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INTERNATIONAL JURISDICTION IN CROSS-BORDER INFRINGEMENT OF PERSONALITY RIGHTS IN THE EUROPEAN UNION

by

ANABELA SUSANA DE SOUSA GONÇALVES*

The legal provision applicable to determine the jurisdiction to decide claims regarding the cross-border infringement of personality rights is Article 7, Section 2, of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia). This legal provision establishes the jurisdiction in non-contractual matters of the court of the place where the harmful event occurred or may occur. Called to interpret the concept of place where the harmful event occurred, the Court of Justice of the European Union (ECJ) was forced to make an interpretative effort in case of online infringement of personality rights, because the information that is placed online can be accessed in any country. The offences that occur on the Internet can have a global reach and cause damage with greater geographical extension and repercussions in the legal sphere of the victim, especially due to the geographical wide location of its users. The aim of this study is to highlight the latest trends of the ECJ regarding this topic.

KEY WORDS

Brussels Ia Regulation; international jurisdiction; online torts, delicts or quasi-delicts

1. INTRODUCTORY REMARKS

In the European Union (EU), the legal provision applicable to determine the jurisdiction to decide claims regarding the cross-border infringement of personality rights is Article 7, Section 2, of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil

* Professor of Law at the Law School of the University of Minho, Portugal; asgoncalves@direito.uminho.pt

and commercial matters (Brussels Ia). Article 7, Section 2, establishes jurisdiction in non-contractual matters to the court of the place where the harmful event occurred or may occur. Called to interpret the concept of place of occurrence of the harmful event, the Court of Justice of the European Union (ECJ) decided that the legal provision should have an autonomous interpretation from the substantive law of the Member States, taking into account the system and objectives of the Regulation¹. To this extend, the ECJ decided that the place where the harmful event occurred or could occur simultaneously comprehends the place of the event, as also the place of the damage.

However, the online infringement of personality rights forced the ECJ to make a new interpretative effort, because the information that is placed online can be accessed in any country. Subsequently, the offences that take place on the Internet can have a worldwide reach and can cause damage with a larger geographical dimension and higher repercussions in the legal sphere of the victim, especially due to the geographical dissemination of the Internet users. The purpose of this study is to analyse the most recent cases of the ECJ regarding the cross-border infringement of personality rights.

2. BRUSSELS IA REGULATION

The Brussels Ia Regulation establishes a uniform system of legal provisions regarding international jurisdiction and a system of automatic recognition and enforcement of decisions in civil and commercial matters (Article 1). Brussels Ia is one of the main legal instruments of the policy of cooperation in civil matters, set in Article 81 of the Treaty on the Functioning of the European Union, that acts as a way of strengthening cooperation between judicial authorities of the Member States in order to simplify

¹ Judgment of 21 December 2021, *Gtflix Tv v DR*, C-251/20, ECLI:EU:C:2021:1036, paragraph 23; Judgment of 17 October 2017, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, C-194/16, EU:C:2017:766, paragraph 25; Judgment of 2011, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, C-509/09 and C-161/10, EU:C:2011:685, paragraph 38; Judgment of 16 July 2009, *Zuid-Chemie BV v Philippos's Mineralenfabriek NV/SA2009*, Case C-189/08, ECLI:EU:C:2009:475, paragraph 17; 2008, *Hassett and Doherty*, C-372/07; ECR I-7403, paragraph 17; Judgment of 23 April 2009, *Draka NK Cables Ltd, AB Sandvik international, VO Sembodja BV and Parc Healthcare International Limited v Omnipol Ltd*.2009, C-167/08, ECR I-3477, paragraph 19. About the autonomous interpretation of the Brussels Ia Regulation, taking into account its system and objectives, as well as the need to articulate the interpretation of the legal instruments regarding judicial cooperation in civil matters, see Gonçalves, A.S.S (2016) *Cooperação judiciária em matéria civil e Direito Internacional Privado*. In: Alessandra Silveira *et al.* (ed.) *Direito da União Europeia*. Coimbra: Almedina, pp. 330-291.

the cross-border enforcement of rights, through the principle of automatic recognition (Recital 3 of the Brussels Ia Regulation)².

