

The Cybersecurities' Notion of "Targeting"

in General Private International Law

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In our opening discourse during the First World Congress for Informatics and Law in Quito last year¹, we tried to demonstrate how the advent of U-business eliminates one for all active territorialism, meaning the State's jurisdiction because of something that relies on its territory. Traditional links like the place of execution, the place of conclusion, domicile and residence cannot anymore respond fully to the needs of e-commerce. Especially if one agrees to see in the Internet a new international space, status we do already have for the High Sea or, more closely to Internet, the Ether. I briefly remind that the proposition is based on the fact that in absence of any *dominium*, States only can exercise an *imperium* in Cyberspace. In other words, a State cannot exercise its jurisdiction because of a geographical, physical link between virtual activities and its territories, but may exercise jurisdiction because of an abstract, conceptual link like nationality for instance. However, it is true that for the moment, Internet does not have such a status and we ought to construct a general theory taking into account the *lex lata*. In regard to the latter, it is also obvious that traditional links cannot play their role.

That's why we do think that the future lies in passive territorialism, meaning that jurisdiction will be asserted from the moment that there are "effects" on the national territory or the national population. And that is the way securities regulation authorities went (I), followed nowadays by other authorities (II). From their example, it is possible to construct a general theory, plainly capable to respond to the new needs of e-commerce and tomorrow u-business (III).

I - A special application of the notion of targeting: the example of cybersecurities

Offers of financial products, especially securities and collective investment undertakings, across national borders are normally submitted to a registration procedure by the targeted country, like the one provided by the US securities regulations. Under the SEC interpretation², "application of the registration provisions of the US securities laws

¹ New Paradigms in Cyberlaw: U-Biz, *RDI*, # 3, 2002, www.alfa-redi.org.

² The US *Securities and Exchange Commission*.

depends on whether Internet offers, solicitations or other communications are targeted to the United States³, taking up the effect test of the second Circuit in its leading case *Schoenbaum v. Firstbrook*⁴. In other words, in order to avoid the American registration procedure, the cyberbanking site has to undertake the necessary technological measures to guard against sales to US citizens. In the other way around, the US have jurisdiction from the moment on that the cyberbanking site is “targeting” US nationals.

A same approach has been adopted by the French Securities Commission⁵, which takes into account the intention of the offerer to determine if the French market is targeted or not. Are taken as indication for example the language used in the offer. It also invites on-line traders to indicate the geographical area of their offer⁶. The Hong Kong regulation applies if some “Internet technology induces people residing in Hong Kong to deal securities, trade in commodity futures contracts, engage in leveraged foreign exchange trading or provides advisory services in respect of securities or futures contracts to people residing in Hong Kong”⁷. In February 1999, the *Australian Securities and Investments Commission* (ASIC) issued a Policy Statement that sets out that the ASIC does not regulate advertisements and offers if they are not targeted at persons in Australia, or have little impact on Australian investors or the offer contains a disclaimer which limits the jurisdiction of the offer and that there is no misconduct⁸. The Policy issued by the Belgian CBF⁹ goes the same way¹⁰. The British Financial Services Authority¹¹ and the Italian Consob¹² went a step further as they do consider that a Web site indexed in a local search engine is constitutive of a targeting of a national market.

The same Consob decided to prohibit a private Net-stock market, registered in the British Virgin Islands, for not having respected the Italian financial laws¹³. To base its decision, it has been taken into account that an Italian ISP hosted the site and, even if the site were multilingual, most of the advertising was in Italian. Furthermore, Italian representatives headed the Company¹⁴. In an earlier case, the SEC ordered a foreign Website run by a Bahamian Corporation to discontinue operations because of providing American investors with the technological capability to trade directly on a foreign

³ *Interpretation: Use of Web Sites Offshore*, Release n° 1125, www.sec.gov/rules/concept/33-7516.htm

⁴ 405 F2d 215 (2d Cir. 1968).

⁵ *Commission des opérations de bourse* (COB).

