Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 14 November 2017 [1]

Case C-498/16

Maximilian Schrems
v
Facebook Ireland Limited

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling — Judicial cooperation in civil matters — Regulation (EC) No 44/2001 — Jurisdiction in matters relating to consumer contracts — Concept of consumer — Social media — Facebook accounts and Facebook pages — Assignment of claims by consumers domiciled in the same Member State, in other Member States and in non-member States — Collective redress)

I. Introduction

1. Mr Maximilian Schrems has started legal proceedings against Facebook Ireland Limited before a court in Austria. He alleges that the company has infringed his privacy and data protection rights. Seven other Facebook users assigned their claims for allegations of the same infringements to him in response to Mr Schrems' online invitation to do so. They are domiciled in Austria, other EU Member States, and in non-member States.

2. This case raises two legal issues. First, who is a 'consumer'? In EU law, the consumer is seen as the weaker party in need of protection. To this end, elements of quite robust legal protection of consumers have been built up over the years, including the possibility of a special head of jurisdiction for consumer contracts provided for in Articles 15 and 16 of Regulation (EC) No 44/2001. [2] That effectively creates a *forum actoris* for consumers: a consumer can sue the other party to the contract in his place of domicile. Mr Schrems submits that the courts of Vienna, Austria, have jurisdiction to hear both his own claims and the assigned claims, as he is a consumer in the sense of Articles 15 and 16 of Regulation No 44/2001.

3. Taxonomy is always a tricky business. Even if some defining elements can be agreed on, there will always be odd cases that do not fit in the box. Moreover, species evolve over time. Can a 'consumer' who becomes increasingly involved in legal disputes gradually become a 'professional litigant in consumer matters', hence no longer in need of special protection? That is, in a nutshell, the gist of the first question posed by the referring court, the Oberster Gerichtshof (Supreme Court, Austria).

1 Original language: English.

2 Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

4. The second question concerns international jurisdiction for disputes concerning consumer contracts where claims have been assigned. Assuming that the claimant is still a consumer in his own right, can he also rely on that special head of jurisdiction for the assigned claims of other consumers domiciled in the same Member State, other EU Member States, and/or in non-member States? In other words, can Article 16(1) of Regulation No 44/2001 establish an additional special jurisdiction in the domicile of the assignee, thus effectively opening up the possibility of collecting consumer claims from around the world?

II. Legal framework

A. EU law

1. Regulation No 44/2001

5. Article 15 of Regulation No 44/2001 is worded as follows:

'1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:

(a) it is a contract for the sale of goods on instalment credit terms; or

(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

(c) in all other cases, 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.

...'

6. Article 16 of Regulation No 44/2001 provides that:

'1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

...'

B. Austrian law

7. According to Paragraph 227 of the Zivilprozessordnung ('ZPO', Austrian civil procedural code):

'(1) Several claims of a plaintiff against the same defendant, even if they are not to be added together (Paragraph 55 of the Jurisdiktionsnorm (Law on Court Jurisdiction)), may be asserted in the same action, if for all claims

1. the trial court has jurisdiction and

2. the same type of proceedings is allowed.

(2) However, claims that do not exceed the amount specified in Paragraph 49(1)(1) of the Law on Court Jurisdiction may be joined with claims that exceed that amount, and claims that are to be heard before a single judge, with those that are to be heard before a Chamber. In the first case, jurisdiction is determined by the higher amount; in the second case, the Chamber shall decide on all claims.'

III. Facts

8. According to the facts as set out by the referring court, Mr Schrems ('the Applicant') specialises in IT law and data protection law. He is writing a PhD thesis on the legal (civil, criminal and administrative) aspects of data protection.

9. The Applicant has used Facebook since 2008. First, he used Facebook exclusively for private purposes under a false name. Since 2010, he has used a *Facebook account* under his own name, spelt using the Cyrillic alphabet, for his private use — uploading photos, posting online and using the messenger service to chat. He has approximately 250 'Facebook friends'. Since 2011 the Applicant has also used a *Facebook page*. That page contains information concerning the lectures he delivers, his participations in panel debates and media appearances, the books he has written, a fundraiser he has launched and information about the legal proceedings he has initiated against Facebook Ireland ('the Defendant').

10. In 2011, the Applicant submitted 22 complaints against the Defendant before the Irish Data Protection Commissioner. In response to those complaints, the Data Protection Commissioner issued a review containing recommendations to the Defendant and, subsequently, a monitoring review. In June 2013 the Applicant brought a further complaint against Facebook Ireland in relation to the PRISM surveillance programme [3] which led to the annulment of the Commission 'Safe Harbour' Decision [4] by this Court. [5]

11. On the subject of his legal proceedings against the Defendant, the Applicant has published two books, delivered lectures (sometimes for remuneration), registered numerous websites (blogs, online petitions, crowdfunding actions for legal proceedings against the Defendant), obtained various awards and founded the Verein zur Durchsetzung des Grundrechts auf Datenschutz (Association for the Enforcement of the Fundamental Right to Data Protection; 'the association'). [6]

12. The declared objective of the Applicant's initiatives is to apply pressure on Facebook. His activities have attracted the interest of the media. His legal proceedings against Facebook have caught the attention of numerous TV broadcasters on Austrian, German and international television channels and radio programmes. There have been at least 184 press articles on the topic, including international and online publications.

3 Programme which grants US authorities access to data stored on servers in the United States owned or controlled by a range of internet companies, including Facebook USA.

4 Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (OJ 2000 L 215, p. 7).

5 Judgment of 6 October 2015, *Schrems* (C-362/14, EU:C:2015:650).

6 According to the referring court, the association is a non-profit organisation whose objectives are the active legal enforcement of the fundamental right to legal protection of personal data. It supports test cases of public interest brought against undertakings which potentially endanger that right, the costs being met by donations.

13. The referring court states that the Applicant is employed by his mother. His income comes from that employment and also the rental of an apartment. In addition, he receives income of unknown amounts from the sale of the abovementioned books and events to which he is invited as a result of the legal proceedings he has brought against the Defendant.

14. In the current proceedings, the Applicant alleges that the Defendant has committed numerous infringements of data protection rules in contravention of Austrian, Irish and EU law.[7] The Applicant seeks a series of remedies: a declaratory statement (concerning the Defendant's status as a service provider and its duty to comply with instructions; its status as a controller insofar as the data processing is carried out for its own purposes; and the invalidity of contractual terms); injunctive relief (relating to the use of data); disclosure (on the use of the applicant's data); production of accounts; and a claim for damages (concerning alteration of contractual terms, compensation, and unjustified enrichment).

15. The action in the main proceedings has been brought with the support of a litigation funding company for a fee of 20% of the proceeds and with the support of a public relations agency. The Applicant has assembled a team of 10 individuals with a core of five to support him in 'his campaign against Facebook'. It is unclear whether those persons receive any remuneration from the Applicant. The required infrastructure is paid for from the Applicant's private account. Neither he nor the association have any employees.

16. Following the invitation posted online by the Applicant, over 25 000 people have assigned their claims against the Defendant to the Applicant through one of the websites registered by him. As of 9 April 2015 another 50 000 people were on a waiting list. Only seven claims are included in the present proceedings before the referring court. Those claims have been assigned to the Applicant by consumers domiciled in Austria, Germany and India.

