Consumers and Audiovisual Platforms: An Assessment of International Jurisdiction*

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Abstract

This article assesses international jurisdiction regarding audiovisual platforms. It analyses the platforms included in the Audio-visual Media Services Directive, it describes some technologies employed when providing such services, and it foresees some conflicts that may happen with users of such platforms. The article analyses the consumer concept under the Brussels Ia Regulation and suggests a broad approach of the targeting of activities. Finally, this work analyses choice-of-forum provisions in Brussels Ia Regulation.

Keywords

Consumers, audio-visual platforms, over-the-top platforms, Private International Law, jurisdiction, Audio-visual Media Services Directive, Brussels Ia Regulation, geo-blocking Regulation

1. Introduction

The technological convergence has blurred the boundaries between established media and other communication industries. Under this paradigm, there are a number of platforms offering content to users to watch or listen online. Other platforms allow users to upload by themselves their user-generated content. In this regard, the terminology referring to online platforms may be confusing. In some occasions, music and film providers of online content are referred to as Over the Top Platforms (OTT), as for its mass size in terms of users and revenue although the European legislator has provided for a different terminology, when encompassing them in the scope of application of the Audio-visual Media Services Directive (AVMSD) [1]. Basically, the AVMSD regulates the services provided by broadcasting services providers, as well as on demand, Audio-visual Media Services Providers (AVMSP) and Video-Sharing Services Providers (VSP). Indeed, the AVMSD's scope of application includes AVMSP, as those platforms providing on-demand services. The Directive defines these services as those services provided by a media service provider so that the user may view the programmes "at the moment chosen and at his individual request on the basis of a catalogue of programmes selected by the media service provider" (art.1.g). Netflix, Apple Music, HBO Max and Amazon Prime are paramount examples of platforms distributing professionally produced content. These US-based platforms have disrupted the on-demand entertainment landscape.

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Moreover, for the first time, the AVMSD also includes VSPs into its scope of application. According to the Directive, the most relevant aspect of these services is that the service provider does not have editorial responsibility over the content; instead, the provider organizes the content, either manually or by automatic means such as algorithms, by displaying, tagging and sequencing it. These platforms may have as the principal purpose of the service the provision of "programmes, user-generated videos, or both, to the general public" in order to "inform, entertain or educate", by electronic means (art. 1.1.aa). It is also applicable when there is a "dissociable section" of the service or an "essential functionality" of the platform that provides those programmes or user-generated videos to the public. YouTube, Tik-Tok and Twitch are specifically devoted to providing such services; adult sites provide a great deal of organised videos [2]. Other platforms may be also qualified as VSP since they provide video sharing services as a "dissociable section" such as Vimeo, which provides software, video hosting and video sharing services. Snapchat, a platform providing a messaging application also provides shared video content. As the reader may foresee, there may be a number of problems when considering whether a specific platform may be characterised as VSPs. Although this lies outside of the topic of this work, perhaps the most controversial issue is referred to videos shared by electronic versions of newspapers and magazines since Recital 28 of the Directive excludes them from falling within its scope of application. Yet, the Court of Justice of the European Union (ECJ) has considered that "a video section which, solely as part of a website, meets the conditions to be classified as an on-demand audio-visual media service, does not lose that classification merely because it is accessible on the website of a newspaper or because it is offered within that site" [3]. Additionally, several national regulators have interpreted in a different view as to when a video section of a newspaper constitutes a stand-alone video on demand (VOD) service [4].

2. Conflicts on audio-visual platforms

Audio-visual platforms have usually followed a policy of data secrecy, providing little information regarding the conflicts that may arise on the provision of these services. In order to fight against this lack of transparency and therefore, to provide for a transparent and safe level playing field on online activities, the EU has recently enshrined a number of key regulatory instruments. One of the most remarkable is the AVMSD but other instruments are the Digital Services Act and the revision of the e-Commerce Directive [5].