⁶ Recommandation #99-02, www.cob.fr.

⁷ 6.1.1.1 and 6.1.2.1 of the Guidance Note of the HKSFC, March 31, 1999, www.hksfc.org.hk, www.cyberbanking-law.de, <statutes>.

⁸ PS 141, www.asic.gov.au.

⁹ *Commission bancaire et financière* (CBF).

¹⁰ Lettre circulaire, 9/3/99, www.cyberbanking-law.d, <statutes>.

¹¹ *Treatment of Material on Overseas Internet WWW sites accessible in the UK but not intended for investors in the UK*, 1998.

¹² Communication 7/7/99, www.consob.it.

¹³ In particular the *Draghi Law* 1998.

¹⁴ Graham, The Italian Smallxchange Case, *CBL-J*, May 2000, www.cyberbanking-law.de

market's facilities¹⁵.

However, these examples do not answer the question if the adoption of a cctld can be regarded as a proof for targeting a national territory. Other authorities than financial have already given some indications in this respect.

II- The application of the notion of targeting and TLDs

In a Colombian case, the Constitutional court ruled that the adoption of the Colombian cctld could be considered as a presumption of submission to the national tax authorities¹⁶. In the same manner, the Council of State of the same country underlined that the cctld is an “official representation of the national State before the International Community”¹⁷.

In regard to the negotiations of the future UNCITRAL *Convention on electronic contracting*, many debates existed about the “value” of the cctld. In a first movement, the drafting committee suggested that “the sole fact that a person makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in such country”¹⁸. In other words, the UNCITRAL did not seem to want to take as a link the cctld in itself, but to use it for determining the location of the place of business, which should be the link. Seen from this point of view, the assertion of the drafting committee is correct. However, in our opinion, it is the cctld that should be the link. And the following comments to the proposed assertion go in our direction. In effect, in its latest comments, the report underlines that a cctld may have some value as in many countries, it is only attributed after verification of the location of the business place¹⁹. And this seems to us the key: if there is some kind of verification of the only point of geographical link meaning the registree of the domain name, why should it not to be considered that it is in reality some kind of voluntary submission to the jurisdiction of that country?

In other words, the notion of targeting seems to respond to the needs of e-commerce. The question that remains is which are the elements to be retained for identifying the targeting.

III – For a general application of the notion of targeting

¹⁵ *Offshore Capital Resources* followed the order of the SEC and by late 1997, the site was shut (ABA, *Draft for the Internet Jurisdiction Project*, <Securities>).

¹⁶ Judgment C-1147, 31/10/01, unpublished.

¹⁷ Unpublished judgment cited in *The Link*, march 2002, p. 6.

¹⁸ *Preliminary Draft, Report by the Secretariat*, A/CN.9/WG.IV/WP.95.

¹⁹ *Report of the Working Group on Electronic Commerce on its thirty-nine session*, 21/3/02, A/CN.9/509, #58.

The meta-norm of any jurisdiction system is foreseeability, without, however, to forget the importance of venue, meaning that the tribunal that has jurisdiction is also one of the most closest connected to the litigation. In other words, the idea consists in constructing a rule that permits the actor to seize the tribunal the most closest to him, and that the jurisdiction of this tribunal does not constitute a “surprise” for the respondent. Otherwise, as noted by the District Court of Oregon, there will be a “litigious nightmare of being subject to suit” in every jurisdiction in this” [world]²⁰.

For the actor, it is surely the tribunal of his residence – or place of business. Foreseeability is only guaranteed if the respondent did have the opportunity to know that he contracted with a person in this place. And in this sense, the cctld among others can play an important role.

A – A proposal for a general rule

The primary idea consists in retaining general criteria for the notion of targeting. The second idea pleads for constructing the rule on the *Proximity Doctrine* developed by Paul Lagarde²¹. Such a rule could be formulated in the following manner:

“ National courts have jurisdiction for electronic transactions if there is a close connection between the litigation and the national legal system.

The close connection is presumed if the party who is to effect the performance which is characteristic of the contract targets the national market”.