17. The Austrian court of first instance, the Landesgericht für Zivilrechtssachen Wien (Regional Court for Civil Matters, Vienna, Austria), dismissed the application. It declared that, in light of the abovementioned activities connected to the Applicant's claims, his use of Facebook had changed over time. He was also using Facebook for professional purposes and that prevented him from relying on the special jurisdiction over consumer contracts. That court also declared that the jurisdiction for consumers on which the assignors could rely is not transferable to the assignee.

18. The appeal court, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) altered that decision in part. It accepted the admissibility of the action with regard to the Applicant's 'personal' claim, made in relation to Mr Schrems' own consumer contract. That court was of the view that the conditions for the application of Article 15 of Regulation No 44/2001 were to be assessed at the point when the contract was concluded.

19. However, the appeal court dismissed that part of the appeal pertaining to the assigned claims. It held that the jurisdiction rules for consumers can be used to the advantage of a consumer only by those who are parties to a legal action. As a result, the Applicant could not successfully rely on the second part of Article 16(1) of Regulation No 44/2001 when seeking to enforce the assigned claims.

7 According to the referring court, the Applicant claims several infringements of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

20. Both parties have challenged the appeal decision before the Oberster Gerichtshof (Supreme Court). That court has stayed the national proceeding and referred two preliminary questions to this Court:

'(1) Is Article 15 of [Regulation No 44/2001] to be interpreted as meaning that a "consumer" within the meaning of that provision loses that status, if, after the comparatively long use of a private Facebook account, he publishes books in connection with the enforcement of his claims, on occasion also delivers lectures for remuneration, operates websites, collects donations for the enforcement of his claims and has assigned to him the claims of numerous consumers on the assurance that he will remit to them any proceeds awarded, after the deduction of legal costs?

(2) Is Article 16 of [Regulation No 44/2001] to be interpreted as meaning that a consumer in a Member State can also invoke at the same time as his own claims arising from a consumer supply at the claimant's place of jurisdiction the claims of others consumers on the same subject who are domiciled

(a) in the same Member State,

(b) in another Member State, or

(c) in a non-member State,

if the claims assigned to him arise from consumer supplies involving the same defendant in the same legal context and if the assignment is not part of a professional or trade activity of the applicant, but rather serves to ensure the joint enforcement of claims?'

21. Mr Schrems, Facebook Ireland, the Austrian, German and Portuguese Governments as well as the European Commission have presented written observations. Mr Schrems, Facebook Ireland, the Austrian Government and the Commission participated in the oral hearing that took place on 19 July 2017.

IV. Assessment

22. This Opinion is structured as follows: I will first assess whether the Applicant can be considered a 'consumer' with regard to his own claims (A). Second, assuming that he indeed is a consumer, I will examine the issue of jurisdiction based on the special consumer forum with regard to the claims assigned to the Applicant by other consumers (B).

A. First question: who is a consumer?

23. The referring court has doubts as to whether the Applicant can be considered a consumer in the sense of Article 15(1) of Regulation No 44/2001 for *his own claims* against the Defendant. In particular, it asks whether the consumer status can be lost if, after having used a Facebook account for private purposes, a person engages in activities such as publishing, delivering lectures, creating websites, or collecting donations. The referring court also mentions that some of those activities connected to the Applicant's claims (the lectures) have been remunerated. Moreover, the Applicant invited other consumers to assign their claims to him. It is suggested that any pecuniary award from the assigned claims will be remitted to the assignors after a deduction of legal costs.

24. All the parties that submitted observations, with the exception of the Defendant, agree that as far as *his own claims* against Facebook Ireland are concerned, the Applicant ought to be considered a consumer.

25. The Defendant holds the opposite view. It submits that the Applicant cannot rely on the special head of jurisdiction for consumers. This is because, at the relevant time, when lodging the application, he used Facebook for commercial purposes. The Defendant relies on two lines of argument in support of this. First, the status of consumer can be lost over time. The date that has to be taken into account in order to assess the status of consumer is the date when the claim was lodged. It is not the commencement date of the contract. The Applicant has engaged in professional activities connected to his claims against the Defendant. As a result he can no longer be considered a consumer for the purposes of those claims. Second, the establishment of a Facebook page devoted to the Applicant's abovementioned activities means that his use of the Facebook account is professional, or commercial. This is because both the Facebook account and the Facebook page form part of a single contractual relationship.

26. Subject to further verifications by the referring court, and provided that the claims concerning the alleged privacy and personal data infringements advanced by the Applicant *relate to his Facebook account*, I am inclined to agree that the Applicant can be considered as a consumer for the claims arising out of his own consumer contract.

27. However, before arriving at such a proposition, it is necessary to dwell on two definitional elements of the traditional concept of a 'consumer' that appear to be somewhat nebulous in the present case. In Subsection (1) I will examine on what basis an individual can be characterised as a consumer for the purposes of Regulation No 44/2001 (a), and whether the status of a consumer can change over time with regard to the same contractual relationship (b). I will then address the concept of consumer in the specific context of social media and Facebook, which pose even greater challenges to the traditional definitions of a consumer (Subsection 2).

1. The concept of consumer

(a) The purpose of the contract: professional or private?

28. Article 15(1) of Regulation No 44/2001 limits the special consumer forum to 'matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession'.

29. Two elements are discernible under that provision: first, the consumer is not defined in general, abstract terms, but always with regard to 'a contract'. Second, that contract has to be concluded for a purpose falling outside the 'trade or profession' of a given person.

30. The first element is important in the present case. It means that an assessment of the consumer status is always contract-specific: the specific contractual relationship at issue must be considered. It is not an abstract or a global assessment of the predominant personal status.

31. The second element, 'trade or profession', relates in broad terms to one's economic activity. This does not mean that the contract at issue would have to be necessarily connected with immediate economic profit. Rather, it means that that contract was entered into in connection with an ongoing, structured economic activity.

32. This approach to the interpretation of Article 15(1) of Regulation No 44/2001 seems to follow from a consistent line of this Court's case-law. In the past, the Court has rejected an approach to the status of consumer that is linked to a general perception of the activities or knowledge of a given individual. The determination of consumer status must be made by reference to the position of that

person in a particular contract, having regard to the nature and aim of that contract.[8] Thus, as lucidly put by several Advocates General[9] and as confirmed by the Court, 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'.[10]

33. This means that the same person can, even on the same day, be acting as a professional and a consumer, depending on the nature and aim of the contract that has been concluded. For example, a professional lawyer specialising in consumer law may still be a consumer, despite his professional activity and knowledge, whenever he enters into a contractual relationship for private purposes.

34. As a consequence, it is the purpose for which a contract was concluded that matters. True, as helpful as it is, that criterion might not always be clear cut. There can be 'dual purpose' contracts, which serve both professional and private purposes. The Court had the opportunity to examine this issue in the well-known case *Gruber* concerning the Brussels Convention. It follows from that ruling that for contracts with a dual purpose, consumer status is maintained only if the connection between the contract and the trade or profession of the person concerned is 'so slight as to be marginal', meaning it had only a negligible role in the context in which the contract was concluded (considered in its entirety).[11]

(b) The time: a static or a dynamic approach?

35. The question of 'dual purpose' contracts, where both purposes exist at the same time (typically the moment of contract formation), differs from the issue of being able to take account of the temporal evolution of the purpose and aim of a contractual relationship. Can the use of a contract shift from an exclusively private to an exclusively professional nature, or vice versa? Can, as a result, consumer status be lost over time?

36. The Applicant, as well as the German and Austrian Governments consider that consumer status cannot be lost. Their view is that the point of reference is when the contract was concluded.

