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*Marek Świerczyński, Remigijus Jokubauskas**

SPECIAL JURISDICTION IN INFRINGEMENTS OF PERSONALITY RIGHTS

Abstract*: This article focuses on the problems of jurisdiction in cross-border civil proceedings concerning an alleged violation of personality rights. There are no specific rules on jurisdiction for such torts in European Union law. In the current case law of the Court of Justice of the European Union (CJEU), Art. 7(2) of the Brussels I bis Regulation is applicable to such disputes. Nevertheless, the authors argue that the CJEU has misinterpreted this article when the claim is based on violation of personality rights, and has thus created a legal chaos in such disputes. The authors analyse the peculiarities of Internet infringements and the locus delicti connecting factor in the case law of the CJEU in this area. The Court has adopted the criterion of 'centre of interests' as the major connecting factor to establish international jurisdiction. The authors criticize this approach and argue that it has led to a structural misunderstanding of the infringement of personality rights. Finally, the authors propose a new rule on jurisdiction in cases concerning violation of personality rights, which should be established in the Brussels I bis Regulation to ensure legal certainty and proper international dispute settlement.*

Keywords: special jurisdiction, personality rights, Brussel I bis, torts, Internet

INTRODUCTION

In this article, we propose to introduce a separate basis of special jurisdiction for infringements of personality rights in cross-border civil proceedings. The proposal is inspired by the judgment of 21 June 2021 in case C-800/19 (the *Mittelbayerischer*

* Marek Swierczyński (dr. habil.), Professor, Cardinal Stefan Wyszynski University (Warsaw); email: m.swierczynski@uksw.edu.pl; ORCID: 0000-0002-4079-0487;

Remigijus Jokubauskas (dr.), Associate Professor, Mykolas Romeris University (Vilnius); email: remigijus@jokubauskas.org; ORCID: 0000-0003-4314-850X.

judgment),[1] in which the Court of Justice of the European Union (CJEU or the Court) once again referred to the 'centre of interests' as a connecting factor formulated by it in the *eDate* judgment.[2] We criticize the CJEU's approach regarding the jurisdiction of Internet torts. We believe that the time has come for introduction of a separate jurisdictional provision relating to alleged infringements of personality rights; one which should be foreseeable for the defendant and protect the interests of the victim.

Currently, the EU courts establish special jurisdiction in matters of tort obligations under Art. 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[3] (Brussels I bis Regulation). The scope of application of Art. 7(2) of the Brussels I bis Regulation also covers cases concerning liability for infringement of personality rights, which has led to a number of debatable judgments of the CJEU.[4] It lacks predictability of such jurisdiction. This problem is confirmed in the doctrine.[5] Moreover, the Grand Chamber of the CJEU has recently rendered another ruling concerning the application of the said provision in a case of dissemination of derogatory comments on the Internet in the *Gtflix Tv* case.[6] In this case, the Court separated the jurisdiction for the claim of rectification of the information and the removal of the content placed online and the claim for compensation for the damage suffered for such infringement. There are other examples of problems of infringement of personal rights and protection of the rights to a fair trial (and right of access to a court). For instance, in the case *Arlewin v. Sweden*,[7] the European Court of Human Rights (ECtHR) found a violation of Art. 6(1) of the European Convention on Human Rights (ECHR) since the Swedish courts refused to hear the case in which the claimant sought damages for the infringement of personal rights by the information announced in a television programme.

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[1] C-800/19 *Mittelbayerischer Verlag KG v. SM* [2021] ECLI:EU:C:2021:489.

[2] Joined cases C-509/09, C-161/10 *eDate Advertising GmbH and Others v. X and Olivier Martinez, Robert Martinez v. MGN Limited* [2011] ECLI:EU:C:2011:685.

[3] O.J. 2012, L 351, p. 1.

[4] J. Gołaczyński, M. Zalisko, *Jurysdykcja krajowa szczególna w sprawach dotyczących czynu niedozwolonego lub czynu podobnego do czynu niedozwolonego w rozporządzeniu nr 1215/2012* [Special national jurisdiction in matters relating to tort, delict or quasi-delict in Regulation no. 1215/2012], 4 Europejski Przegląd Sądowy 23 (2019).