Article 4, Section 1, is the general rule regarding international jurisdiction, that sets the jurisdiction of the court of the Member State of the defendant's domicile. In addition, Brussels Ia Regulation establishes a set of alternative jurisdictions for certain matters listed in Article 7. The attribution of alternative jurisdiction provided for in this legal provision is based on the principle of proximity, as these legal provisions are based in the existence of a particular close connection between the jurisdictions listed in the rule and the litigation. Therefore, this alternative jurisdiction is justified by the principle of trust, the protection of the legitimate expectations of the parties and the need of security and legal certainty, through the attribution of jurisdiction to a foreseeable jurisdiction, taking into account its proximity with the dispute. At the same time, some procedural advantages are also guaranteed, such as the efficient handling and organization of proceedings, the sound administration of justice and the production of evidence, with positive repercussions in fast the settlement of the dispute³. In the case of an alternative jurisdiction, the plaintiff, when bringing an action, can resort to the general rule of the court of the defendant's domicile (Article 4, Section 1) or to the special rule of Article 7. One of these special alternative jurisdictions concerns matters relating to tort, delict or quasi-delict, provided for in Section 2 of Article 7.

3. MATTERS RELATING TO TORT, DELICT OR QUASI-DELICT IN BRUSSELS IA REGULATION

Article 7, Section 2, gives jurisdiction in matters relating to tort, delict or quasi-delict to the courts of the place where the harmful event occurred or may occur. Called to interpret the concept of place where the harmful event occurred, the ECJ determined that this notion simultaneously covers

² For a more detailed view of this Regulation, see AAVV (2016) *ECPIL, European Commentaries of Private International Law, Brussels Ibis Regulation*. Ulrich Magnus, Pater Mankowski (ed.). Köln: OttoSchmidt; Gaudemet-Tallon, H. (2015) *Compétence et exécution des jugements en Europe, Matières civile et commerciale*. 5th ed. Paris: LGDJ; Gonçalves, A.S.S. (2014) A revisão do Regulamento Bruxelas I relativo à competência judiciária, ao reconhecimento e à execução de decisões em matéria civil e comercial. In: M.F. Monte, J.F. Rocha, J.A. Silva, E. Fernandez (ed.) *Estudos em Comemoração dos 20 Anos da Escola de Direito da Universidade do Minho*. Coimbra: Coimbra Editora, pp. 39-59.

³ With more detail about the justification of alternative jurisdiction in Article 7, see Gaudemet-Tallon, H. (2015) *Compétence et exécution des jugements en Europe, Matières civile et commerciale*. 5th ed. Paris: LGDJ, pp. 195-196; Mankowski, P. (2016) Article 7. In: Ulrich Magnus, Pater Mankowski (ed.) *ECPIL, European Commentaries of Private International Law, Brussels Ibis Regulation*, Köln: OttoSchmidt, pp. 143-145.

both the place where the event giving rise to the damage occurred or the place where the damage occurred⁴. Also called upon to interpret the concept of place of occurrence of the damage, the ECJ decided that the damage relevant to the application of Article 7, Section 2, would only referred to the direct damage, that means the place where the direct results of the unlawful action or omission occurred⁵.

This interpretation of the ECJ increased the number of courts available to the plaintiff, who, in addition to the general rule of the court where the defendant was domiciled, could resort to the court of the place of the event or to the court of the place of damage. However, the scope of jurisdiction of each of these courts is different, as the court of the place of damage would only have jurisdiction to decide on the damage that occurred in its territory. On the other hand, the court of the place of the event would have a broader jurisdiction, being able to assess all the consequences arising from that unlawful behaviour⁶.

4. ONLINE TORTS, DELICTS OR QUASI-DELICTS

The occurrence of online torts, delicts or quasi-delicts forced the ECJ to make a new interpretative effort of Article 7, now taking into account the specific characteristics of the Internet. The Internet is a way of fast communication, where the information is globally disseminated and is accessible worldwide. The information that is placed online can be easily accessed in any country and the infringement of rights on the Internet can

⁴ See this position, v.g., in Judgment of 30 November 1976, *Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*, C-21/76, ECLI:EU:C:1976:166. According with the ECJ jurisprudence, the interpretation given by the Court to the legal provisions of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters should be applied to the equivalent rules of Brussels I Regulation: see, v.g., Judgment of 16 July 2009, *Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA2009*, Case C 189/08, ECLI:EU:C:2009:475; Judgment of 1 October 2002, *Verein für Konsumenteninformation v. Karl Heinz Henkel*, C-167/00, ECLI:EU:C:2002:555; Judgment of 10 June 2004, *Rudolf Kronhofer v. Marianne Maier and Others*, C-168/02, ECLI:EU:C:2004:364.