37. Conversely, the Defendant pleads for a 'dynamic' approach to the concept of consumer, which is a position that the Commission does not oppose. According to that approach, consumer status ought to be determined at the moment when the action is lodged.

38. I well understand that considerations of foreseeability and legitimate expectations of the contractual parties are of paramount importance. Thus, the parties to a contract ought to be able to rely on the status of the other party, which was determined at the time of the contract's conclusion.

39. However, in abstract terms and in rather exceptional cases, a 'dynamic' approach to consumer status should not be entirely excluded. This could be potentially relevant in the event that a contract does not specify its aim, or it is open to different uses, and it lasts a long period of time, or is even indeterminate. It is conceivable that in such cases, the purpose for which a certain contractual service is used might change — not just partially, but even completely.

8 See, with regard to the *Brussels Convention of* 27 September *1968 on jurisdiction and the enforcement of judgments in civil and commercial matters* (OJ 1978 L 304, p. 36, 'the Brussels Convention'), judgment of 3 July 1997, *Benincasa* (C-269/95, EU:C:1997:337, paragraph 16).

9 See, for example, Opinion of Advocate General Jacobs in *Gruber* (C-464/01, EU:C:2004:529, point 34) and Opinion of Advocate General Cruz Villalón in *Costea* (C-110/14, EU:C:2015:271, points 29 and 30). Although the latter case related to Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), the Court generally seeks to take into account the different definitions of consumer in different instruments 'in order to ensure compliance with the objectives pursued by the European legislature in the sphere of consumer contracts, and the consistency of EU law …' — see judgment of 5 December 2013, *Vapenik* (C-508/12, EU:C:2013:790, paragraph 25).

10 Judgment of 3 September 2015, *Costea* (C-110/14, EU:C:2015:538, paragraph 21).

11 Judgment of 20 January 2005, *Gruber* (C-464/01, EU:C:2005:32, paragraph 39), on Articles 13 to 15 of the Brussels Convention.

40. Imagine Ms Smith signed a contract related to electronic communication services, such as an email account. When concluded, Ms Smith used the contract for purely private purposes. However, later, she started using that account for her business. Ten years down the road, she ended up using the electronic communication services exclusively for commercial purposes. If the original contractual terms do not exclude such a use, and there was no renewal, modification or amendment of the contract in those 10 years, can such a use still be qualified as 'private'?

41. I would therefore suggest not completely closing the door on such subsequent changes in use. They may occur. They should, however, be reserved for exceptional scenarios. The fair and correct assumption remains that the purpose for which the contract was originally concluded is decisive. If, and only if, it is clearly shown on the facts of the case that that assumption no longer holds might consumer status be reassessed.

(c) Interim conclusion

42. From the foregoing considerations, it follows that the central element upon which consumer status for the purpose of Articles 15 and 16 of Regulation No 44/2001 is to be assessed is the nature and aim of contract to which the claim(s) relate. In complex cases where the nature and aim of a contract is mixed, namely, that it is both private and professional, there must be an assessment of whether the professional 'content' can be considered as marginal. If that is indeed the case, consumer status may still be retained. Moreover, it ought not be excluded that in certain exceptional situations, due to the indeterminate content and the potentially long duration of the contract, the status of one of the parties may shift over time.

2. A socially networking consumer

43. The application of the abovementioned principles in the context of social media is not entirely straightforward (a). In addition, the lack of knowledge of the exact nature of the contractual relationships in the main proceedings in this case further clouds the assessment (b). I shall, however, seek to assist the referring court by outlining the possible options that may, subject to further factual verifications, materialise (c).

(a) On binary choices and mixed statuses

44. Social media platforms such as Facebook do not fit easily in the somewhat black and white definitions of Regulation No 44/2001. Article 15(1) of that regulation draws a line between who is and who is not a consumer. However, a number of actual uses and users of Facebook escape this binary classification.

45. There are, of course, the clear-cut cases. On the one hand, there is the profile of a teenager with a string of odd selfies with comments containing more emoticons and exclamation marks than words. It encapsulates a singular, but certainly non-professional social universe measured by the number of 'likes' received and Facebook friends. On the other hand, there is the clearly commercial presentation of a large company who, in spite of using Facebook as a means of advertisement, manages to have a surprising number of 'friends' and 'followers'.

46. However, between these two spectrums, one being clearly private and the other one distinctly professional, there are fifty shades of (Facebook) blue. In particular, a Facebook account which is private might also be used for self-promotional purposes with a professional impact or purpose. Any individual may post about his professional achievements and activities of a (quasi-)professional nature and share them with a community of 'friends'. Professional content in the form of communication of public speeches or publications may even become dominant and be shared with vast communities of 'friends', 'friends of friends', or become entirely 'public'.

47. This is not just in the case of music artists, football players, politicians, and social activists, but also academics, or a number of other professions. Imagine a versatile physics professor, who initially opened a Facebook account just to share personal pictures with friends. Gradually, however, he also starts posting about his new research. He posts about his new papers, lectures, and other public appearances. He is also an avid cook and photographer, putting a number of recipes online, together with pictures taken at conference venues all around the world. Some of those pictures, having artistic value, are offered for sale. All of that is peppered with pictures of his beloved cats and a witty running commentary on the (current) political situation, with the latter comments often being picked up by the media and leading to invitations to give talks and interviews all over Europe.

48. In my opinion, such uses do not confer a professional or commercial character on a Facebook account. In fact, the nature of a social network, which is designed to encourage personal development and communication, can lead almost inevitably to a situation where the professional world of an individual seeps into the network. All of these dimensions are, however, clearly an expression of the person and their personality. Although it is clear that in one way or another, some of those uses do contribute to 'self-promotion' and improvement of one's professional standing, they might only do so in the long run. They are not aimed at generating an immediate commercial effect.

49. By contrast, nowadays there are entire professions that blur the line between private and professional connections in internet communication, in particular on social networks. Some uses might appear to be private, but are entirely commercial in nature. Social media marketing influencers, 'prosumers' (professional consumers), or community managers may use their personal accounts on social networks as an essential working tool. [12]

50. Although the subject of some discussion in the context of the case at issue, I am not sure that the resolution of such complex scenarios is necessary for the present case. According to the facts provided by the referring court, the Applicant used the Facebook *account* he established between 2008 and 2010 *exclusively for private purposes*. Since 2011 he has also used a Facebook *page*. It would thus appear that the initial and also ongoing use of the Facebook account is essentially private. What, however, is unclear and in need of addressing is the exact relationship between Facebook accounts and Facebook pages and the corresponding nature of the contractual relationship between the Applicant and Defendant.

(b) On Facebook accounts and Facebook pages

51. At the hearing, the Applicant and the Defendant were invited to clarify the contractual intricacies of Facebook accounts and Facebook pages. Both interested parties have however defended irreconcilable positions. The Applicant submits that there are two different contracts for the Facebook page and the Facebook account, since separate terms and conditions had to be accepted by the user. Moreover, he submits that whereas a Facebook account is personal, Facebook pages can be administered by different persons. In fact, the Applicant claims that he abandoned the Facebook page

12 Such 'influencers' may be defined as 'everyday, ordinary internet users who accumulate a relatively large following on blogs and social media through the textual and visual narration of their personal lives and lifestyles, engage with their following in digital and physical spaces, and monetise their following by integrating "advertorials" into their blog or social media posts', Abidin, C., 'Communicative Intimacies: Influencers and Perceived Interconnectedness', *Ada: A Journal of Gender, New Media, and Technology*, issue 8, 2015, p. 29.

that he created and that he is no longer one of its administrators. The Defendant however submits that both the Facebook account and the Facebook page are part of the same single contractual relationship. A Facebook page cannot be created without a Facebook profile and both are inseparable from the initial Facebook account.