[5] T.C. Hartley, *Jurisdiction in tort claims for non-physical harm under Brussels 2012, Article 7(2)*, 67(4) International and Comparative Law Quarterly 987 (2018); J. Kramberger Škerl, *Jurisdiction in On-line Defamation and Violations of Privacy: In Search of a Right Balance*, 9(2) Lexonomica 87 (2017).

[6] C-251/20 *Gtflix Tv v. DR* [2021] ECLI:EU:C:2021:1036.

[7] ECtHR, *Arlewin v. Sweden* (App. No. 22302/10), Judgment, 1 March 2016.

We propose to introduce a new jurisdictional provision in the Brussels I bis Regulation. The wording should be as follows: "[f]or non-contractual obligations arising out of violations of personality rights, the courts of the country in which the habitual residence of the person sustaining damage is situated at the time when the tort or delict occurred shall have jurisdiction." This rule would be applicable to the infringement of personality rights of both natural and legal persons (in the latter case the rule should be based on the place of registration of the entity and the objective link).

The need for a new jurisdictional rule is confirmed by the *Mittelbayerischer* judgment, in which the CJEU misinterpreted both the scope of Art. 7(2) itself as well as its *locus delicti* (place of infringement) connecting factor. The Court once again introduced new requirements for the jurisdictional provision to be applied by the courts and thus triggered conceptual chaos. The solution to this problem would be the adoption of an unambiguous and stable personal connecting factor that will not be subject to the Court's divergent interpretations, which depend on the categorization of the case. We contend that Art. 7(2) of the Brussels I bis Regulation is outdated and inadequate to the current needs, particularly when it comes to Internet infringements. In cases involving infringements of personal rights, this has led the CJEU to put forward the connecting factor of a "centre of interests" of the victim alongside the so-called "mosaic approach". Neither of these solutions properly meet the objectives of proper jurisdiction for national courts, which should include the predictability of their jurisdiction; the proper administration of justice; and the efficient organisation of proceedings. Failure to change the EU's jurisdiction rules in this field will result in a growing state of uncertainty regarding the jurisdiction of the courts. Subsequent judgments of the CJEU may further surprise us, as the court seems to be overly creative with regard to Internet infringements.[8] The choices made in the recent case law have actually diminished jurisdictional predictability and spurred the fragmentation of litigation, which is deemed contrary to the objective of sound administration of justice.[9]

We believe that the grounds of special jurisdiction for torts in the Brussels I bis Regulation should be expanded to differentiate between various types of torts, not only infringements of personal rights. These rules should be harmonized with the conflict of law rules arising from the Rome II Regulation. This also means that the Rome II Regulation should be supplemented by a corresponding conflict of

[8] As pointed out in the doctrine, the EU PIL is still rooted on a technology-neutral lawmaking, which is mitigated by the creative, case-by-case based interpretations of the CJEU. O. Feraci, *Digital Rights and Jurisdiction: The European Approach to Online Defamation and IPRs Infringements*, in: E. Carpanelli, N. Lazzerini (eds.), *Use and Misuse of New Technologies*, Springer Nature Switzerland, Cham: 2019, p. 280.

[9] H. Schack, *Internationale Zuständigkeit bei Verletzung von Urhebervermögensrechten über Internet*, 50 Neue Juristische Wochenschrift 3630 (2013).

law rule for infringements of personality rights.[10] It should be noted however that the question of the applicable law is beyond the scope of this article and we focus only on matters of jurisdiction. Another argument for the introduction of new jurisdictional grounds in the Brussels I bis Regulation is the fact that General Data Protection Regulation (GDPR) provides special rules for jurisdiction in cases of personal data breaches (Arts. 79 et seq.).[11] These rules are based on the habitual residence of the victim (the data subject) connecting factor. The jurisdictional rules in the field of personal rights infringements could therefore be consolidated; i.e. the introduction of a new jurisdictional rule in the Brussels I bis Regulation may lead to the deletion of the separate jurisdictional ground of Art. 79 GDPR.

The structure of this article is as follows: In Section 1 we refer to the *locus delicti* (place of infringement), which is still being applied as the connecting factor in Art. 7 (2) of the Brussel I bis Regulation. The CJEU jurisprudence on Internet defamation cases is the subject of analysis in this respect. In Section 2 the concept of the 'centre of interests' as a connecting factor is criticised, with particular reference to the *Mittelbayerischer* judgment. In this section we present, as an alternative, the personal connecting factor based on the habitual residence of the victim. Separately, we also analyse the hypothetical scope of the proposed new jurisdictional rule, especially taking into consideration the *Mittelbayerischer* case. A summary and conclusions are presented in the final part (Section 3) of this text.