⁵ See, v.g., Judgment of 16 July 2009, *Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA2009*, Case C 189/08, ECLI:EU:C:2009:475; Judgment of 10 June 2004, *Rudolf Kronhofer v. Marianne Maier and Others*, C-168/02, ECLI:EU:C:2004:364; Judgment of 11 January 1990, *Dumez France SA and Tracoba SARL v. Hessische Landesbank and others*, C-220/88, ECLI:EU:C:1990:8; Judgment of 2011, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, C 509/09 and C 161/10, EU:C:2011:685, paragraph 41.

⁶ About this interpretation, see Mankowski, P. (2016) Article 7. In: Ulrich Magnus, Pater Mankowski (ed.) *ECPIL, European Commentaries of Private International Law, Brussels Ibis Regulation*, Köln: OttoSchmidt, pp. 195-196; AAVV (2019) *Derecho Internacional Privado*, Vol. II. A.L. Calvo Caravaca, J. Carrascosa González (ed.). 14^a Ed. Granada: Comares, pp. 1062-1080; Virgós Soriano, M.; Garcimartín Alférez, F. (2007) *Derecho Procesal Civil Internacional, Litigación Internacional*. 2.^a Ed., Pamplona: Thomson Civitas, pp. 186-200; Salerno, F. (2006) *Giurisdizione ed Efficacia delle Decisioni Straniere nel Regolamento (CE) N. 44/2001 (La revisione della Convenzione di Bruxelles del 1980)*. 3.^a Ed. Padova: Cedam, pp. 150-166.

have a global reach. This means that the impact of the damage is broader, especially due to the wide geographic location of Internet users.

The characteristics of the Internet led the ECJ to adopt a *delict oriented approach* in the interpretation of the place where the damage occurred, in relation to online torts, delicts or quasi-delicts: that means, an interpretation that varies depending on the delict in question, taking into account the nature of the infringed right, the scope of geographic protection of that right and the analysis of the extent of the damage. The starting idea of the *delict oriented approach* is that the occurrence of damage in a given location depends on the condition that the right in question is protected in the territory of that State. Therefore, the *delict oriented approach* takes into account the area of geographic protection of the right, due to the need to identify the court best placed to assess the infringement of the right in question⁷. The ECJ has tested the delict oriented approach in several decisions regarding online torts, delicts or quasi-delicts. One example is the *Wintersteiger* case, in which it was at stake an infringement of an intellectual property right through the Internet, namely a registered trademark⁸; another example is the *Peter Pinckney* case, in which copyrights were infringed through content posted on a website⁹; the *Pez Hejduk* case regarded also an online copyright infringement¹⁰; the *Concurrence SARL* case was another example, that involved the online infringement of exclusive distribution rights¹¹.

Regarding the interpretation of the place of event in online torts, delicts or quasi-delicts, the ECJ has several decisions on the implementation of this concept in the cross-border infringement of personality rights.

5. THE CROSS-BORDER INFRINGEMENT OF PERSONALITY RIGHTS

On the *Shevill* case, the ECJ focused on the release through the press of a defamatory article published in several States. In this case, it was decided that the victim could file an action seeking compensation for all

⁷ See with more detail about the delict oriented approach, Gonçalves, A.S.S. (2018) The application of the Brussels I Recast Regulation to wrongful activities online and the delict oriented approach. *European Journal of Law and Technology*, 9 (1), pp. 1-14.

⁸ Judgment of 19 April 2012 2012, *Wintersteiger AG v. Producuts 4USondermaschinenbau GmbH*, C-523/10, ECLI:EU:C:2012:220.

⁹ Judgment of 3 October 2013, *Peter Pinckney v. KDG Mediatech AG*, C-170/12, ECLI:EU:C:2013:635.

¹⁰ Judgment of 22 January 2015, *Pez Hejduk v. EnergieAgentur.NRW GmbH*, C-441/13, ECLI:EU:C:2015:28.

¹¹ Judgment of 21 December 2016, *Concurrence SARL v. Samsung Electronics France SAS, Amazon Services Europe Sàrl*, C-618/15, ECLI:EU:C:2016:976.

the damages suffered in the place of the causal event, which would be the place of the establishment of the publisher, as this was the place where the unlawful act occurred: “that is the place where the harmful event originated and from which the libel was issued and put into circulation”¹². As for the place where the damage occurred, the court ruled that in the case of cross-border libel through the press “the injury caused by a defamatory publication to the honour, reputation and good name of a natural or legal person occurs in the places where the publication is distributed, when the victim is known in those places”¹³. Therefore, it was considered that the courts of the State in which the publication was published and where the victim claims to have suffered an attack to his reputation would also have jurisdiction, as a court of the occurrence of the damage, with the specificity that these latter courts could only judge the damages occurring in the territory of that State¹⁴. This position is known as the mosaic approach (*Mosaikbetrachtung*), since potentially the victim can bring an action in the court of the place where each one of the damages occurred, and that court, in turn, can only decide the damages that occurred in its own territory¹⁵.

