WEBSITE ACCESSIBILITY AS BASIS FOR JURISDICTION UNDER THE BRUSSELS I REGULATION

by

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This paper discusses the relevance, pursuant to the EU Brussels I Regulation, of the accessibility of a website from the Member State of the forum. There are currently several cases pending in the ECJ concerning the question of whether Article 5(3) of the Regulation gives jurisdiction, in the event of personality infringement on the Internet, to the courts of any Member State from which the website in question may be accessed. The ECJ recently held that the mere accessibility of a trader's website by consumers domiciled in a Member State is not sufficient for fulfilling the jurisdictional prerequisite in Article 15(1)(c) that the trader directs, by any means, his commercial or professional activities to the Member State of the consumer's domicile.

KEYWORDS
Brussels I, consumer disputes, cyberspace, jurisdiction, tort disputes

1. INTRODUCTION

In private-law disputes having connection with more than one country, it is not unusual that the defendant contests the jurisdiction (competence) of the adjudicating court. This issue has to be decided by jurisdictional rules of the country of the forum, but these rules may originate from or be based on international instruments, such as treaties or EU statutory norms. The jurisdictional rules employ various jurisdictional grounds reflecting a connection between the dispute and the forum country, such as the habitual resid-

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ence of the parties, the place of performance of a contractual obligation or, in tort disputes, the place of the damage.

For most disputes concerning contracts, torts and property matters where the defendant is domiciled within the EU, the jurisdictional rules of the EU Member States have been unified by Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the so-called Brussels I Regulation).[1] Pursuant to the main rule in Article 2 of this Regulation, persons domiciled in a Member State must be sued in the courts of that Member State (the *forum domicilii* of the defendant). The domicile of the defendant is a jurisdictional ground which is in principle unaffected by the use of the Internet. There are, however, several exceptions to the main rule and some of them rely on grounds of jurisdiction that may cause complications in Internet-related situations, illustrating how the advent of the Internet has given rise to new challenges for private international law. This paper deals with two such exceptions, selected because they are either the objects of proceedings presently pending in the EU Court of Justice (ECJ), or have recently been interpreted by that court. In both situations, the core of the problem concerns the question of whether the fact that a website can be accessed from a certain Member State can, at least under certain circumstances, constitute a ground for the jurisdiction of the courts of that State.

2. FORUM DELICTI

Pursuant to Article 5(3) of the Brussels I Regulation, in matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may, as an alternative to his *forum domicilii*, be sued in another Member State in the courts for the place "where the harmful event occurred or may occur" (the *forum delicti*). Article 5(3) covers both disputes concerning compensation for damage that has already occurred and actions for preventive measures such as injunctions forbidding the harmful behaviour of the defendant. According to the ECJ, in the case of a cross-border tort this gives the plaintiff the possibility to sue, at his option, either in the courts for the place of the damage, or in the courts for the place of the event which gives rise to and is at the origin of that damage (the wrongful act or omission).[2] If the plaintiff chooses to sue in the contracting state where the damage occurred or may

[1] Official Journal of the European Communities 2001 L 12 p. 1.

occur, the jurisdiction of that state is, however, limited to the direct[3] and immediate[4] harm suffered there, whereas the courts of the country of the tortious act or omission, just like the defendant's *forum domicilii*, have jurisdiction over the totality of the damage caused by that harmful behaviour.[5] This is potentially of great importance for harmful acts committed through the Internet, since a characteristic feature of such acts is that they may simultaneously cause harm in many countries, for example if an internationally-known movie or sport star is exposed to defamation on the World-Wide Web.

The German Federal Court referred on 9 December 2009 to the ECJ certain questions arising out of the case of *eDate Advertising v. X*.[6] In essence, the *Bundesgerichtshof* wants to know whether the phrase "the place where the harmful event … may occur" in Article 5(3) of the Brussels I Regulation is to be interpreted as meaning, in the event of (possible) infringements of the right to protection of personality by means of content on an Internet website, that the person concerned may bring an action for an injunction against the operator of the website, who is established in a Member State, in the courts of any other Member State in which the website may be accessed. Practically the same question was referred to the ECJ on 6 April 2010 by *Tribunal de grande instance* in Paris regarding the case of *Martinez v. MGN*.[7] If the jurisdiction of a Member State from which the website can be accessed requires additional special connection(s) or link, the two referring courts ask about the relevant criteria, such as whether jurisdiction depends on the subjective intention of the operator to target his website at the Internet users in the Member State of the forum, or on objective factors such as the number of times the website has been accessed from the forum Member State