1. INTERNET INFRINGEMENTS AND THE *LOCUS DELICTI* CONNECTING FACTOR

Art. 7 of the Brussels I bis Regulation provides the main grounds of special jurisdiction. It supplements the general jurisdiction based on the connecting factor of domicile of the infringer (Art. 4).[12] According to the case law of the CJEU, the

[10] Art. 1(2)(g) of the Rome II Regulation excludes from its scope obligations arising out of violations of privacy and other personal rights, including defamation. This issue was originally covered by the draft regulation, which was subsequently modified several times and generated much controversy (see *Comments on the European Commission's draft proposal for a Council regulation on the law applicable to non-contractual obligations*, available at: https://bit.ly/3MKicZT, accessed 30 June 2022). As a result of disputes and the impossibility to reach a compromise, it was finally decided to exclude torts arising from violations of personal rights by introducing the so-called 'review clause' contained in Art. 30(2) of the Rome II Regulation.

[11] Disputes arising from international data breaches can be complex. Despite the introduction of GDPR, the EU failed to amend the Rome II Regulation on the applicable law to non-contractual liability and to extend its scope to include infringements of privacy. GDPR only contains provisions on international civil procedure. However, there are no supplementing conflict-of-law rules. In order to determine the applicable law national courts have to apply divergent and dispersed national codifications of private international law. *See* M. Brkan, *Data Protection and Conflict-of-Laws: A Challenging Relationship*, 2(3) European Data Protection Law Review 324 (2016).

[12] C-228/11 *Melzer v. MF Global UK Ltd* [2013], ECLI:EU:C:2013:305.

concepts and criteria used in Art. 7(2) are subject to autonomous interpretation, with reference to the system introduced in the Brussels I bis Regulation and its objectives.[13] What matters is the predictability of the jurisdiction, proper administration of justice, and the efficient organization of proceedings.[14] However, the case law of the CJEU relating to Internet infringements does not in fact meet these objectives. The juridical interpretative activism of the CJEU has only to some degree addressed the shortcomings of Art. 7(2), while at the same time it also has triggered new uncertainties.

The CJEU case-law confirms that the connecting factor based on "place where the harmful event occurred or may occur", as used in Art. 7(2), refers to both the place where the damage materialised and the place where the harmful event occurred, so that the defendant may be sued, at the plaintiff's choice, also in the courts of the place where the damage occurred or may occur.[15] This distinction, however, is not sufficient in the case of infringements of personality rights, particularly those committed on the Internet, so the need for clarification arose. The Internet continues to present new challenges for jurisdictional principles,[16] leading to a dramatic increase in difficult jurisdictional problems.[17]

In the classic 1995 *Shevill* case,[18] the CJEU ruled that the courts of the place where the defamatory publications were delivered and where the victim suffered damage to his reputation are territorially best placed to determine the nature of the defamation and to determine the extent of the damage suffered. The judgment thus gave rise to the so-called "mosaic theory."[19] This solution is particularly problem-

[13] For more on this matter, *see* U. Magnus et al., *Brussels I-bis Regulation*, Sellier European Law Publishers, Münich: 2016.

[14] P. Mankowski, *Article 7*, in: U. Magnus et al. (eds.), *Brussels I-bis Regulation*, Sellier European Law Publishers, Münich: 2016, p. 271.

[15] In the famous case of *GMines de Potasse D'Alsace S.A.*, the phrase "harmful event" was interpreted to mean alternatively either the place where the wrongful acts took place or the place where the harm was felt. C-21/76 *Handelskwekerij G. J. Bier BV v. Mines de Potasse D'Alsace SA* [1976], ECLI:EU:C:1976:166.

[16] J. Hörnle, *The Jurisdictional Challenge of the Internet*, in: L. Edwards, C. Waelde (eds.), *Law and the Internet*, Oxford University Press, Oxford: 2008; J. Hörnle, *Cross-Border Internet Dispute Resolution*, Cambridge University Press, Cambridge: 2009; U. Kohl, *Jurisdiction and the Internet: Regulatory Competence Over Online Activity*, Cambridge University Press, Cambridge: 2007; U. Kohl, *Jurisdiction in Cyberspace*, in: N Tsagourias, R. Buchan (eds.), *Research Handbook on International Law and Cyberspace*, Edward Elgar, Cheltenham: 2017, pp. 30-54.