On the eDate case, the ECJ again analysed a situation of transnational infringement of personality rights, however, the disclosure of harmful content was done through the Internet. In this case, the court recognized the specificity of the Internet, as, due to its characteristics and its worldwide reach, the impact of harmful content that was posted online on an individual's personality rights is greater and, consequently, is the scale of the damages that can produce¹⁶. Therefore, the ECJ maintained the position that the victim could appeal to the court of the causal event – in this case, the place of establishment of the content editor, for compensation for all damages. However, it could also bring an action in each of the Member States where the damage occurred, although in that case these courts would only have jurisdiction to rule on the damage that occurred in their territory. In addition, in the case of an online infringement,

¹² Judgment of 7 March 1995, *Fiona Shevill, Ixora Trading INC., Chequepoint SARL e Chequepoint International LTD v. Presse Alliance SA.*, C-68/93, ECLI:EU:C:1995:61, paragraph 24.

¹³ *Op cit*, paragraph 29.

¹⁴ *Op cit*, paragraph 30 e 33.

¹⁵ On scattered damage and the mosaic approach, *v. Gonçalves, A.S.S.* (2014) The application of the general rule of the Rome II Regulation on the internet torts. *Masaryk University Journal of Law and Technology*, 8 (1), pp. 64-66.

¹⁶ Judgment of 2011, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, C 509/09 and C 161/10, EU:C:2011:685, paragraph 41.

the Court decided that the damage would occur in each of the States in whose territory the content placed online is or was accessible¹⁷ and where the injured party claims that his reputation has been harmed¹⁸.

Nevertheless, the ECJ was sensitive to the fact that Internet users are spread all over the world and that the content that is placed online can potentially be accessed in any State, which increases the impact of the damage. It also considered that "it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State"¹⁹. Taking into account the severity, the geographical extent of the damage and the difficulty of locating it in only one State, the ECJ considered that the court of the place where is the centre of interests of the victim, would have jurisdiction over all the damages²⁰. The victim's centre of interests would be the place where the damage to the person's reputation would be greatest and would generally correspond to the place of his/her habitual residence²¹. However, the place of the centre of interests could also materialize in the place where the victim pursues his/her professional activity, if the person has a particularly close relationship with that State²². The jurisdiction of the court of the place where is based the centre of interests of the victim is justified, by the ECJ, in accordance with the principle of proximity and predictability underlying the rules of international jurisdiction, as the publisher of the wrongful content is in a position to know where is the centre of interests of the person who claims that his rights have been infringed. Furthermore, the possibility for this court to decide the totality of the damage is justified on the grounds of the sound administration of justice²³.

¹⁷ Note that victim is considered the direct victim of the damage. For further developments regarding this notion, see Gonçalves, A.S.S. (2013) *Da Responsabilidade Extracontratual em Direito Internacional Privado, A Mudança de Paradigma*. Coimbra: Almedina, pp. 374-380 and p. 406.

¹⁸ Judgment of 2011, *eDate Advertising GmbH and Others v X and Société MGN LIMITED*, C 509/09 and C 161/10, EU:C:2011:685, paragraph 42.

¹⁹ *Op cit*, paragraph 46.

²⁰ *Op cit*, paragraph 48.

²¹ *Op cit*, paragraph 49.

²² *Ibid.*

²³ *Op cit*, paragraph 48.

6. THE BOLAGSUPPLYSNINGEN CASE

On the Bolagsupplysningen decision, the ECJ was called again to interpret of the concept of place where the harmful event occurred, in cross-border infringement of personality rights through the Internet, in a case where a natural person and a legal person invoked the infringement of personality rights by the publication of incorrect information on a webpage and for not eliminating negative comments about them. The victims asked for the rectification of the information, the suppression of comments and a compensation for the damages suffered as a result of that publication.

In this case, the court restates the place of the victim's centre of interests "as the place in which a court can best assess the actual impact of the publication on the internet and its harmful nature"²⁴, and restates that this court should decide about all the damages suffered in the name of the sound administration of justice²⁵. Once again, it is emphasized that this interpretation allows for the predictability of the rules of jurisdiction and legal certainty, making it easy for the plaintiff and the defendant to identify the forum²⁶. The truth is that the centre of the activities of the person is: the place most identifiable with the person; where the person's reputation is more deep-rooted and where he/she is interested in preserving it; where the greatest economic repercussions of the damage occur on the activity of the person, in case of damage to its reputation. This is clear in the Bolagsupplysningen case, where it is claimed that the information that Svensk Handel (the defendant and a company incorporated under Swedish law) placed on its website accusing Bolagsupplysningen of carrying out acts of fraud and deceit swindling, as well as the 1000 comments in the webpage that followed that publication, paralyzed the company's economic activity in Sweden (the main place of its activity), causing daily material losses.