Conflicts may arise between users of a platform and the platform itself, but also between different users of the platform as well as between a user and a non-user of the platform. Conflicts may usually appear when someone feels aggrieved by content shown by the platform or when the content affects intellectual property rights. For instance, the Michael Jackson Estate sued HBO over "Leaving Neverland", the documentary about the late pop star's alleged sexual abuse, claiming that the documentary constituted a breach of a non-disparagement clause in a contract [6]. Moreover, some years ago, several subscribers sued Netflix regarding a running contest to improve its recommendation algorithm. In that case, Netflix provided contestants with semi-anonymised rental information and preferences that could be identified with individuals, information that could be related with sexuality, religious beliefs, or political affiliations; or it

could be associated with domestic violence, adultery, alcoholism or substance abuse. Basically, the main issue at stake was a Private International Law (PIL) one, that is, whether the court had jurisdiction to deal with the case. The District Court for the Northern District of California considered that the venue was proper because the Netflix' Terms of Use contained a clause stating that that District Court had exclusive jurisdiction over any dispute between the subscriber and Netflix. Moreover, the court asserted that Netflix is a corporation whose contacts are sufficient to subject it to personal jurisdiction. According to the court, the company "had sufficient minimum contacts with that State and/or otherwise intentionally availed itself of the markets in this state, which make the exercise of jurisdiction by the Court permissible under notions of fair play and traditional justice". In addition, the court considered that personal jurisdiction comes from the fact that "Netflix regularly and systematically directs electronic activity into California with the manifested intent of engaging into business with California" [7]. As we will see in the following pages, in the EU issues related with international jurisdiction shall be treated mainly under the paradigm of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (also called Brussels Ia Regulation).

Conflicts with the content uploaded by someone else can also emerge with VSP; a person may feel aggrieved from another user of the same platform, by the content uploaded by this user, such as when making disparaging or misleading statements about a person. Additionally, there may be a number of conflicts related to the content generated and uploaded by someone, especially when the platform removes that content against the will of the person uploading it.

3. Technologies for audiovisual platforms

In the early days of the Internet, it used to be all about communication. In the beginning, academics would communicate with remote machines and would log in over the network to perform tasks. Then, when Internet entered private households, local routers quite ineffectively helped with personal and professional communications. Yet, since the Web grew up, the Internet has become more about content than communication. This switch to content is shown today as the majority of Internet bandwidth is used to deliver stored videos [8]. In fact, video streaming has been dominating the global IP traffic in recent years, and it is expected that this will continue to grow due to the introduction of higher resolution formats. In this regard, service providers need flexible solutions to ensure that they can deliver content regardless of where the customer is located and which device he uses [9].

In fact, it is technically impossible to handle all this amount of data on a single server. This is why most big content providers have built their own content distribution networks, which use data centres spread around the world, such as Content Distribution Network (CDN), where a provider sets up a distributed collection of machines at locations inside the Internet and uses them to serve content to clients. Moreover, CDNs use Domain Name Servers (DNS) to direct clients to a nearby server. When a CDN is implemented, the provider places a copy of the page in a set of nodes at different locations and directs the client to use a nearby node as the server [8].

There are also collaborative services, federated data centres or cloud computing services

being explored for streaming services [10]. One example is Peer-to-Peer networks (P2P), where a collection of computers, pool their resources to serve content to each other, without separately provisioned servers or any central point of control. P2P networks let a collection of machines share content among themselves and provide for a content distribution capacity [8]. In these systems there is no dedicated infrastructure, unlike in a CDN, and usually there is no central point of control, which from a legal point of view is a key difference. At the moment, yet such collaborative systems are not widely deployed today [10].

4. Consumer protection from a jurisdiction point of view

4.1. Consumer protection forums

The Brussels Ia Regulation is the main instrument in Europe dealing with both international jurisdiction and recognition and enforcement of foreign decisions in civil and commercial matters. This Regulation provides for a number of forums which detail which courts may assume international jurisdiction in a particular case, having more than one international element. Moreover, the Regulation in its art. 18 provides for special protection rules to a party considered as weaker in a contract, specifically a consumer in a contract performed with a trader. From a jurisdiction point of view, the consumer is protected by not forcing him to move to the courts of the trader's foreign defendant if willing to sue him; instead, he has the option of suing a foreign trader before his own courts, or suing the trader before the courts of the trader. Yet, when it is for the foreign trader, who wants to sue the consumer defendant, he has to move to the consumer's place of habitual residence.

4.2. The consumer concept according to the Brussels Ia Regulation

The Brussels Ia' consumer protection rules require the fulfilment of some cumulative requirements: first, it is necessary that there is a contract; second, that this contract has to be signed between a consumer and a trader or professional; and third, that the contract has to fall within one of the categories of art. 17.1a-c; specifically, that there is a territorial connection with the territory of the consumer [11, 12].