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2 See *Bier* v. *Mines de potasse d'Alsace*, case 21/76, [1976] ECR 1735; *Shevill* v. *Presse Alliance*, case C-68/93, [1995] ECR I-415. Both judgments concern interpretation of the corresponding provision in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which has been replaced by the Brussels I Regulation, but the ECJ case law regarding the Brussels Convention is considered to be relevant also for the understanding of the Brussels I Regulation, unless the wording of the Regulation deviates from that of the Convention. No changes pertinent to the issues discussed in this paper are proposed in the Commission's proposal of 14 December 2010 for a recast of the Brussels I Regulation, se COM(2010)748/3.

3 See *Dumez* v. *Helaba*, case C-220/88, [1990] ECR I-49.

4 See *Marinari* v. *Lloyd's Bank*, case C-364/93, [1995] ECR I-2719; *Kronhofer* v. *Maier*, case C-168/02, [2004] ECR I-6009.

5 See *Shevill* v. *Presse Alliance*, case C-68/93, [1995] ECR I-415.

6 Case C-509/09.

7 Case C-161/10.

(the number of "hits"), the residence or nationality of the victim, or some other circumstances.[8]

It is impossible to say when and how the ECJ will answer these questions and there is a substantial risk that any guess I can make will at the end of the day turn out to be wrong. At the time of writing these lines, there is not even a published opinion of the Advocate General. I abstain, therefore, from the temptation to predict the outcome of the case. Instead, I venture to present my own personal view on the matter.

It is typical of tort disputes, irrespective of whether they concern payment of compensation or the issuing of a preventive injunction, that the person sustaining real or potential damage (usually the plaintiff) has not voluntarily entered into the legal relationship with the person claimed to be responsible for the damage (usually the defendant). The situation has rather been imposed upon the plaintiff by a unilateral act or omission of the defendant. Most of the damage in defamation cases is usually sustained in the country or countries with which the plaintiff is closely connected by such ties as habitual residence, nationality or business activity.[9] The victim normally should not be compelled to sue in the – perhaps distant – home Member State of the tortfeasor. At the same time, no proceedings should be started in a Member State from where the website can be accessed if no real or potential damage arises there or if such damage is purely symbolical (for example, sometimes it can be suspected that certain website content has been downloaded by someone acting upon the demand of the plaintiff just in order to create jurisdiction). The accessibility of the website from a certain Member State, whether closely related to the plaintiff or not, thus should not *per se* suffice for jurisdiction of that State's courts, but if combined with the requirement of real or potential damage arising in the forum country (a requirement following from the above-mentioned limitation of jurisdiction to such damage), it seems to constitute a reasonable compromise.[10]

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[8] The German Federal Court also asks about the relevance of Articles 3(1) and 3(2) of EC Directive No 2000/31 of 8 June 2000 on Electronic Commerce, Official Journal of the European Communities 2000 L 178 p. 1, for the determination of the applicable substantive law, but that extremely interesting question lies beyond the scope of this paper.

[9] It is, of course, conceivable that a website causes considerable damage, but not in the home country of the plaintiff, for example because the content is in a language that is not understood there.

[10] See, for example, the decision of a Swedish appellate court in RH 2008:4, concerning Swedish jurisdiction to deal with damages for a copyright infringement committed by a Norwegian publisher whose Norwegian website had some 60 subscribers in Sweden.

In order to work, this solution presupposes though that the forum will apply the substantive rules of the applicable law[11] in a reasonable manner. For example, to the extent there is at present no reliable software making it simple, practical and economically feasible to divide Cyberspace along national boundaries, an injunction forbidding certain contents of a given website and threatening with drastic punishments for contempt of court in the case of disobedience may *de facto* amount to a world-wide prohibition even if *de jure* it extends merely to preventing potential damage arising in the forum country. This result is particularly unfortunate when that potential damage only constitutes a relatively small part of the world-wide effects of the website,[12] which in fact may be completely legal in all countries concerned except the country of the forum.[13] It is submitted that this aspect of the problem, which concerns substantive law rather than jurisdiction, should be taken into consideration by the forum when deciding upon the appropriate measures to be taken in the particular case.