As for the centre of interest of one of the claimants, Ilsjan, it is restated that, in the case of natural persons, this generally corresponds to their habitual residence, even though it may correspond to the place of exercise of their professional activity, if there is a close connection with that State²⁷. Therefore, Estonia would be the place of Ilsjan's centre of interests, her habitual residence, and the Estonian court could assess the totality

²⁴ Judgment of 17 October 2017, Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB, C 194/16, EU:C:2017:766, paragraph 37.

²⁵ *Op cit*, paragraph 38.

²⁶ *Op cit*, paragraph 35.

²⁷ *Ibid.*

of the damages suffered. In this case, when the centre of interests coincides with the victim's habitual residence, a forum actoris is created and the protection of the victim is enhanced, since jurisdiction is given to the court that is closest to the victim²⁸.

In relation to the Bolagsupplysningen company, the other claimant and a legal person with commercial activity, the court decided that the place where the reputation of that person is most established should be searched, and should correspond to the place where the essential part of its economic activity is carried out, which may or may not coincide with the place of its registered office depending on the circumstances. However, in a situation, as in the case, where the registered office of the legal person is located in a Member State (Estonia), but most of its activities are carried out in another Member State (Sweden), the damage to the person's reputation is felt most in the latter²⁹. Therefore, the Sweden courts (the State where were concentrated of the economic activities of the society and where society has established its reputation) would be the closest to decide the infringement of the right at stake. This is so, because the infringement of the company's reputation "is the publication of information and comments that are allegedly incorrect or defamatory on a professional site managed in the Member State in which the relevant legal person carries out the main part of its activities and that are, bearing in mind the language in which they are written, intended, for the most part, to be understood by people living in that Member State"³⁰. Sweden will be considered the place where the damage to the victim's reputation occurred and it will assume jurisdiction as its centre of interests.

The ECJ also specified the concept of place of damage, taking into account its nature. The claimants asked for the rectification of incorrect information on the publication about them placed on the website and the elimination of comments related to them, published in the discussion forum. The ECJ decided that it would not be possible to resort to the courts of each of the Member States in whose territory the information is or was accessible in order to obtain the rectification of incorrect data or the removal of the comments³¹. According to the court, "in the light of the ubiquitous

²⁸ With the same opinion, see Vanleenhove, C. (2018) The European Court of Justice in Bolagsupplysningen: The Brussels I Recast Regulation's jurisdictional rules for online infringement of personality rights further clarified. *Computer Law & Security Review*, 34(3), p. 646.

²⁹ Judgment of 17 October 2017, Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB, C 194/16, EU:C:2017:766, paragraph 41.

³⁰ *Op cit*, paragraph 42.

³¹ *Ibid*.

nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal (...), an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage", as decided in the Shevill and eDate case³². In other words, the ECJ considered that the damage at skate (rectification of incorrect information and the elimination of the comments) was not geographically divisible. Consequently, it was not possible to resort, in this case, to the place of damage.

7. THE GTFLIX TV CASE

The recent Gtflix Tv case³³ helps to clarify the position taken by the ECJ in the Bolagsupplysningen decision. Gtflix Tv has its seat and centre of interest in the Czech Republic, where it produces and distributes, through the internet, adult audio-visual content. DR is a director, producer and distributor of films of the same type, marketed on websites hosted in Hungary, country where he has his domicile. Gtflix Tv claims that DR made defamatory comments about it on websites and forums and decides to bring an action against him asking: to cease all acts of belittling towards Gtflix Tv and to publish a legal notice in French and English on each of the internet forums; to consent in Gtflix Tv to post a comment on those forums; to pay Gtflix Tv a compensation for economic and non-material damages. In this case, the distinction between the different types of damages and how their nature affects the court jurisdiction becomes clear.

The action was brought before the French courts, as the courts of the place of the damage, and the doubt that was posed before the ECJ regarded the jurisdiction of the French courts, according with Article 7, Section 2. The ECJ restated that the victim can bring an action: for all the damages, before the place of the event giving rise to damages (place in which the publisher of that content is established); for all the damages, before the place of the victims centre of interests; before the courts of each Member State in which the content placed online is or has been accessible, as place of damage, but only regarding the damage occurred in that Member State³⁴.

