Gerichtshof* ultimately referred to the ECJ:

- Can Schrems still be considered a consumer in the sense of Art 15(1) Brussels I, despite his continued activism and professional interest in the claims?
- If so, can he also rely on the privilege of Art 16(1) Brussels I regarding claims that have been assigned to him by other consumers who are domiciled in (a) the same EU Member State; (b) another Member State; (c) a non-member State?

Following the Advocate General's opinion (reported here), the Court answered the first question in the positive (I.) and the second one in the negative (II.). Both answers are testimony to a nuanced interpretation of the special rules of jurisdiction for consumer contracts (III.)

I. The Consumer Exception

According to the ECJ's well-known decisions in Case C-269/95 *Benincasa* and Case C-464/01 *Gruber*, the assessment of whether a party is a 'consumer' in the sense of Art 15(1) Brussels I does not depend on their subjective qualities but on the 'the position of the person concerned in a particular contract' (*Benincasa*, [16]), which must have been 'concluded for the

purpose of satisfying an individual's own needs in terms of private consumption' (ibid, [17]); where a contract has been concluded for a purpose that is partly private and partly professional, the professional aspect of it must be 'so slight as to be marginal' for the contract to still fall under the provision (*Gruber*, [39]).

In the present case, this definition raised two questions. The Court first had to decide whether the assessment was to be made only at the moment when the contract was originally concluded or whether subsequent changes of circumstances must also be taken into account. It held that

[38] … a user of [a digital social network] may, in bringing an action, rely on his status as a consumer only if the predominately non-professional use of those services, for which the applicant initially concluded a contract, ***has not subsequently become predominately professional****.*

Second, the Court had to decide whether this was the case for Schrems, who had originally entered into a contract with Facebook for private purposes but subsequently developed a professional activity involving litigation against Facebook. According to the Court,

[39] … neither the expertise which [a] person may acquire in the field covered by those 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' within the meaning of Article 15 [Brussels I].

[40] 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. …*

Interestingly, the Court put little emphasis on the possible

distinction between Schrems' private Facebook 'profile' and his arguably professional Facebook 'page' (see [34]–[36]). Instead, it seemed to generally exclude 'representing the rights and interests of the users' of a particular service from the range of professional activities that might prevent the contract for this service from being considered a consumer contract. The Court explicitly linked this interpretation to the objective of ensuring a high level of consumer protection in Art 169 TFEU. Thus, its decision might not even have been different had Schrems joined Facebook with the sole aim of enforcing his (and other users') rights. This way, the Court effectively sidestepped the problems created by the increasingly wide range of uses to which social media and other online platform accounts can be put, which the Advocate General had so colourfully described as 'fifty shades of (Facebook) blue' (Opinion, [46]) – and which, for the time being, remain unaddressed.

II. Jurisdiction for Assigned Claims

With regard to using the second alternative of Art 16(1) Brussels I to bring claims that have been assigned to the claimant by other consumers at the claimant's domicile, the Court held:

[45] The rules on jurisdiction laid down, as regards consumer contracts, in Article 16(1) of the regulation ***apply****, in accordance with the wording of that provision,* ***only to an action brought by a consumer against the other party to the contract****, which necessarily implies that a contract has been concluded by the consumer with the trader or professional concerned ….*

…

[48] … ***[T]he assignment of claims cannot, in itself, have an impact on the determination of the court having jurisdiction*** *…. It follows that the jurisdiction of courts other than those*

expressly referred to by Regulation No 44/2001 cannot be established through the concentration of several claims in the person of a single applicant. … ***[A]n assignment of claims such as that at issue in the main proceedings cannot provide the basis for a new specific forum for a consumer to whom those claims have been assigned.***

This interpretation seems to align well with earlier decisions by the Court, according to which the special head of jurisdiction in Art 16(1) Brussels I is only available personally to the consumer who is party to the consumer contract in question (Case C-89/91 *Shearson Lehman Hutton*, [23]; Case C-167/00 *Henkel*), [33]), and according to which the assignment of a claim does not affect international jurisdiction under the Brussels I Regulation (Case C-352/13 *CDC Hydrogene Peroxide*, [35]–[36]).

An interesting, and arguably unfortunate, side effect of this restrictive interpretation is that it may even exclude the consolidation of the claims of other Austrian consumers in the same forum, considering that the second alternative of Art 16(1) does not only contain a rule of international jurisdiction but also determines local (internal) jurisdiction. In this regard, the Advocate General argued that an *additional* forum in which such consumer claims could be brought could be created under national law (Opinion, [117]), a proposition that does not appear easily reconcilable with the clear wording of Art 16(1).

Contrary to the claimant's press release, though, the fact that a consumer is not allowed to avail him- or herself of the privilege in Art 16(1) Brussels I in order to bring the claims 25,000 other consumers that have been assigned to him at his or her domicile does not mean that company's can 'divide and conquer' and 'block enforcement of consumer rights'. A claimant is free to rely on the first alternative of Art 16(1) Brussels I (which mirrors Art 2(1)) and bring all claims in the defendant's Member State of domicile, the procedural law

of which will then decide on whether the claims may be consolidated.

III. A Nuanced Approach to the Consumer Exception

What seems to emerge from the decision is a nuanced approach to the special provisions for consumer contracts. The Court applies a rather flexible interpretation to Art 15(1) Brussels I, allowing for changes of circumstances to be taken into account but also distinguishing the enforcement of (consumer) rights from other types of professional activities. At the same time, it interprets the special head of jurisdiction in Art 16(1) restrictively, limiting the privilege to each individual consumer and excluding the possibility of other consumers assigning their claims to one who is domiciled in what may appear as a more favourable forum.

Of course, there may well be strong arguments for the existence of such a possibility, especially in cases where each individual claim is too small to justify litigation but the sum of them is not. But it seems questionable whether Art 16(1) Brussels I would be the right instrument to create such a mechanism of collective redress – and, indeed, whether it should be the Court’s role to implement it.