3. CONSUMER DISPUTES

The Brussels I Regulation contains in Articles 15-17 some special semi-mandatory jurisdictional rules for consumer disputes, intended to protect the consumers. These so-called weak-party rules cannot be described here in detail; it suffices to say that in principle they allow the consumer to bring proceedings against the businessman in the courts for the place where the consumer is domiciled while forcing the businessman to sue the consumer in the country of the domicile of the latter. Pursuant to Article 15(1)(c), the application of these protective rules in most situations depends, *i.a.*, on whether the businessman "directs" (in French *dirige*, in German *ausrichtet*, in

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[11] In all EU Member States except Denmark, the law to be applied to a tort is determined by the conflict-of-laws rules in the Rome II Regulation No 864/2007 of 11 July 2007 on the Law Applicable to Non-Contractual Obligations, Official Journal of the European Union 2007 L 199 p. 40. However, non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, are excluded from the scope of this Regulation by its Article 1(1)(g), which means that in these cases the applicable law is normally to be ascertained by the autonomous conflict rules of the country of the forum.

[12] If the damage in the forum country is manifestly insignificant in comparison with the principal damage in another Member State, it may perhaps be argued that the case should be dismissed according to the principle of *accessorium sequitur principale*, see para. 19 in the judgment of the ECJ in *Shevanai* v. *Kreischer*, case 266/85, [1987] ECR 239, dealing with Article 5(1) of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

[13] See the unfortunate English decision in the case of *Bin Mahfouz* v. *Ehrenfeld*, [2005] EWHC 1156 (Q.B.). It seems that there is a risk of England becoming a "libel haven", see Hartley, T., ''Libel Tourism' and Conflict of Laws', 59 International and Comparative Law Quarterly 25-38 (2010).

Czech *zaměřuje*) his commercial or professional activities to the Member State of the consumer's domicile (or to several countries including that Member State). This gives rise to the question of whether this precondition can be considered fulfilled whenever the website of a foreign businessman or his agent can be accessed and consulted in (or rather from) the Member State of the consumer's domicile. The question is important because due to the borderless nature of the Web, most websites are accessible to consumers without any geographical limitation, *i.e.*, all over the world including all EU Member States, regardless of whether the businessman has the intention of addressing consumers domiciled in a certain Member State or not.

The Austrian Supreme Court (*Oberster Gerichtshof*) referred the above-mentioned question to the ECJ in connection with two cases, *Pammer v. Reederei Karl Schlüter*[14] and *Hotel Alpenhof v. Heller*[15]. The two cases were joined and decided by the Grand Chamber of the ECJ on 7 December 2010.

In the *Pammer* Case, a consumer domiciled in Austria started proceedings in an Austrian court against a German company, demanding repayment of the price of a cruise. The consumer had found out that the voyage existed by consulting the website of the company's German agent, contacted him by e-mail to obtain further information and subsequently made the booking by e-mail. In the case of *Hotel Alpenhof*, an Austrian hotel company sued in an Austrian court a consumer domiciled in Germany for the payment of a hotel bill. The consumer had found out that the hotel existed by means of the hotel's website and made and confirmed his reservation by e-mail. In both cases it was decisive for the jurisdiction of the Austrian court whether the company's activity, within the terms of Article 15(1)(c), had been directed towards the country of the consumer's domicile.

The Brussels I Regulation does not define what it means by "directs", but the problem was noticed, shortly after the adoption of the Regulation, by the Council and the Commission, which issued a joint declaration stating that "the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the lan-

[14] Case C-585/08.
[15] Case C-144/09.

guage or currency which a website uses does not constitute a relevant factor".[16]

This declaration is, however, a mere recommendation, and does not bind the ECJ. The starting point of the Court's reasoning is that the words "directs such activities to" must be interpreted independently, by reference principally to the system and objectives of the Regulation, in order to ensure that it is fully effective. The Court points out that it is not clear whether the formulation refers to the businessman's intention to turn towards one or more of the other Member States or whether it relates simply to an activity turned de facto towards them irrespective of such an intention. The Court opts for the former alternative. As the Internet has a worldwide reach and is in principle accessible in all Member States irrespective of the trader's intention, the mere accessibility is not sufficient. It must be determined, in each particular case, whether, before any contract was concluded, there was evidence demonstrating that the company was envisaging doing business with consumers domiciled in the Member State in question, "in the sense that it was minded to conclude a contract with those consumers" (para. 76 of the judgment). Among the evidence establishing whether an activity is directed to the Member State of the consumer's domicile, all clear expressions of such intention are to be considered, while the distinction between passive and interactive websites is not relevant. Relevant evidence does not include mention on a website of the businessman's email address, geographical address or telephone number without an international code, as that type of information is necessary, and partly obligatory pursuant to Directive No 2000/31 on Electronic Commerce, even when the businessman wishes to address merely consumers in his own Member State. On the other hand, clear expressions of the businessman's intention include his mention that he is offering his goods or services to consumers in one or more Member States designated by name, or that he pays the operator of a search engine to facilitate access by consumers in one or more Member States. The Court mentions, in para. 83 of the judgment, a number of other items of evidence that can be relevant, possibly in combination with one another. The list includes the international nature of the business (such as in the tourism industry), the mention of telephone numbers with the international