52. Whether the Applicant and the Defendant are bound by one or more contracts and whether the claims at issue raised by the Applicant concerning privacy and personal data protection infringements relate exclusively to the Facebook account or also to the Facebook page are questions for the national court to ascertain. However, there are some elements contained in the file available to this Court and in the observations submitted by the interested parties that could perhaps assist the referring court in this regard.

53. First, a Facebook account is created through the acceptance of Facebook's general terms of service. Second, Facebook offers further services that are available to users that already have a Facebook account. One of those services is the possibility to open Facebook pages, which are said to be for business, commercial or professional purposes. Whereas a Facebook account is necessary in order to be able to set up a Facebook page, it would appear that additional terms of service must be accepted. Third, while a Facebook account in its basic form (a Facebook profile, including the 'timeline' or the 'wall', pictures, friends) may generally be used for private purposes, its professional use is not excluded. However, as the Defendant submits in its written submissions, according to point 4.4 of the 2013 conditions of use, users agree not to use the 'personal timeline primarily for [their] own commercial gain, and will use a Facebook Page for such purposes'.

(c) The options

54. Thus, based on the eventual findings by the referring court, two situations are possible. First, there were two separate contracts (one for the Facebook account and another for the Facebook page). Second, there was a single contract encompassing both 'products'.

55. If there were *two separate contracts* and the claims at issue *relate to the Facebook account*, the consumer status of the Applicant would need to be determined exclusively with regard to the nature and aim of the contract concerning that account. The use of the Facebook page does not change the assessment of the status of consumer under the Facebook account.

56. The Applicant would therefore enjoy consumer status if, as it appears from the order for reference, he has used his Facebook *account* for private purposes during the relevant period. Indeed, it follows from the contract-specific and objective assessment of the status of consumer that the fact that the Applicant has specialised academically and is engaging in activities in an area connected to his own claims against Facebook, is, in itself, not decisive. Knowledge, experience, civic engagement or the fact of having acquired certain renown due to litigation do not in themselves prevent someone from being a consumer.

57. In my opinion, that conclusion would also remain the same in the case where the two contracts were linked in the form of a main contract (the Facebook account) and a supplementary connected contract (the Facebook page). Indeed, in the event of there being two separate contracts, even if closely interlinked, the nature of the ancillary agreement cannot change the nature of the main contract.[13]

58. If there was just *one single contract* including the Facebook account and the Facebook page, then the *Gruber* test becomes relevant. Under that test, the national court would have to examine the extent to which the professional content may be considered *negligible*.

13 See, by analogy, judgment of 3 September 2015, *Costea* (C-110/14, EU:C:2015:538, paragraph 29).

59. With regard to the judgment in *Gruber*, however, two additional points ought to be highlighted. First, what *Gruber* aims at, in my view, and what should remain negligible within one single contract, are activities having immediate commercial aim and impact, in the sense of structured and profit-making activity being the driving purpose of such use. Second, the potential dynamism of the contractual relationship would need to be assessed if the nature and aim of the contract were not apparent from its terms, and, on the ascertained facts, there would be a clear evolution of the type of the capacity in which the Applicant has made use of such single contract,.

60. However, in both types of assessment, certain flexibility is called for in the specific context of social media,[14] where a number of uses concerning professional reputation and standing represent a prolongation of the personality of the user. If there is no direct and immediate commercial impact, they remain instances of private use.

(d) Interim conclusion

61. As a result of the foregoing, and subject to verification by the national court, it would appear that the Applicant can be considered a consumer with regard to *his own* claims arising from the private use of his *own* Facebook *account*.

62. I therefore propose to the Court that the answer to the first question should be that Article 15(1) of Regulation No 44/2001 is to be interpreted in the sense that the carrying out of activities such as publishing, lecturing, operating websites, or fundraising for the enforcement of claims does not entail the loss of consumer status for claims concerning one's own Facebook account used for private purposes.

B. Question 2: jurisdiction over assigned claims

63. By its second question, the referring court has asked the Court whether a consumer can rely on the special consumer forum of Article 16(1) of Regulation No 44/2001, not only with regard to his own claims, but also with regard to the *claims assigned* to him by other consumers domiciled in the same Member State, in other Member States and in non-member States. In particular, the referring court enquires about this possibility in the event that the claims assigned to the Applicant arise from consumer supplies involving the same defendant and the same legal context.

64. The Applicant and the Austrian, German and Portuguese Governments maintain that Mr Schrems can rely on his own consumer forum for his own claims *as well as* for *all* the claims assigned to him by other consumers (irrespective of the place of domicile of the assignors).

65. The Defendant holds the opposite position: the consumer forum is not applicable to the assigned claims. Only a party to the contractual relationship can avail himself of the special forum of Article 16(1) of Regulation No 44/2001. Even if it were to be accepted that the Applicant is a consumer, he does not have that status with regard to the assigned claims.

66. The Commission agrees with the Defendant that the Applicant cannot claim in the court *of the place* of his domicile the rights assigned to him by consumers who have their domiciles in other Member States or in non-member States. However, the special forum of Article 16(1) of Regulation No 44/2001 could apply, according to the Commission, with regard to claims assigned by other Austrian consumers even if they are domiciled elsewhere in that Member State.

14 Above, points 44 to 50.

67. I must admit that I fail to see how the interpretation of Article 16(1) of Regulation No 44/2001 proposed by the Applicant could be reconciled with the text and logic of that provision. In his submissions, the Applicant is indeed making a number of interesting propositions regarding the need for collective action for the protection of consumers in the European Union. However, in my view, powerful as they may be on the level of policy, most of those arguments rather pertain to reflections on the potential future of the law, but find limited support in the law as it stands today.

68. I shall start by offering a brief, but in the context of this case, very necessary, clarification about the nature of the main proceedings and the scope of the second question referred to the Court (Subsection 1). I then offer my assessment of the question, based on a literal, systematic and teleological interpretation of the provisions concerned (Subsection 2), before turning to the Applicant's broad policy arguments (Subsection 3).

1. Preliminary clarifications

(a) Class actions the 'Austrian way'

69. The perception of what qualifies as a class action may of course vary, depending on the precise definition that has been adopted. I must admit, however, that I have difficulty, when looking closely at the text and operation of the national provision concerning the present case, namely Paragraph 227 of the ZPO, to refer to that provision as an instrument of 'class action',[15] certainly as far rules on *territorial jurisdiction* are concerned.

70. As has been explained in the different observations presented to this Court, Paragraph 227(1) of the ZPO allows different claims of one applicant against the same defendant to be heard together in the same proceedings if two conditions are met. First, the court seised should have jurisdiction for each of the individual claims, including its territorial competence. Second, it must be possible to subject each claim to the same type of proceeding.