[17] As already observed almost 20 years ago by P. Borchers, *Tort and Contract Jurisdiction via the Internet: The 'Minimum Contacts' Test and The Brussels Regulation Compared*, 50(3) Netherlands International Law Review 401 (2003).

[18] C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA* [1995], ECLI:EU:C:1995:61.

[19] O. Feraci, *La legge applicabile alla tutela dei diritti della personalità nella prospettiva comunitaria*, 4 Rivista di diritto internazionale 1020 (2009).

atic in cases involving electronic communications.[20] A characteristic feature of the Internet is the so-called dispersion of the factual state of the tort, which consists in linking the tort itself, or the damage caused by this tort, to the territories of many countries.[21] As we shall see, the increasingly ubiquitous nature of the Internet has transformed the tort of infringements of personality rights to that of a common tort. It is also pointed out that the mere availability of a website including defamatory material in a given Member State should not be used as a ground for establishing national jurisdiction of the courts of such Member States.[22] There is no doubt, therefore, that the "mosaic theory", which is still being applied by the EU courts since the *Shevill* ruling, should be abandoned.

In the 2011 *eDate* case the Court ruled that in the case of infringement of personal rights, a person who considers him/herself harmed by content published on the Internet may bring an action for liability – with respect to all of the damage suffered – before the courts of the Member State in which the centre of his/her interests is situated. The CJEU clarified that the place where a person has the centre of his/her interests coincides, in general, with habitual residence. However, the centre of interests may also be elsewhere, insofar as other factors may establish the existence of a particularly close link with a given State, for instance the pursuit of a professional activity.[23] In the Court's view, the connecting factor of the victim's centre of interests is compatible with the objective of foreseeability of jurisdiction, since it enables the plaintiff to easily determine the court before he or she may bring his/her action, and at the same time the defendant to reasonably foresee before which court (s)he/it may be sued. Therefore, in the above judgment the concept of "centre of interests" was created, but without replacing the "mosaic approach".

The *eDate* ruling had been widely criticized.[24] It is pointed out that, in essence, the CJEU maintains a mosaic approach to the Internet, without considering the

[20] K. Weitz, *Jurysdykcyjne aspekty umownych i deliktowych zobowiązań elektronicznych w świetle rozporządzenia Rady (WE) nr 44/2001 – zagadnienia węzłowe* [Jurisdictional aspects of electronic contractual and tort obligations under Council Regulation (EC) No 44/2001 – nodal issues], in: J. Gołaczyński (ed.), *Kolizyjne aspekty zobowiązań elektronicznych*, Wolters Kluwer, Warszawa: 2007, p. 291; A. Tomaszek, *Dochodzenie roszczeń z tytułu czynów niedozwolonych w Internecie* [Pursuing claims for tort on the Internet], 11 Monitor Prawniczy 685 (2000); K. Cornils, *Der Begehungsort von aeusserungsdelikten im Internet*, 8 JuristenZeitung 394 (1999).

[21] H. Kronke, *Applicable Law in Torts and Contracts in Cyberspace*, in: C. Kessedjian, K. Boele-Woelki, Michel Pelichet (eds.), *Internet – Which Court Decides? Which Law Applies?, Proceedings of the international colloquium*, Kluwer Law International, The Hague: 1998, p. 71.

[22] Gołaczyński, Zalisko, *supra* note 4, p. 30.

[23] C-509/09, C-161/10 *eDate Advertising GmbH*, paras. 48-49.