The phraseology of the “specific performance” is taken from the 1980 Rome Convention *on the law applicable to contractual obligations* and permits thus to include performance of sell as performance of services. Targeting indices can be first of all the cctld. However, other indices can intervene, which may be particular important in case of use of an gtld, like the used language, currency, the fact that there are “nationalized” pages in a site, and so on.

It seems *prima facie* that the European Union took up the same direction, even if a closer analysis shows that in fact its regulations are much broader than our suggestions.

B – The proposed rule in regard to the EU Regulation on jurisdiction

The European Regulation 44/2001 of 22 December 2000 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*²² previews in its article 15 that:

²⁰ *Millenium Entreprises Inc. V. Millenium Music LP* (D.Ore, 1999).

²¹ *Op.cit.*, n° 124.

²² *OJEC*, 16/1/01, L12/1; Beraudo, Le règlement du Conseil du 22 décembre 2000, *Clunet*,

“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:

[...]

(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”.

The European criterion of “directing” has unfortunately not been defined and the European commission itself admitted that its notion is not of a “particular well-fined sharp”²³. If we do compare this notion to our proposal, a main semantic difference appears. Whereas for the European text it is the “activities” that must be directed to the European market, we do defend the idea that it is the “site” that “targets” the market. The practical consequence is that in our proposal a site that does not target the European market is not submitted to the European courts nonetheless if there is a conclusion of a single contract. If we do read article 15 of the Brussels Regulation in the light of the published declaration of the European Council, it is clear that for the Union, Member States courts have jurisdiction for each contract concluded with a consumer that has a domicile within the European territory, nonetheless the employed language or currency for example²⁴. Italy consequently foresees in its law that local courts always have jurisdiction in contracts involving consumers who have their domicile or residence in the country, nonetheless any elective jurisdiction clause²⁵.

We do not have to underline the danger of such a broad jurisdiction, especially in regard to sales contracts having for object immaterial goods like music, movie, etc...that have to be downloaded and where the whole contractual process is automated. If the seller targets the United States, how could he be aware of one single contract for instance concluded with an Italian consumer? Once more, the meta-norm of transnational business is the principle of foreseeability, insured through reasonable rules, as stated by Judge Aiken, quoting in regard to e-commerce the *obiter dictum* in *World-Wide Volkswagen*²⁶:

“The timeless and fundamental bedrock of [...] jurisdiction assures us all that a defendant will not be “haled” into a court of a foreign jurisdiction based on nothing more than the foreseeability or potentiality of commercial activity with the forum state”²⁷.

2001.1033 ; Droz & Gaudemet-Tallon, La transformation de la Convention de Bruxelles en règlement du Conseil, *Revue critique de droit international privé*, 2001.601. Appendix : Basedow, European Conflict of Laws under the Treaty of Amsterdam, *International Conflicts of Laws for the Third Millennium*, New York, Transnational Publisher, 2001.175.

²³ Proposition de règlement COM (1999) 349/4, 14/7/1999, p. 17.

²⁴ Doc 13742/00 JUSTCIV 131, 24/11/00, p. 40.

²⁵ Art. 14, decreto legislativo, 22/5/99, # 185, *Gazzetta Ufficiale*, # 143, 21/6/99.

²⁶ 444 US 286 (1980)

²⁷ *Millenium case*, *op.cit.*

Conclusion

In the frame of the present work, we did just evoke briefly the notion of targeting for jurisdiction purposes. However, we do think that the same reasoning could be adopted for the applicable law, in particular in regard to the so-called *lois de police*. The notion of targeting has already proved its efficiency in the frame of the regulation of unfair competition, especially in European law through the notion of “effect test” in the frame of article 85 EC dealing with the prevention, restriction or distortion of competition within the Union²⁸. Why could it not be the same for e-commerce? The future will tell us.

²⁸ For an extra-territorial application, see e.g. *Woodpulp Producers v. Commission* (1988), *ECR*, 98.5193.