The problem, nowadays, is that there are new roles users of online platforms may have, and thus it is not always straightforward to characterise a consumer or a trader since the dividing line between a consumer and a trader is less obvious. For one thing, whereas some years ago consumers were simply passive buyers, now they may turn into active prosumers. In other occasions, users may be involved in a relationship with a platform with an aim of gaining commercial activity such as it happens with instagramers or vloggers.

Art. 17 Brussels Ia Regulation requires that there is a "contract concluded by a person (...) for a purpose which can be regarded as being outside his trade or profession." When proving a proof of such a subjective element the ECJ only considers objective elements, in particular, the signed contract between the parties, as only the contract can show whether the person concluded a contract "for the purpose of satisfying an individual's own needs in terms of private consumption." [13] When such a person has concluded a contract for a purpose lying in his business or profession he cannot claim the protection of the consumer rules, and when he signed

a contract with a purpose, which is partly professional and partly private, he can claim the consumer protection rules only when the link between the contract and the trade or profession is so slight as to be marginal [14].

Subscribers of AVM platforms perform a contract with the platform for a purpose, which lies outside of their trade. All Terms of Use analysed (Netflix, Amazon Prime, Apple Music, HBO Max) set out that such services are provided only for personal and non-commercial uses. Therefore, subscribers cannot make any profit out of the access of this content, nor they can show it in public performances. This is also applicable when members of the family have access to the content through several devices. Yet, a subscriber could theoretically circumvent the protective measures of the AVMS provider, perhaps with a lucrative intention. In this case, it would be interesting to see whether such a person could claim the application of the consumer protection rules. According to the ECJ case-law, he could claim such a protection since the purpose of the contract was outside his trade or profession.

There are some cases that have been dealt with by the ECJ where a person has had a very lucrative relationship with a trader and still, he has been characterised as consumer. In the Personal Exchange case, a company, which offered online gambling services via the website www.mybet.com, was directing its commercial activity towards Slovenia, among other countries. Then, a person opened a user account on that website and, had to accept the general terms and conditions drawn up unilaterally by the company, where there was a clause establishing the jurisdiction of the courts of the Republic of Malta. In fact, that person won approximately EUR 227000 from playing poker on that website around nine hours a day; after a while his account was blocked by the company, and that amount was withheld by it on the ground that apparently the person infringed the rule of play. Having brought an action at first instance before the Slovenian courts, this raised a jurisdiction issue, whether the person was a consumer, since in these cases, choice-of-forum clauses are limited. In the case, the ECJ stated that the person in question was still a consumer even if that person plays the game for a large number of hours per day and receives substantial winnings from that game [15].

Furthermore, in the Jana Petruchová case, a university student concluded a contract with a brokerage company, trading on the FOREX market, and the Court also stated that she was a consumer, according to the Brussels Ia Regulation [16].

More interestingly, perhaps noticing the unfairness of such outcomes, the Court has opened the possibility for consumers to lose their status as consumers, when the predominately non-professional use of those services, for which the person initially concluded a contract, has subsequently become predominately professional [13]. As for the proof, the Court opens the possibility for such a person to lose its status as a consumer should he have offered his services as a payment service, or when officially declaring such activity [15]. Thus, a subscriber could lose its status as a consumer if he makes, not only a profit but a predominant business with the sharing of such audio-visual content.

Additionally, users of VSP can be considered as consumers in certain occasions, and as professionals in others. For instance, an influencer signing up with a VSP according to a business account cannot invoke the consumer protection rules. Arguably this would be applicable when he signed as professional even if the real purpose was outside of his trade or profession, such as when an amateur musician signs up an account as a professional musician in Instagram; otherwise, the person in question should have to prove with objective elements that even if he

signed up with a professional account the purpose was merely private. On the contrary, when the user signs up with a personal account, he could claim his characterisation as consumer. Furthermore, a user signing up with a personal account for a purpose which is partly professional and partly personal, the consumer rules shall be applicable only when the link between the contract and the profession or trade is merely marginal.