[24] *Cf.* M. Reymond, *The ECJ eDate Decision: A Case Comment*, 13 Yearbook of Private International Law" 493 (2011); M. Bogdan, *Defamation on the Internet, Forum Delicti and the E-Commerce Directive: Some Comments on the ECJ Judgment in the eDate Case*, 13 Yearbook of Private International Law 483 (2011); S. Bollée, B. Haftel, *Les nouveaux (dés)équilibres de la compétence internationale en matière de cyberdélits après l'arrêt eDate Advertising et Martinez*, Recueil Dalloz 1285 (2012).

practical problems involved. The CJEU's approach weakens the main principle of *actor sequitur forum rei* in favour of *forum actoris*.[25] Moreover, as rightly pointed out in the doctrine, in the vast majority of cases the centre of interest will be equal to the place of habitual residence of the victim. The same is true for legal entities, whose centre of interests will likely correspond to the place of registration (place of the seat). Still, as proved by the following judgments the proposed approach includes a high level of ambiguity. A person does not necessarily have only one centre of interests. In addition, the Court's ruling is controversial because in the Internet cases jurisdiction should not depend only on the dissemination of information in a certain territory, but rather on the fact that the defendant has failed to restrict the availability of information to residents of a given country.[26] Furthermore, the place of centre of interests may change over time when the person moves his/her interests to another country.

In 2017, the CJEU further tried to develop its interpretation of Art. 7(2) of the Brussel I bis Regulation in the *Bolagsupplysningen* case.[27] In this case, the legal entity sought first and foremost rectification and/or retraction and removal of the information made available online, and only secondarily compensation for the alleged infringement of its reputation. In its judgment, the CJEU confirmed the application of the "mosaic approach", despite AG Bobek's proposed different opinion. The *Bolagsupplysningen* judgment confirms that the centre of interests concept is based on the presumption that the victim's centre of interests is at his or her habitual residence, or in the case of a legal entity at its registered office (with the provison that this latter presumption can be rebutted by showing that it carries out the main part of its economic activities in another Member State).[28] The CJEU's statement in *Bolagsupplysningen* that economic activity must be carried out mainly in a certain Member State in order to invoke the centre of interests as the basis for

[25] S. Francq, *Responsabilité du fournisseur d'information sur Internet: affaires eDate Advertising et Martinez*, 1-2 La Semaine Juridique - édition Générale 35 (2012); K. Weitz, *Forum delicti commissi w sprawach o naruszenie dóbr osobistych w Internecie w świetle art. 5 pkt 3 rozporządzenia nr 44/2001* [Forum delicti commissi in cases of infringement of personal rights on the Internet in the light of Art. 5 point 3 of Regulation No 44/2001], 3 Polski Proces Cywilny 316 (2013), p. 330.

[26] M. Pilich, *Prawo właściwe dla dóbr osobistych i ich ochrony* [The law applicable to personal rights and their protection], 3 Kwartalnik Prawa Prywatnego 599 (2012), p. 635; M. Pilich, M. Orecki, *Jurysdykcja i prawo właściwe w sprawach o ochronę dóbr osobistych przed naruszeniem w Internecie. Glosa do wyroku TSUE (wielka izba) z 25 października 2011 r. w sprawach połaczonych C-509/09 i C-161/10 eDate Advertising v. X oraz Oliver Martinez, Robert Martinez v. MGN Limited* [Jurisdiction and applicable law in cases concerning the protection of personal rights against infringement on the Internet. Glossary to the judgment of the CJEU (Grand Chamber) of 25 October 2011 in joined cases C-509/09 and C-161/*10 eDate Advertising v. X and Oliver Martinez, Robert Martinez v. MGN Limited*], 1 Polski Proces Cywilny 109 (2015).

[27] C-194/16 *Bolagsupplysningen OÜ, Ingrid Ilsjan v Svensk Handel AB (BOÜ/Ilsjan)* [2017], ECLI:EU:C:2017:766.

[28] T. Lutzi, *Shevill is dead, long live Shevill!*, 134 The Law Quarterly Review 210 (2018).

jurisdiction is likely to raise difficult questions with respect to how to draw the line. This ruling has also been much criticized.[29]

The CJEU has set a high bar for invoking the centre of interests basis of jurisdiction, in that a legal entity's centre of interests must be clearly identifiable at the stage when the court assesses its jurisdiction.[30] In particular, the CJEU's approach leads to the conclusion that the localisation of the victim's centre of interests is dependent upon the circumstances of the actual dispute.[31] This practice of the CJEU shows that a claimant has to prove to the national court – at the initial stage of civil proceedings – that its/her/his centre of interests is mainly in this member state, instead of the fact that the actual damage took place there. Nevertheless, there is no indication in Art. 7(2) of the Brussel I bis Regulation that such a requirement for the special jurisdiction rule has to be established. Also, the CJEU itself has not provided any guidance how the centre of main interests should be established, and this leads to more legal uncertainties.