71. The actual operation of that provision can be exemplified by the facts of a case that I understand to be the leading decision of the Oberster Gerichtshof (Supreme Court) on the matter.[16] In that case, 684 consumers who alleged that interest rates on their consumer credits were in breach of the applicable legislation, assigned their claims against the bank concerned to a legal person, the Bundeskammer für Arbeiter und Angestellte (Federal Chamber of Labour, Austria). Deciding on a point of law at appeal level, the Supreme Court agreed that those claims could be put together in one set of proceedings. However, the judgment was concerned exclusively with the issue of material jurisdiction. As was clearly stated by the court, the territorial jurisdiction of the Austrian court seised was never in dispute.[17]

15 It has been suggested that despite the fact that that provision was not devised with the idea of creating a system of collective redress, it has in practice served as a useful tool to develop a *sui generis* mechanism for collective redress through the assignment of similar claims appertaining to multiple persons to a third party who will consolidate and pursue them in a single set of proceedings. Even though this system is commonly used through assignment to consumer organisations, claims can also be assigned to individuals. Further, see for example, Micklitz, H.-W., and Purnhagen, K.P., *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union* — Country report Austria, 2008 and Steindl, B.H., 'Class Action and Collective Action in Arbitration and Litigation — Europe and Austria', *NYSBA International Section Seasonal Meeting 2014, Rebuilding the Transatlantic Marketplace: Austria and Central Europe as Catalysts for Entrepreneurship and Innovation*. http://www.nysba.org.

16 OGH 12.7.2005, 4 Ob 116/05w.

17 OGH 12.7.2005, 4 Ob 116/05w, point 1 (pp. 3 to 5). The Oberster Gerichtshof (Supreme Court) has also added that the consolidation of claims by different persons through such cession of claims ('Inkassozession') to a claimant under Paragraph 227 of the ZPO is admissible if and only if the claims share a similar legal basis and questions that must be assessed relate essentially to the same questions of a factual or legal nature, which concern the main question or a very relevant preliminary question common to all claims.

72. As a result, if the conditions mentioned in Paragraph 227(1) of the ZPO are fulfilled, what may become to some degree flexible are, as Paragraph 227(2) of the ZPO foreshadows, issues of competence *ratione materiae*, but not *ratione loci*.

73. To sum up, I understand that under national law, Paragraph 227 of the ZPO is not a sufficient legal basis for either a change in international jurisdiction or the creation of a new forum for the consumer-assignee.

(b) The construction of the present case

74. There is a second element that must be underlined. The case in the national court is construed as an *assignment of a claim* arising out of a contract: the Applicant has been assigned several claims with the same content as his own claims against the Defendant. He has therefore stepped into the shoes of those other Facebook users only with regard to the particular claims assigned. The contracts between those users and the Defendant nonetheless remain in place for all the other matters between the original contracting parties. Procedurally, the Applicant (who is the assignee) is the only applicant in the main proceedings.

75. Within this context, the Applicant is essentially advocating, *solely* on the basis of Article 16(1) of Regulation No 44/2001, the creation of a second layer of special jurisdiction. He does not argue that the initial special 'consumer' forum of the assignor would not be maintained, which means that the original assignors may still potentially sue the Defendant with regard to the other elements of the contract not assigned, in the place of their own domicile. What the Applicant is effectively arguing is that the special consumer forum of Article 16(1) of Regulation No 44/2001 can be reused to create a second special forum, this time around for the assignee and the assigned claims.

76. In the light of the above, it is somehow surprising that the Applicant invokes the principles of effectiveness and equivalence with regard to the abovementioned Austrian mechanism to support his view. Those principles limit the procedural autonomy of the Member States. I fail to see how they would be pertinent in the present case to establish jurisdictional competence. This is all the more so since national law does not provide for the establishment of international jurisdiction that he is advocating.

2. Interpretation of the law as it stands

77. With both of the preliminary clarifications provided in the previous section in mind, it is clear that the Applicant's case stands and falls solely on the interpretation of Article 16(1) of Regulation No 44/2001. Can that provision in itself establish a new special head of jurisdiction to another consumer who was not party to the original consumer contract in question?

(a) Text

78. The Applicant submits that the consumer bringing the claim does not necessarily need to be the same consumer who is party to the consumer contract. Both he and the German Government, argue that Article 16(1) of Regulation No 44/2001 refers to '*a* consumer' as the person who can bring the claim not to '*the* consumer'. According to the Applicant, requiring identity between the contractual parties and the parties to the proceedings would amount to a *contra legem* unwritten condition for the application of Article 16(1), not admissible under the regulation.

79. This argument fails to convince. The wording of both Article 15 and Article 16 of Regulation No 44/2001 clearly stresses the importance of the identity of the parties to the concrete contractual relationship in the determination of the applicability of those provisions.

80. First, drawing such significant conclusions from the simple use of an indefinite article at the beginning of a sentence appears somewhat far-fetched. It starts to crumble when inspecting other language versions, such as those in Slavic languages, which do not use (in)definite articles and where accordingly no such distinction is made. Above all, however, even in the languages that employ articles and make this distinction, it would be quite logical that since the word 'consumer' is mentioned for the first time in a sentence, the first reference is to 'a' consumer (using the indefinite), whereas the second reference to the same consumer in that sentence is 'the' consumer.

81. Second, the wording of Article 16(1) of Regulation No 44/2001 is clear: 'a consumer may bring proceedings *against the other party to a contract*'.[18] In the same vein, Article 16(2) of Regulation No 44/2001 provides that 'proceedings may be brought against a consumer *by the other party* to the contract only in the courts of the Member State in which the consumer is domiciled'.[19]

82. The wording of those provisions clearly refers to the other party to a contract. This shows that the special forum is always limited to the concrete and specific parties to the contract. As a result, the dissociation of the parties to the contract from the contract would go against the natural reading of those provisions. I thus fully agree with Advocate General Darmon that the expressions 'a consumer may bring proceedings' and 'proceedings may be brought against a consumer' indicate that the protection is granted '*expressis verbis* only inasmuch as he *personally is the plaintiff or defendant* in proceedings'.[20]

(b) Context

83. There are three further systemic arguments that strengthen the position against the Applicant's proposal to dissociate the parties in the proceedings and the parties to the contractual relationship.

84. First, quite logically, Article 16 has to be interpreted in conjunction with Article 15 of Regulation No 44/2001. The latter defines the scope of application of Section 4, devoted to jurisdiction over consumer contracts. The Court has held that 'Article 15(1) of Regulation No 44/2001 applies if three conditions are met: first, *a party to a contract is a consumer* who is acting in a context which can be regarded as being outside his trade or profession, second, *the contract between such a consumer and a professional* has actually been concluded and, third, such a contract falls within one of the categories referred to in Article 15(1)(a) to (c)'.[21]

85. An interpretation according to which Article 16 of Regulation No 44/2001 encompasses claims made by a consumer on the basis of consumer contracts concluded by *other* consumers would cut the logical link between Articles 15 and 16 of Regulation No 44/2001. It would enlarge the scope of the special head of jurisdiction beyond the cases explicitly provided for by those provisions.

18 Emphasis added.

19 Emphasis added. It might be added that it would be quite interesting to know what the proposition of the Applicant would then mean for the interpretation of Article 16(2) of the regulation, which in the English version also refers to the consumer with an indefinite article, but provides for a reverse scenario to that of Article 16(1): 'Proceedings may be brought against *a consumer* by the other party to the contract only in the courts of the Member State in which the consumer is domiciled'. However, it would appear that in other linguistic versions, definite articles are used. This underlines that statements of principle cannot be made on the basis of the indefinite or definite character of the article used in this context.