4.3. The targeting of activities regarding audiovisual platforms

Additionally, art. 17.1.c) requires a territorial connection from the trader or professional towards the consumer's territory. Thus, it sets out that: "(...) the 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."[1] Such territorial connection demonstrates that a particular website has sufficient contacts with the forum, meaning that the courts may assume jurisdiction because there is a close link between the case and those courts. Yet, the targeting of activities does not intrinsically indicate that the forum at which a company is targeting is the most appropriate forum or the most closely connected with a dispute [17]; Indeed, art. 17.1.c sets out that it is necessary that the company "by any means, direct(s) (...) such activities to the consumer's Member State", and that the contract falls within the scope of such activities. This targeting test has been interpreted by the ECJ in the Pammer case, and it is still the reference landmark ruling. In this regard, the Pammer case refers to the use of indicative elements in order to assess whether a particular webpage targets the consumer's domicile [18]. Yet, the approach opened by this ruling establishes the necessity to analyse how a particular website addresses its customers in order to see whether there are sufficient elements establishing that it is targeting the territory of a consumer, among others. In particular, the court in Pammer establishes that when the website mentions an international clientele, or there is an indication of how to arrive to a particular place from abroad, or when the website uses a top-level domain name, these could be indicative elements of the targeting of activities. And yet, is for the national courts to ascertain whether such evidence exists, and therefore, to apply this test to a particular case.

When applying the Pammer test to audio-visual platforms one can see some particularities. Indeed, audiovisual platforms usually geo-locate the country of subscription in order to assign the account to a particular country. This may be important because they do not require any activity from the subscriber's perspective, since they do not require the subscriber to fill in his billing address or home address when creating an account. When registered, the subscriber has access to the "national" catalogue. According to this kind of action, it may be arguable to establish that the audiovisual platform targets the country in which the subscriber is located. If at the registration process the platform asks the subscriber to fill in the details, the targeting of activities could be derived from other elements such as the display of language directed towards a particular country.

[1]This territorial connection is not necessary to apply when any of the following two categories are fulfilled: a contract for the sale of goods on instalment credit terms, and a contract for a loan repayable by instalments, or any other form of credit, made to finance the sale of goods (art. 17.1 a) and b).

Moreover, it is relevant to analyse the use of geoblocking by such platforms, and its relationship with the targeting of activities. In this regard, since audio-visual services are currently excluded from the scope of application of the EU geoblocking Regulation [19], AVMS platforms are allowed to geoblock users from other countries. In such cases, a consumer in one country may not be allowed to access a "national" catalogue available in another EU country. Therefore, it could be affirmed that a platform not geoblocking users in a particular territory, it does prima facie target that territory. This presumption is excluded by the geoblocking Regulation in its art. 1.6, when it sets out that the trader who does not geo-block "shall not be, on those grounds alone, considered to be directing activities to the Member State where the consumer has the habitual residence or domicile." Nevertheless, as already mentioned, this (lack of) presumption is not applicable to audiovisual platforms. Other than this, when a platform does not geoblock consumers in a particular territory, an analysis of the display of the website should be taken into account in order to see whether it targets a particular territory.

As regards VSP, it should be taken into account that their outreach is most of the times global. Platforms such as Instagram, YouTube or Tik-Tok provide those services to users located anywhere in the world. Therefore, arguably the interpretation of the targeting test should be widely understood when referring to the activity of global, VSP platforms.

4.4. Choice-of-court clauses in consumer contracts

Usually traders include choice-of-court clauses in their contracts. The main aim of such clauses is to avoid the uncertainty of being sued in a distant forum and thus to know in advance which forum shall be competent in case a conflict arises. Additionally, traders may also include Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) clauses in their contracts, so that if a conflict arises parties shall refer to out-of-court mechanisms such as arbitration or mediation, or to online out-of-court mechanisms. When the parties perform a contract through Internet one of them usually signs up the Terms of Use by checking a box saying, "I agree" (also called click wrap agreements), where a choice-of-forum clause may be included.

This study shows that AVMS providers usually include such choice-of-court and ADR clauses in their Terms of Use. For instance, Amazon Prime's Terms of Use indicate the option that subscribers have in order to bring the proceedings before the courts of the subscriber's domicile or before the courts of the AVMSP's domicile. Literally, Amazon Prime states that "We both agree to submit to the non-exclusive jurisdiction of the district courts of the city of Luxembourg, which means that you may claim your rights as a consumer in relation to these Terms of Use both in Luxembourg and in your Member State of residence in the European Union."[2] The platform HBO Max also correctly identifies the courts of the consumer's domicile as the competent ones since it states that: "As a consumer, you have the right to refer the matter to a court of law where you reside."[3] In addition, HBO Max also refers to institutional ADR as well as the EU ODR platform: "You may also choose to make a complaint in the first instance to the relevant consumer protection agency in the Europe Service Area or to the relevant EU or national board/authority for consumer disputes (...) or, you can go to (EU ODR Platform) to