2. CRITIQUE OF THE CENTRE OF INTERESTS CONNECTING FACTOR IN THE LIGHT OF *MITTELBAYERISCHER* JUDGMENT

The centre of interests as a connecting factor for cross-border jurisdiction in civil cases was once again applied in the *Mittelbayerischer* case, in which the CJEU continued the previous case law in this area (*eDate*; *Bolagsupplysningen*). The claimant, a Polish national, brought a civil claim against a German newspaper before the Polish courts for having used the expression "Polish extermination camp." The expression was mentioned in an online article to refer to a Nazi extermination camp built on the territory of (then-occupied) Poland. The claimant sought protection of his personality rights, in particular his national identity and dignity, which he claimed had been infringed as a result of the use of that expression.

Nevertheless, the factual and legal situation in the *Mittelbayerischer* case differs from the previous case law. Though it also concerns infringement of personal rights online, the peculiarity in this case is that the victim who brought the claim to the court in Poland was not mentioned in the Internet publication. The CJEU put great emphasis on this aspect of the case and primarily focused on the foreseeability of

[29] L. Lundstedt, *Putting Right Holders in the Centre: Bolagsupplysningen and Ilsjan (C-194/16): What Does It Mean for International Jurisdiction over Transborder Intellectual Property Infringement Disputes?*, 49 International Review of Intellectual Property and Competition Law 1022 (2018); T. Kyselovská, *Critical Analysis of the "Mosaic Principle" under Art. 7 Para 2 Brussels Ibis Regulation for Disputes Arising out of Non-Contractual Obligations on the Internet*, 1 Prawo Mediów Elektronicznych 36 (2019).

[30] Lundstedt, *supra* note 29, p. 1027.

[31] T. Lutzi, *Internet cases in private international law: developing a coherent approach*, 66(3) International and Comparative Law Quarterly 687 (2017).

cross-border jurisdiction, without further analysis of where the actual place of harm is. Also, the subject matter of the claim was not the defamation of a person, but an alleged violation of his national identity and dignity. The claimant asked the court to prohibit the defendant from disseminating in any way the terms which according to the claimant violated his national dignity; order the defendant to apologise, and pay the amount of 50,000 Polish zlotys.[32]

The outcome of the *Mittelbayerischer* judgment demonstrates that in cases of infringement of personal rights online not only is Art. 7(2) of the Brussels I bis Regulation difficult to apply, but also that another additional requirement for this special rule of jurisdiction was established; which is the identification of a victim in the Internet publication. We argue that this case not only reveals the need for special rules on jurisdiction for infringement of personal rights online in the Brussels I bis regulation, but also the lack of protection of the interests of a victim in such cases which exists in the current regulation of cross-border civil cases. Also, it shows that the CJEU failed to analyse the peculiarities of infringement of personal rights online and did not provide a solution to the current problem in such cross-border cases.

First, the CJEU found that the factual circumstances in the *Mittelbayerischer* case differed from the previous cases concerning violation of personality rights online. In this case the alleged victim of the violation of personal rights who brought a claim against the defendant was not explicitly mentioned in the Internet publication. Relying heavily on the foreseeability of jurisdiction in cross-border civil proceedings, the court found that in order to achieve the objectives of predictability of the rules of jurisdiction laid down by the Brussels I bis Regulation and of legal certainty pursued by that regulation, the connection must – in cases where a person claims that his or her personality rights have been infringed by content placed online – be based not 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 someone who was specifically harmed.[33] Thus, a victim of infringement by online publication has the right to bring a claim only if he or she can be identified. This means that in the event an infringer publishes information which according to the national law could be regarded as a basis for violation of personal rights, but no victim can be identified *individually*, the jurisdiction rule of Art. 7(2) of the Brussels I bis Regulation is not applicable. This approach of the CJEU focuses ultimately on the protection of interests of an infringer, and weakens protection of the interests of a victim. In order words, the CJEU did not base the application of Art. 7(2)

[32] Opinion of Advocate General Bobek delivered on 23 February 2021, Case C-800/19 *Mittelbayerischer Verlag KG v SM*, ECLI:EU:C:2021:124, para. 16.