³² *Op cit*, paragraph 49.

³³ Judgment of 21 December 2021, Gtflix Tv v DR, C 251/20, ECLI:EU:C:2021:1036.

³⁴ *Op cit*, paragraph 30.

However, clarifying the *Bolagsupplysningen* decision, the ECJ states that an application for the rectification and the removal of information that is placed online is a single and indivisible application and can only be brought before a court that has jurisdiction to decide the totality of the damages, because due to the nature of the internet the spreading of a content placed online is universal³⁵. Therefore, only the court of the event or the court of the centre of interest could decide this claim. On the other hand, regarding the compensation in respect of the damages resulting from the placement of the content online, the court ruled that the victim can ask compensation for all the damages, resorting to the referred courts, or only for a part of those damages. In this last case, the victim can bring an action for partial compensation in each Member State where the damage occurred, as long as those comments are or were accessible in that Member State³⁶. These courts will only have jurisdiction to rule on the damage occurred in its territory.

8. THE MITTELBAYERISCHER CASE

The *Mittelbayerischer* case has the specificity that the person that claims the infringement of his personality rights by the content placed online on the *Mittelbayerischer* website is not directly or indirectly referred on that content. SM was a Polish national, residing in Poland, and was a prisoner in the extermination camp at Auschwitz during the Second World War. *Mittelbayerischer Verlag* is a German company, that publishes an online newspaper in its website, in German, but accessible from other countries. SM claims that his personality rights were infringed, namely his national identity and dignity, with an expression published by the defendant that stated that the Treblinka camp, situated in Poland, was a Nazi extermination camp. Latter, this expression was substituted by German Nazi extermination camp of Treblinka, situated in occupied Poland³⁷. The question posed to the ECJ was if the Polish courts could have jurisdiction according with Article 7, Section 2, as the courts of the place where the claimant has his centre of interests.

The ECJ invoked the foreseeability and legal certainty of rules of jurisdiction to justify that a person that is not mentioned or indirectly identified by a content put online cannot resort to the courts of its centre

³⁵ *Op cit*, paragraph 32.

³⁶ *Op cit*, paragraph 43.

³⁷ Judgment of 17 June 2021, *Mittelbayerischer Verlag KG v SM*, Case C-800/19, ECLI:EU:C:2021:489, paragraph 7-12.

of interest, because the defendant could not “reasonably foresee being sued before those courts, since they are not, at the time when they place content online on the internet, in a position to know the centres of interests of persons who are not in any way referred to in that content”³⁸. Another interpretation would multiply the courts that would have jurisdiction to decide the entire damage, not taking into consideration that Article 7, Section 2, is an exception to the general rule of Article 4; should be interpreted strictly; and to be applicable, there should be a particular close connection between the litigation and the courts set in the legal provision, to guarantee legal certainty and the predictability of the forum³⁹. That close connection cannot lay “on exclusively subjective factors, relating solely to the individual sensitivity of that person, but on objective and verifiable elements which make it possible to identify, directly or indirectly, that person as an individual”⁴⁰. The fact that SM is a part of an identifiable group referred in the content placed online is not enough, because it does not translate into closer connection between the place of its centre of interests and the dispute⁴¹. Consequently, the person that claims that his personality rights were infringed by a content place online can only rely on the courts of his centre of interests “if that content contains objective and verifiable elements which make it possible to identify, directly or indirectly, that person as an individual”⁴².

9. GLOBAL PERSPECTIVE

In *Mittelbayerischer* case, the ECJ decides that the connecting factors of the jurisdiction rules should be established with the direct victim of the tortious action. This position is in line with the notions established by Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). The notion of the person sustaining damage of Article 4, Section 2, of the Rome II Regulation must be interpreted as the direct victim of the damage, which may not coincide with the person seeking compensation. This is the most appropriate interpretation, because it is according with the notion of damage established in Article 4, Section 1, of the same Regulation, which gives relevance to the direct damage⁴³. This legal provision of the Rome II Regulation, refers to the place where

³⁸ *Op cit*, paragraph 38.

³⁹ *Op cit*, paragraph 40.

⁴⁰ *Op cit*, paragraph 42.

⁴¹ *Op cit*, paragraph 44.