[2]See https://www.amazon.co.uk/gp/help/customer/display.html?nodeId=201909000 (last accessed, 16 January 2023).
[3]art. 5.4. https://www.hbomax.com/terms-of-use/en-emea (last accessed, 16 January 2023).

resolve a consumer dispute out of court online."[4] Furthermore, under the Governing Law section of its terms of use, the Apple platform states that for European consumers the jurisdiction shall be the courts of the consumer's habitual place of residence, but it does not mention the trader's forum. In particular, it states that "If you are a resident of any European Union country or the United Kingdom, Switzerland, Norway or Iceland, the governing law and forum shall be the laws and courts of your usual place of residence."[5] Finally, Netflix does not contain any choice-of-court provision.

When dealing with party autonomy in consumer contracts there are a number of aspects to be analysed. First, in order for these choice-of-court agreements to be valid they have to fulfil some requirements enshrined by art. 25 of the Brussels Ia Regulation. Second, party autonomy is limited to consumer contracts by art. 19 of the same Regulation.

4.4.1. Requirements for the validity of choice-of-court clauses

The Brussels Ia Regulation establishes some formalities to choice-of-court clauses which aim to ensure the consensus between the parties regarding those clauses. The Court has established that ensuring the real consent of the parties is justified by the concern to protect the weaker party to the contract by avoiding jurisdiction clauses, incorporated in a contract by one party going unnoticed [20, 21]. However, some studies show that most consumers do not read the Terms and Conditions on online platforms, and therefore in some cases it is more than doubtful that users have accepted the clause [22].[6]

Art. 25.2 sets out the functional equivalence of agreements performed online and in writing. Thus, it sets out that "Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'". Therefore, contracts can be, for instance, digitally signed with an electronic signature, which provides evidence that the person accepts it, or performed by an exchange of emails. Yet, usually low-value contracts are agreed upon by way of clicking on a "click-wrapp agreement", whereby a trader presents the terms of the contract to the other party and the other party must click on a box. In particular, the ECJ has interpreted this provision when a choice-of-court agreement is agreed on such a "click-wrapp agreement." In the Jaouad El Majdoub case, the ECJ stated that this requirement is fulfilled when the website gives the possibility of providing a durable record of such an agreement, such as saving and printing the information. According to the ECJ, it does not require that the parties have actually recorded such a clause [23].

Moreover, in a recent ruling regarding the application the Lugano Convention [24], the ECJ had to decide about a choice-of-court clause stated in the General Terms and Conditions to which the contract directed through a hypertext link, and in which no tik-box was required to be accepted. Thus, the Court considered that such a clause is validly concluded when the hypertext link allows those general terms and conditions to be viewed, downloaded, and printed, prior to the signature of the contract [25].

In conclusion, the interpretation of the ECJ favours the acceptance of clauses included in

[4]https://www.hbomax.com/terms-of-use/en-emea (last accessed, 16 January 2023).

[5]https://www.apple.com/legal/internet-services/itunes/uk/terms.html (last accessed, 16 January 2023).

[6]Since more than half of European consumers do not read the Terms and Conditions on online platforms. Moreover, only a quarter of the users of online platforms read the Terms and Conditions and take them into account.

click-wrap agreements or hypertext links with the purpose of simplifying the conclusion of contracts by electronic means [23], although it is doubtful that consumers have consented to these choice-of-forum clauses. In addition, it should be bear in mind that the EU material law standards for consumer protection cannot be considered since art. 25 is a uniform provision.

4.4.2. Limitations to choice-of-court clauses in consumer contracts

Party autonomy in consumer contracts are limited by the Brussels I bis Regulation since it is considered that traders may abuse of its power towards consumers (art. 19). Choice-of-court agreements are only valid in three particular cases. First, when both parties agree on such a clause after the dispute has arisen, since the legislator considers that these cases scape from standard contract terms imposed by traders, and therefore, both parties may eventually negotiate the terms of the agreement. Second, such a clause is considered valid when it gives an additional forum choice to the consumer, and therefore, it allows the consumer to bring proceedings in courts other than from the courts of his or her domicile or from the courts of the trader. And finally, such an agreement is valid when there is a specific territorial connection between both parties, in particular, when the parties are "at the time of conclusion of the contract domiciled or habitually resident in the same Member State", and the agreement "confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State."

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