[33] Joined cases C-509/09, C-161/10 *eDate Advertising GmbH*, para. 42.

of the Brussels I bis Regulation on the violation of personal rights, but instead it focused on the predictability of jurisdiction vis-à-vis the infringer. However, this generalized requirement for an individual identification of the victim establishes a requirement for the application of Art. 7(2) of the Brussels I bis Regulation which is not mentioned in the text of the regulation and requires a claimant to prove to the court, at the initial stage of the instigation of civil proceedings, an additional fact (i.e. that he or she was mentioned in the publication). Another issue arising from this requirement is that it establishes this personal identification criterion without leaving room for the assessment of an individual's situation. Violation of personal rights online is a *sui generis* tort which often cannot be objectively established, since harm in some cases is the violation of non-pecuniary rights, such as dignity and reputation. The peculiarity of this tort suggests that it should also be assessed on an individual basis, and a victim should be allowed to prove that his or her individual rights have been infringed. It is worthy of note that this position was supported by the Advocate General Bobek, who argued that pursuant to Art. 7(2) of the Brussels I bis Regulation the establishment of jurisdiction based on the centre of interests does not require that the allegedly harmful online content names a particular person, and consequently posited that jurisdiction over the violation of personal rights online should be assessed on *ad hoc* basis.[34]

Secondly, the problem with the CJEU's rationale in this case is the vagueness of the requirement for *individual identification* of a victim. The CJEU did not provide how such identification should be established and which criteria should be assessed. It only mentioned that objective and verifiable elements shall be used to search for an answer. According to the simple logical rule of syllogism, if a victim *cannot* show directly or indirectly that she or he is mentioned in the Internet publication as an individual, he or she *cannot* enjoy jurisdiction under Art. 7(2) of the Brussels I bis Regulation. However, such an interpretation is far from the essence of the said rule, which bases jurisdiction on *locus delicti*. Instead of looking to the place where the damage was carried out or is suffered, the court only relied on the principles of foreseeability and legal certainty. Also, the CJEU dismissed the argument that a subjective criterion could be sufficient in this case, wherein the claimant claimed an infringement of his national dignity and identity.

Thirdly, it seems that the CJEU placed great importance on the economy of civil proceedings. The CJEU seemingly identified the victim as belonging to a vast identifiable group (the Polish people), and it found that the principles of foreseeability and legal certainty cannot be established in such a case since the centres of interests of the members of such a group may potentially be located in any Member

[34] Opinion of Advocate General Bobek in C-800/19, para. 88.

State of the European Union.[35] This creates another riddle. Though a victim can be identified, Art. 7(2) of the Brussels I bis Regulation is still not applicable because of the potential myriad of places of centres of interests of the persons belonging to such group. Such an approach leads to more obscurity in cases where information online violates the personal rights of a group of persons. Does it mean that in such case all persons of such group must have their centres of interests only in one EU Member State? Does it mean that in case an infringer violates personal rights belonging to a group of people who have similar legal interests, Art. 7(2) of the Brussels I bis Regulation is not applicable because the publication mentions only *a group of people*, but not a separate individual? Also, even though the jurisdictional rules in the Brussels I bis Regulation are based on individual litigation, violation of individual rights belonging to a group of people suggests that a collective action can be brought and/or procedural joinder is possible. For instance, according to Art. 43 (1)(2) of the Code of Civil Procedure of the Republic of Lithuania, a claim may be brought by several co-plaintiffs together or against several defendants if the subject of a claim concerns requests or liabilities of the same nature, based on the same matter and the same factual and legal issues, when each separate demand could be the subject of an independent claim (optional joinder). Given that some information spread online could violate the personal rights of a large group of people, individual litigation may not always be the most effective procedure and the joining and/or coordination of actions would seem like a proper solution. However, this would not mean that the said rule on jurisdiction is not applicable. Furthermore, since the CJEU identified the claimant as a member of the group whose interests were allegedly infringed, the question arises: What else needs to be established to find jurisdiction under Art. 7(2) of the Brussels I bis Regulation? Even following the argument that the centre of main interests should be established (which in this case seems to be clearly in Poland), the requirements for jurisdiction set out in *eDate* and *Bolagsupplysningen* are likely to be met. It should also be noted that the claimant did not claim damages for violation of the rights of other members of the group in this case, since he argued namely that *his personal* rights were violated. Thus the scope of the claimant's claims leads to the questions why the CJEU focused on the interests of all members of this group, since only one member of the group argued infringement of his personal rights, and not the infringement of others' rights?