20 Emphasis in the original. Opinion of Advocate General Darmon in *Shearson Lehman Hutton* (C-89/91, EU:C:1992:410, point 26 and footnote 9), referring to Article 14 of the Brussels Convention.

21 For example, judgments of 14 March 2013, *Česká spořitelna* (C-419/11, EU:C:2013:165, paragraph 30), and of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 23). Emphasis added.

86. Indeed, as examined in points 28 to 34 of this Opinion with regard to the first preliminary question, and as admitted by the Applicant, the special head of jurisdiction relating to consumers aims at protecting a person in his capacity as a consumer to a given contract. It would therefore be somewhat paradoxical to allow for such an intimate link between consumer status and a given contract to be diluted by conferring the special consumer forum on the basis of a claim emanating from a contract concluded by another person.

87. Second, in contrast to Article 5(1) of Regulation No 44/2001, which refers to 'matters relating to contract' without adding any further specification concerning the identity of the contractual parties that may rely on it, Article 16(1) of that regulation is much more precise and limited. The latter provision expressly mentions the consumer and the other party to the contract. The interpretation of Article 5(1) indeed allows for greater leeway and flexibility in terms of identity of the claimant, provided that there is an obligation freely assumed.[22] In limited circumstances it permits the enforcement of contractual obligations by a third party, who (or which) was not the initial contractual party. However, the clearly different and narrower wording of Article 16(1) does not allow for such interpretation.

88. Third, the consumer forum provided for in Articles 15 and 16 of Regulation No 44/2001 departs not only from the general rule of jurisdiction laid down in Article 2(1) of that regulation (conferring jurisdiction on the courts of the Member State in which the defendant is domiciled), but also from the rule of special jurisdiction for contracts, set out in Article 5(1) of that regulation (according to which jurisdiction lies with the courts of the place of performance of the obligation on which the claim is based). As a consequence, Articles 15 and 16 of Regulation No 44/2001 should not be interpreted as extending the *forum actoris* privilege outside the situations for which it has been explicitly established.[23]

(c) Purpose

89. The thrust of the Applicant's arguments is based on teleological argumentation. Those arguments can be grouped into three.

90. First, the Applicant submits that since the assignor and the assignee are consumers, they are both worthy of protection. The objective of the provision at issue to protect the vulnerable party would preclude an interpretation according to which the parties to the contract ought to be the same as the parties to the dispute.

91. Second, with regard to the objective of foreseeability of the forum generally pursued by Regulation No 44/2001, the Applicant submits that the Defendant has no legitimate expectation regarding the existence of a particular forum. The certainty of the consumer forum is limited because the consumer can always change his domicile. It does not matter therefore whether the forum changes on the basis of a change of domicile or of a transfer of rights through assignment. Moreover, Facebook directs its activities (in the sense of Article 15(1)(c) of Regulation No 44/2001) to the entire world, including Austria. The Defendant could thus have foreseen claims being brought before Austrian courts.

22 In relation to Article 5(1) of the Brussels Convention: see for example, judgment of 5 February 2004, *Frahuil* (C-265/02, EU:C:2004:77, paragraph 24 and the case-law cited). With regard to Article 5(1)(a) of Regulation No 44/2001, see judgments of 14 March 2013, *Česká spořitelna* (C-419/11, EU:C:2013:165, paragraph 46); of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 39); and of 21 April 2016, *Austro-Mechana* (C-572/14, EU:C:2016:286, paragraph 36). See also my Opinion in *Flightright and Others* (Joined Cases C-274/16, C-447/16 and C-448/16, EU:C:2017:787, points 53 to 55).

23 See, to that effect, for example, judgment of 14 March 2013, *Česká spořitelna* (C-419/11, EU:C:2013:165, paragraph 26 and the case-law cited).

92. Third, the Applicant suggests that Article 16 of Regulation No 44/2001 ought to be interpreted as allowing for the forum of the consumer-assignee for assigned claims to foster collective redress for reasons connected with the vulnerability of consumers, effective judicial protection and the objective to avoid multiple concurrent proceedings.

93. Arguments relating to the objective of the protection of the consumer as the weaker party (1) and those concerning the foreseeability of the forum and avoidance of concurrent proceedings (2) are arguments which, in my view, are relevant with regard toRegulation No 44/2001 as it currently stands. I shall therefore examine each of them in turn within the remainder of this section, before concluding on the issue of local jurisdiction (3).

(1) The objective of 'protection of the weaker party'

94. The Applicant submits that his position on the proper interpretation of Article 16(1) of Regulation No 44/2001 is supported by the case-law of the Court according to which the determining element for the application of the special consumer jurisdiction is the abstract worthiness of protection. [24]

95. On the level of a general statement, I cannot but agree that this Court has consistently placed a paramount importance on the objective to protect consumers as weaker parties when interpreting the provisions related to the special consumer jurisdiction in Regulation No 44/2001. However, on the level of concrete legal propositions, I cannot subscribe to the portrayal of the case-law as put forward by the Applicant.

96. First, the Court has indeed already had the opportunity to examine whether the *forum actoris* of consumers is applicable to assignees of consumer claims that are not themselves parties to a contract. In the *Henkel* and *Shearson Lehman Hutton* judgments, the Court found that the special consumer jurisdiction was *not applicable* to legal persons acting as assignees of the rights of a consumer. However, the Court arrived at that conclusion not only because, as the Applicant submits, those legal persons (a private company and a consumers' association) were not 'weaker parties', but also, as clearly stated in both decisions, because those persons were not themselves parties to the contract. [25]

97. Second, according to the Applicant, the case-law of the Court relies on an abstract need of consumer protection as the determining element for establishing the forum, irrespective of the assigned nature of claims. In this regard, both the Austrian Government and the Applicant have referred to the Court's judgment in *Vorarlberger Gebietskrankenkasse*, where it was stated that contrary to the social security institutions, 'where the statutory assignee of the rights of the directly injured party may himself be considered to be a weaker party, such an assignee should be able to benefit from special rules on the jurisdiction of courts laid down in those provisions. This is particularly the situation ... of the heirs of the person injured in an accident'. [26]

98. Inasmuch as reliance on that case can still be of relevance in the light of the Court's recent judgment in *MMA IARD*, [27] which has considerably nuanced the approach adopted in *Vorarlberger Gebietskrankenkasse*, the analogy with the present case is misplaced for two reasons. First, the special head of jurisdiction for matters related to insurance is differently conceived and, is, in itself, much

24 The Applicant refers concretely to four decisions of the Court: judgments of 19 January 1993, *Shearson Lehman Hutton* (C-89/91, EU:C:1993:15); of 1 October 2002, *Henkel* (C-167/00, EU:C:2002:555); of 15 January 2004, *Blijdenstein* (C-433/01, EU:C:2004:21); and of 17 September 2009, *Vorarlberger Gebietskrankenkasse* (C-347/08, EU:C:2009:561).

25 Judgments of 19 January 1993, *Shearson Lehman Hutton* (C-89/91, EU:C:1993:15, paragraph 23), and of 1 October 2002, *Henkel* (C-167/00, EU:C:2002:555, paragraphs 33 and 38).

26 Judgment of 17 September 2009 (C-347/08, EU:C:2009:561, paragraph 44).

27 Judgment of 20 July 2017 (C-340/16, EU:C:2017:576).

broader.[28] Second, and more importantly, in *Vorarlberger Gebietskrankenkasse*, the request was to keep the already extant special forum and to be allowed to pass it on to a third party. What the Applicant is effectively asking for is the *creation* of a new special forum particular to the assignee or successor to the claims, in a situation where those claims have been assigned purely for litigation purposes.