⁴² *Op cit*, paragraph 46.

the direct damage occurs, that means that the tort/delict will be governed by the law of the place where the direct results of the event occurred, following the notion of direct damage set by jurisprudence of the ECJ, regarding the jurisdiction rule of Article 7, Section 2, of Brussels Ia Regulation⁴⁴. So, one can conclude that in the *Mittelbayerischer* decision there is consistency between the notions set in Brussels Ia and Rome II Regulations, following Recital 7 of Rome II Regulation, that establishes the consistency between the instruments dealing with jurisdiction and the applicable law⁴⁵.

This interpretation also avoids the multiplication of forums, and takes under consideration the objectives of the special rules of Article 7: close connection between the dispute and the court; legal security; and predictability of the defendant about the jurisdiction. Another interpretation would create jurisdictions with weak connection with the dispute and would make impossible for the defendant to foresee the jurisdiction, since the internet has a global reach and the claimant could have his centre of interests in any Member State. As set in Recital 16 of the Brussels Ia Regulation, the predictability of the jurisdiction is particularly important in violations of rights relating to personality, including defamation.

The *Bolagsupplysningen* and *Gtflix Tv* cases follow the delict oriented approach already stated in other cases of delicts on the internet: when online activities cause damages, the place where the damage occurs varies according to the nature of the right infringed and the scope of geographical protection of that right, which implies an analysis of the infringement,

⁴³ With the same position, see Dickinson, A. (2010) *The Rome II Regulation, The Law Applicable to Non-Contractual Obligations*. Oxford: Oxford Publishing Press, p. 339; Gonçalves, A.S.S. (2013) *Da Responsabilidade Extracontratual em Direito Internacional Privado, A Mudança de Paradigma*. Coimbra: Almedina, p. 406; Von Hein, H. (2011) Article 4 General Rule. In: Graf Peter Calliess (ed.) *Rome Regulations, Commentary on the European Rules on the Conflict of Law*. The Netherlands: Wolters Kluwer, p. 416; Magnus, U. (2019) Article 4 General Rule. In: Ulrich Magnus, Pater Mankowski (ed.) *ECPIL, European Commentaries of Private International Law, Rome II Regulation*, Köln: OttoSchmidt, pp. 179-180.

⁴⁴ Judgment of 11 January 1990, *Dumez France SA and Tracoba SARL v. Hessische Landesbank and others*, C-220/88, ECLI:EU:C:1990:8; Judgment of 19 September 1995, *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*, Case C-364/93, ECLI:EU:C:1995:289; Judgment of 10 June 2004, *Rudolf Kronhofer v. Marianne Maier and Others*, C-168/02, ECLI:EU:C:2004:364; Judgment of 27 October 1998, *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002*, Case C-51/97, ECLI:EU:C:1998:509.

⁴⁵ According with the European Commission, the Brussels I, Rome II and the Rome I Regulations form an inseparable group of rules, setting the legal framework of European Union private international law in matters of contractual and non-contractual obligations in civil and commercial matters: European Commission. (2005) *Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)*. Brussels: COM/2005/0650 final - COD 2005/0261, p. 2.

the nature of the right, and its geographical area of protection⁴⁶. However, in cases of online infringement of personality rights, one can question the appropriateness of scattering the damage, giving jurisdiction to each of the Member States where the content that was placed online can be assessed. The ubiquitous nature of the Internet and the spreading of its users allows worldwide dissemination of the content placed online. So, in online infringement of personality rights it can be difficult on a technical level to distribute the damage through several countries and for the court to assess the existence and extension of the damage in its territory. Besides, although the ECJ does not agree⁴⁷, it is undeniable the link of dependence between the application for the rectification and the removal of content placed online and the application for compensation in respect of the damages resulting from that placement. It would be quite strange if, regarding the same situation, one court ruled that there was no infringement of personality rights, refusing the rectification and the removal of content placed online, and another court would grant compensation for the damages occurred in its territory for the infringement of personality rights.

It is necessary to adapt the jurisprudence to the specificity of the internet when there is a violation of a personality right⁴⁸. Consequently, foreseeability and legal certainty, and the need of consistency would require the ECJ to rethink its jurisprudence on online infringement of personality rights and to give jurisdiction to the court that is able to assess the totality of the damages, respecting the closer connection between the court and the entire dispute. That would mean to restrict jurisdiction to the place of the victim's centre of interests (as the place where the damage to the reputation of the victim occurred) or to the place of the event, eliminating the jurisdiction of the place of the damage and the mosaic

⁴⁶ For a more in-depth understanding, see Gonçalves, A.S.S. (2018) The application of the Brussels I Recast Regulation to wrongful activities online and the delict oriented approach. *European Journal of Law and Technology*, 9 (1), pp. 1-14.