[16] The declaration is quoted in para. 11 of the judgment and in Recital 24 of the Rome I Regulation No 593/2008 on the Law Applicable to Contractual Obligations, Official Journal of the European Union 2008 L 177 p. 6.

code, the use of a top-level domain name other than that of the businessman's own country (such as the top-level domain name of the country of the consumer or a neutral name such as ".com"), the description of itineraries from the country of the consumer, and the mention of an international clientele (for example by presenting accounts written by such customers), but the Court stresses that this list is not exhaustive. As to the language and currency, the Court agrees with the above-mentioned joint declaration of the Council and the Commission that they do not constitute relevant factors, but only to the extent they correspond to the language(s) and currency generally used in the Member State of the businessman. If the website permits consumers to use a different language or a different currency, this may constitute evidence from which it may be concluded that the activity is directed to other Member States. The Court refrains from deciding whether the evidence in the two cases under scrutiny is sufficient, as this is a matter for the referring national court.

In principle, I agree with the Court's reasoning and conclusions. Even though it is obvious that the need to evaluate the combinations of circumstances in each particular case is not conducive to predictability and legal certainty, it seems to be the only acceptable alternative. To consider the mere accessibility of a website to be sufficient would clearly be unreasonable. It is also valuable that the ECJ confirms that it is the situation before the conclusion of the contract rather than at the time of the proceedings that is to be taken into account. Some of the factors mentioned by the Court are, however, not unproblematic. Limiting the offers on the website to consumers in some Member States designated by name may, under certain circumstances, constitute a splitting of the internal market in violation of the EU competition rules and it may also constitute a covert indirect discrimination on grounds of nationality. These rather complicated aspects cannot be discussed here in more detail.

It can also be doubted whether it is appropriate that the ECJ, in para. 76 of the judgment, seems to consider the businessman to have the intention of directing his activities to a certain Member State whenever he is willing or disposed ("minded") to conclude a contract with consumers domiciled there. Imagine a consumer who, just like the author of these lines, is a Czech-speaking habitual resident of Sweden. In anticipation of a trip to Prague, he books, from his Swedish home, some theatre tickets through the Prague theatre's website, which is totally in the Czech language and ori-

ented towards Czech consumers only but does not refuse to sell tickets to anyone possessing a valid credit card. It seems far-fetched to consider the theatre to direct its activities to Sweden in the sense of Article 15(1)(c), thus subjecting it to the jurisdiction of Swedish courts.

An additional question is how one should deal with those cases where the businessman directed his Internet marketing to the Member State of the consumer's domicile but the consumer involved in the dispute has clearly not been reached by it, for example because he is very old, blind, owns no computer and obviously does not know how to operate one. This question did not arise in the two cases decided by the ECJ and the ECJ did not express any opinion on it. The wording of Article 15(1)(c) speaks about activities directed to a Member State as such rather than to individual consumers. It is, therefore, submitted that the circumstances of individual consumers are irrelevant for the purposes of that provision.

It can be added that the two ECJ decisions on Article 15(1)(c) of the Brussels I Regulation also provide guidance for the interpretation of Article 6(1)(b) of the Rome I Regulation No 593/2008 on the Law Applicable to Contractual Obligations,[17] which designates the law applicable to consumer contracts and relies normally on the same criterion, *i.e.*, on whether the businessman directs his activities to the country where the consumer has his habitual residence (or several countries including that country). It remains to be seen whether and how the two decisions may influence also the interpretation of Article 5(3) on *forum delicti*.

[17] Official Journal of the European Union 2008 L 177 p. 6. See, in particular, Recital 24 of the Rome I Regulation on the "harmonious" interpretation of both Regulations on this point.