(2) Foreseeability and avoidance of concurrent proceedings

99. The Applicant, as well as the German and Austrian Governments, have emphasised that the application of the special consumer jurisdiction of the consumer-assignee to all the assigned claims (either assigned by consumers domiciled in the same Member States, other Member States or non-member States) does not undermine the objectives of legal certainty and foreseeability. First, the certainty of the consumer forum is limited anyway because the consumer can always change his domicile. Second, Facebook directs its activities (in the sense of Article 15(1)(c) of Regulation No 44/2001) to the entire world, Austria included. It would thus be foreseeable to that company that claims would be brought before Austrian jurisdictions. Third, the 'concentration' of claims would even amount to an advantage for the Defendant, who would not have to confront different claims in different Member States. Furthermore, the risk of having divergent decisions would be avoided. Moreover, the Applicant argues that he is not asking for the recognition of a new forum that he would not already be entitled to, since he already enjoys the consumer jurisdiction with regard to his own claims.

100. It is indeed true that according to recital 11 of Regulation No 44/2001, the rules of jurisdiction must be highly predictable. Moreover, according to recital 15, 'in the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States'.

101. I must admit that I would have understood the imperative of predictability of jurisdiction embedded in Regulation No 44/2001 primarily to operate on the facts of a concrete legal relationship. The question then essentially is: if I engage in such and such legal relationship, what is likely to be the international jurisdiction?

102. The understanding of 'foreseeability' advocated by the Applicant is clearly built on a different approach. It effectively replicates the same logic advanced already at the semantic level, suggesting that also in terms of foreseeability, if a professional has 'a consumer' in one jurisdiction, he must be able to reasonably foresee that he might be sued by 'any consumer' or effectively by 'all his consumers' in that jurisdiction.

103. I disagree. However, even if one were to go along with the approach advocated by the Applicant, *quod non*, a number of problems remain.

104. First, as the Defendant submits, there are important considerations linked to legal certainty, such as the risk of forum shopping.

28 The case concerned the special head of jurisdiction with regard to the injured party in the sense of Article 11(2) of Regulation No 44/2001. The purpose of that provision is to add injured parties to the list of plaintiffs of Article 9(1)(b) of that regulation ...'without restricting the category of persons having suffered damage to those suffering it directly'. Therefore, the concept of 'injured' parties is suitable to cover by itself the assignees who may be considered as having suffered damage. Moreover, the Court has confirmed that 'the notion of the "weaker party" has a wider acceptance in matters relating to insurance than those relating to consumer contracts or individual employment contracts' — see judgment of 20 July 2017, *MMA IARD* (C-340/16, EU:C:2017:576, paragraphs 32 and 33).

105. It is true that the place of the consumer's domicile is not permanently fixed. As is the case with the rule of the Member State where the Defendant is domiciled, it may vary.[29] However, this does not entail that foreseeability and legal certainty are absolutely deprived of relevance. The solution proposed by the Applicant would allow for a concentration of claims and the possibility to choose, for collective actions, the place of the more favourable courts, by assigning all claims to a consumer domiciled in that jurisdiction. As the Defendant puts it, such a solution could lead to unrestrained targeted assignment to consumers in any jurisdiction whatsoever with more favourable case-law, with lesser costs or more generous jurisdictional aid, potentially leading to the overburdening of some jurisdictions.[30]

106. Second, the creation of a new consumer forum for the consumer-assignee with regard to claims assigned by other consumers is likely to lead to a fragmentation and multiplication of fora. On the one hand, the assignee does not step into the contractual position of the assignor. There is no subrogation into the position of the consumer or into the substantive rights attached to the contract. The claims assigned are specifically severed from the contract and that is done for the specific purpose of litigation. The consumer forum of the initial assignor would persist with regard to other contractual claims, leading to a potential fragmentation of claims arising from one contract. On the other hand, it would then of course be possible for the assignor to assign different rights following from his consumer contract to different assignees. If each of those assignees were consumers, then a number of special jurisdictions could be created in parallel.

107. Those concerns become much stronger in the case of claims ceded by consumers domiciled in non-member States.[31] The possibility of bringing before the forum of the consumer-assignee claims emanating from contracts concluded with consumers domiciled in non-Member States does not sit comfortably within the text of Regulation No 44/2001. It is true that the Court has established that Regulation No 44/2001 applies independently of whether the plaintiff is domiciled in a non-member State or not.[32] However, Article 15(1)(c), which is pertinent for the present case, requires 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'. As a result, even though Article 16 only refers to the 'place where the consumer is domiciled', the previous remarks make it clear that that 'place' ought to be in a Member State.

108. Finally, the Applicant has relied on the judgment in *CDC Hydrogen Peroxide*[33] to maintain that the Court has explicitly recognised that collective action does not preclude the application of the special heads of jurisdiction under Regulation No 44/2001.

109. However, in that case, the Court explicitly declared in relation to Article 5(3) of Regulation No 44/2001 that 'the transfer of claims by the initial creditor cannot, by itself, have an impact on the determination of the court having jurisdiction'.[34] As a consequence, the Court concluded that the requirement for the application of that head of jurisdiction (the location of the harmful event) 'must be assessed for each claim for damages independently of any subsequent assignment or consolidation'.[35]

29 See, to that effect, judgment of 17 November 2011, *Hypoteční banka* (C-327/10, EU:C:2011:745, paragraph 42).

30 In addition, that possibility could be of quite some interest to a number of claim collectors who may devise changes in their corporate structure accordingly (with claims not being assigned to a legal person, but rather to a physical person, another consumer).

31 Leaving entirely aside the question of applicable law governing the contracts concluded by users in third countries, which indeed should not be decisive in issues of jurisdiction (but could be of some relevance for the issue of sound administration of justice).

32 See, in the framework of the Brussels Convention, judgment of 13 July 2000, *Group Josi* (C-412/98, EU:C:2000:399, paragraph 57).

33 Judgment of 21 May 2015 (C-352/13, EU:C:2015:335).

34 Judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 35). Similarly, see judgment of 18 July 2013, *ÖFAB* (C-147/12, EU:C:2013:490, paragraph 58).

35 Judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 36).

110. In sum, the propositions advanced by the Applicant in the present proceedings find little support in the case-law. Again, the key difference is that what the Applicant is effectively asking for is not the passing on of a special forum, but the creation of a new forum for another consumer who was not a party to the original contract.

111. That position is at odds with the basic logic of the rule on assignment and succession. The case-law invoked by the Applicant was concerned with the issue of whether the special (consumer) forum can be retained or whether it will be lost. But arguing that a new special forum is to be created for the assignee clearly goes far beyond this discussion.

112. Moreover, the issue of assignment of and succession into claims is, within the context of Regulation No 44/2001, a transversal issue, applicable to a number of different heads of jurisdiction. Hence, any solution embraced by this Court with regard to the rules on assignment of claims under Article 16(1) would naturally have repercussions on the entire regulation.

(3) Interim Conclusion (and a coda on local jurisdiction)

113. For these reasons, I do not think that Article 16(1) of Regulation No 44/2001 can be interpreted as establishing a new special jurisdiction for a consumer with respect to claims assigned to him on the same subject by other consumers domiciled in another Member State or in non-member States.