⁴⁷ Judgment of 21 December 2021, Gtflix Tv v DR, C 251/20, ECLI:EU:C:2021:1036, paragraph 36.

⁴⁸ Underlining the importance of adapting the rules of the Brussels Ia Regulation to offences that occur on the Internet, v. Calvo Caravaca, A.L., Carrascoza González, J. (2001) *Conflictos de leyes y conflictos de jurisdicción en internet*. Madrid: Colex.; Feraci, O. (2012) Diffamazione internazionale a mezzo di Internet: quale foro competente? Alcune considerazioni sulla sentenza 'eDate'. *Rivista di Diritto Internazionale*. 95 (2), pp. 461-469; Zarra, G. (2015) Conflitti di giurisdizione e bilanciamento dei diritti nei casi di diffamazione internazionale a mezzo internet. *Rivista di Diritto Internazionale*. 98 (4), pp. 1234-1262; Lorente Martínez, I. (2012) Lugar del hecho dañoso y obligaciones extracontractuales. La sentencia del TJUE de 25 octubre 2011 y el coste de la litigación internacional en Internet. *Cuadernos de Derecho Transnacional*. Vol. 4(1), pp. 277-301; Cedeño Hernán, M. (2021) La tutela transfronteriza de los derechos de la personalidad en la Unión Europea. *Cuadernos de Derecho Transnacional*. 13(1), pp. 110-133.

approach. This would be more in line with the nature of the online infringement of personality rights and the characteristics of the Internet, as a global instrument of spreading information. It would also allow the consistency in the judgment of different claims regarding the same situation, avoiding contradictory decisions. Moreover, it would make it easier the judgment of these cases and would contribute to the sound administration of justice and the efficiency in the production of proof, because on a territorial level, it is not easy to locate the online infringement of personality rights through several Member States and to calculate the compensation of partial damages in each Member State. Finally, to resort to one court to decide all claims regarding the same situation (the court of the place of the event or the court of the centre of interests of the victim) would be in the best interest of the victim, that would have a more comprehensive decision.

10. FINAL REMARKS

The aim of this study is to highlight the latest trends of the ECJ regarding international jurisdiction in cross-border infringement of personality rights in the European Union, which is important to the debate that is starting about the need to introduce some changes in the Brussels Ia Regulation⁴⁹.

From the analysis of the recent decisions of the ECJ, it is clear that there is, by this time, a settled case law regarding the court of the place of the victim's centre of interests regarding the cross-border infringement of personality rights. The international jurisdiction of the victim's centre of interests began to be outlined in the eDate decision and has been reaffirmed over the years in the various ECJ decisions, only regarding cross-border infringement of personality right, and is not applicable to infringement of other torts or delicts. Consequently, it should be considered in a future recast of Brussels Ia the distinction of the infringement of personality rights from other torts and delicts, taking into account the specificity of the first. In addition, the legal provision regarding the infringement of personality rights should finally take to the Brussels Ia Regulation wording the criteria of the victim's centre of interest that was developed by the ECJ. As demonstrated, this criterion has advantages to determine the jurisdiction in cross-border infringement of personality rights: close connection between the dispute and the court;

⁴⁹ Defending the need to reform Brussels Ia Regulation and with some suggestions, see Hess, B. (2022) La reforma del Reglamento Bruselas I bis. Posibilidades y perspectivas. *Cuadernos de Derecho Transnacional*, 14(1), pp. 10-24.

legal security; predictability of the defendant about the jurisdiction; efficient handling and organization of proceedings; sound administration of justice and production of evidence; with positive consequences in fast the settlement of the dispute.

From the analysis of the recent decisions of the ECJ, it also results that the place of the damage and the mosaic approach are not the most adequate criteria to be applied to online infringement of personality rights and that it should be given jurisdiction to the court that can assess the totality of the damages, respecting the closer connection between the court and the entire dispute⁵⁰. As demonstrated, it endangers the sound administration of justice, the predictability of the rules of jurisdiction and the consistency in the judgment of different claims regarding the same situation. A future reform of the Brussels Ia Regulation should consider, whether this ECJ jurisprudence is in line with the principles that underlie the alternative jurisdiction of Article 7, Section 2, the specificities of cross-border infringement of personality rights, and the need of the victim to search for redress in the most appropriate jurisdiction to protect his/her rights relating to personality, including defamation.

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⁵⁰ With, the same opinion considering that the place of damage and the mosaic approach should be limited to the infringements of printed publications: Hess, B. (2022) La reforma del Reglamento Bruselas I bis. Posibilidades y perspectivas. *Cuadernos de Derecho Transnacional*, 14(1), p. 18.

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