114. However, the referring court posed its second question also with regard to a third category of assigned claims: those assigned by consumers who are domiciled in the same Member State. As stated by the referring court, some of the assigned claims come from other consumers domiciled in Austria. In addition, it is true that the wording of Article 16(1) refers to *local* jurisdiction: 'in the courts of the *place* where the consumer is domiciled'. Article 16(1) of Regulation No 44/2001, unlike the Brussels Convention, thus does not only determine the international jurisdiction, but also the internal jurisdiction, with the aim of offering broader protection to consumers.

115. In its submissions, the Commission shares the concerns related to legal certainty and the foreseeability of forum with regard to the claims assigned by consumers domiciled in non-member States and in other Member States. However, it admits the possibility to apply the forum of the domicile of the consumer-assignee provided that the assignor and assignee are consumers, that the claims are identical and that both could choose the forum *within the same* Member State. The Commission explains that this solution, even though seemingly contradicting the wording of Article 16(1) of Regulation No 44/2001, is a better way to serve the purpose of the provisions related to the special consumer forum.

116. I find it difficult to follow the proposition why, solely on the basis of Regulation No 44/2001, a different conclusion should be reached with regard to the claims assigned by consumers residing in the same Member State as the consumer-assignee, taking into account the text of Article 16(1) of Regulation No 44/2001, which designates as the competent courts those of the 'place where the consumer is domiciled'. Absent any other compelling arguments, on the basis of Article 16(1) of Regulation No 44/2001, the same conclusion ought to be valid for all three categories mentioned in the referring court's second question (claims assigned by consumers domiciled in different Member States, in non-member States and within a Member State).

117. However, the fact that Article 16(1) of Regulation No 44/2001 does *not* establish a new special jurisdiction does not, in my view, mean that it would *prevent* it if it were internally provided for by national law. The logic of the local jurisdiction in Article 16(1) is that the consumer cannot be deprived of it. In any event, should an additional one be provided for under national law, within that Member State, that would, to my mind, not run counter to either the wording or the objectives of the regulation. However, this does not seem to be the case in the present proceedings, inasmuch as the

arguments of the Applicant to establishjurisdiction (even within the same Member State), appear to rely exclusively on Article 16(1) of Regulation No 44/2001.[36]

118. I therefore propose to the Court that the answer to the second question referred should be that on the basis of Article 16(1) of Regulation No 44/2001 a consumer cannot invoke, at the same time as his own claims, claims on the same subject assigned by other consumers domiciled in other places of the same Member State, in other Member States or in non-member States.

3. On the need for collective redress in consumer matters in the Union (and on the dangers of judicial legislation)

119. A number of arguments advanced by the Applicant in this case are, at least in my view, essentially policy arguments. They suggest, in one way or another, that in the name of a set of rather abstract values, such as the need for collective redress in consumer matters in the EU or the fostering of effective judicial protection in consumer matters, the Court ought to interpret Article 16(1) in the way proposed by the Applicant.

120. There is no doubt that collective redress serves the purpose of effective judicial consumer protection. If well designed and implemented, it may also provide further systemic benefits to the judicial system, such as reducing the need for concurrent proceedings.[37] However, as the Defendant rightly points out, such arguments of the Applicant rather belong to the *de lege ferenda* sphere.

121. Regulation No 44/2001 does not provide specific provisions on the assignment of claims[38] or procedures for collective redress. This (presumed or real) lacuna has long been debated by the legal scholarship, which has expressed the view that the regulation is an insufficient basis for cross-border EU collective actions.[39] The application of the consumer forum in cases of collective action is the object of heated debate.[40]

122. More importantly perhaps, those problems have also been widely recognised by the Commission, which made several attempts to advance the adoption of EU instruments on collective redress.[41] Those proposals have not yet led to the adoption of any binding legislative instruments. So far, only a Commission Recommendation has been adopted,[42] which has also been invoked by the Applicant in the present proceedings.

36 As clarified above at points 74 to 76.

37 See for example the Resolution No 1/2008 on Transnational Group Actions, of the International Law Association, adopted at its Rio de Janeiro Conference. Point 3 of this resolution is devoted to jurisdiction. According to 3.1: 'A transnational group action may be brought in the defendant's forum.' According to 3.3: 'A transnational group action may also be brought in the courts of another country closely connected to the parties and the transactions, provided that trial of the action in that country is reasonably capable of serving the interests of the group and has not been selected to frustrate those interests.'

38 See the Opinion of Advocate General Sharpston in *Flight Refund* (C-94/14, EU:C:2015:723, point 60).

39 See, amongst others, Hess, B., 'Collective Redress and the Jurisdictional Model of the Brussels I Regulation', in Nuyts, A., and Hatzimihail, N.E., *Cross-Border Class Actions. The European Way*, SELP, 2014, pp. 59 to 68, at p. 67; Nuyts, A., 'The Consolidation of Collective Claims under Brussels I', in Nuyts, A., and Hatzimihail, N.E., *Cross-Border Class Actions. The European Way*, SELP, 2014, pp. 69 to 84; Danov, M., 'The Brussels I Regulation: Cross-Border Collective Redress Proceedings and Judgments', *Journal of Private International Law*, Vol. 6, 2010, pp. 359 to 393, at p. 377.

40 See, for example, Tang, Z.S., 'Consumer Collective Redress in European Private International Law', *Journal of Private international Law*, Vol. 7, 2011, pp. 101, 147, at Tang, Z.S., *Electronic Consumer Contracts in the Conflict of Laws*, 2nd ed., Hart, 2015, p. 284 et seq.; Lein, E., 'Cross-Border Collective Redress and Jurisdiction under Brussels I: A Mismatch' in Fairgrieve, D., and Lein, E., *Extraterritoriality and Collective Redress*, Oxford University Press, Oxford, 2012, at p. 129.

41 See, inter alia, White Paper on damages actions for breach of the EC antitrust rules, COM(2008) 165 final; Commission 'Green Paper on Consumer Collective Redress', COM(2008) 794 final; Commission Consultation Paper for discussion on the follow-up to the 'Green Paper on Consumer Collective Redress' 2009; Commission consultation document 'Towards a Coherent European Approach to Collective Redress' SEC(2011) 173 final; Commission communication, 'Towards a European Horizontal Framework for Collective Redress', COM(2013) 401/2.

42 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (OJ 2013 L 201, p. 60).

123. I do not believe that it is the role of courts, including this Court, within such a context, to attempt at creating collective redress in consumer matters at the stroke of a pen. Three reasons why such a course of action would be unwise stand out. First, it would clearly go against the wording and the logic of the regulation, thus effectively leading to its rewriting. Second, the issue is too delicate and complex. It is in need of comprehensive legislation, not an isolated judicial intervention within a related but somewhat remote legislative instrument that is clearly unfit for that purpose. That is eventually likely to cause more problems than offer systemic solutions. Third, although perhaps neither straightforward nor speedy, legislative deliberation and discussions at the EU level have been ongoing. That legislative process should not be judicially pre-empted or rendered futile.

V. Conclusion

124. In the light of the foregoing, I propose that the Court answer the questions posed by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

(1) Article 15(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted in the sense that the carrying out of activities such as publishing, lecturing, operating websites, or fundraising for the enforcement of claims does not entail the loss of consumer status for claims concerning one's own Facebook account used for private purposes.

(2) On the basis of Article 16(1) of Regulation No 44/2001 a consumer cannot invoke, at the same time as his own claims, claims on the same subject assigned by other consumers domiciled in other places of the same Member State, in other Member States or in non-member States.