Finally, even following the CJEU's approach regarding the foreseeability and legal certainty of cross-border civil jurisdiction, it seems that these broad but essential criteria can be established in this case. In essence, the principle of foreseeability means that an applicant should be able to easily identify the court in which he may

[35] Joined cases C-509/09, C-161/10 *eDate Advertising GmbH*, para. 43.

sue, and the defendant reasonably foresee before which court it may be sued.[36] In such cases the courts should look for a strong connection between the case and the jurisdiction it belongs to.[37] It seems that great importance should be attached to the content of the publication and the language in which it was published (to mention the elements which could be attributed to the specific individual or a group); whether the publication targets a specific audience; and of course the place where the harm was manifested. It is noteworthy that such criteria were considered by the ECtHR in the case *Arlewin v. Sweden*, in which the court established that these aspects showed very strong connections with Sweden, when the information which infringed personal reputation was transmitted by satellite TV.[38]

The facts presented to the CJEU also indicate that the requirement of foreseeability was also met. To put it in the words of the Advocate General Bobek:

> [I]t is indeed difficult to suggest that it would have been wholly unforeseeable to a publisher in Germany, posting online the phrase 'the Polish extermination camp of Treblinka', that somebody in Poland could take issue with such a statement. It was thus perhaps not inconceivable that 'the place where the damage occurred' as a result of that statement could be located within that territory, especially in view of the fact that that statement was published in a language that is widely understood beyond its national territory.[39]

It seems that the Advocate General was suggesting that since the Internet publication specifically mentioned the location in Poland and the language of the publication is widely known in the state of residence of the claimant, the publisher could have reasonably foreseen that such publication would be read by Polish readers. Consequently, it could also be argued that the published information could infringe the interests of a particular group (Polish people), and thus the harm occurred in Poland. Moreover, one can also argue that mentioning of a specific place and event in history which took place in a particular territory also seems to create a link to the specific territory which could be the *locus delicti*. However, the CJEU did not consider these factual circumstances.

To sum up, the CJEU's *Mittelbayerischer* case paid great attention to the principles of predictability and legal certainty, without an examination of the peculiarities of the specific tort of violation of personal rights. Moreover, although the court managed

[36] C-533/07 *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhors* [2009], ECLI:EU:C:2009:257, para. 22

[37] Council of Europe, *Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states*, DGI (2019)04.

[38] *Arlewin v. Sweden*, para. 72.

[39] Opinion of Advocate General Bobek C-800/19, para. 74.

to identify the possible victim (a member of a group of people), this was deemed not relevant since no specific indication or identification of the claimant was made in the Internet publication. Such an additional requirement for personal identification of the victim in the initial stage of civil proceedings creates legal uncertainty and does not resolve the problem. Also, it seems that the facts of the case may have revealed that the publisher of the Internet publication could have reasonably foreseen the harm in Poland and the violation of personal rights in this Member state.

3. THE SCOPE OF THE JURISDICTIONAL RULE FOR INFRINGEMENTS OF PERSONALITY RIGHTS

The analysis of the *Mittelbayerischer* judgment leads to the conclusion that the CJEU understands 'personality rights' in a narrow sense, having in mind primarily defamation. This led to the incorrect ruling in the case because the Court directly applied the 'centre of interests' connecting factor that was originally developed for the purpose of Internet defamation, requiring unequivocal identification of the plaintiff in the publication at issue. The *Mittelbayerischer* case however involves not defamation, but infringement of other personal rights. The applicable law does not require identification of the victim in the publication. In fact, such a requirement should not exist at all, as Art. 7 (2) of the Brussels I bis Regulation is based on the *locus delicti* (place of infringement) connecting factor, which the court did not consider at all in this particular case.

The legal basis for the plaintiff's claims under the applicable law were Arts. 23 and 24 of the Polish Civil Code, which protect personality rights in a broad sense. Although these provisions do not explicitly mention national identity and national dignity, or the right to respect for the truth about the history of the Polish nation, numerous examples from the case law confirm that these three values are covered by the scope of personal rights protected under Art. 23 of the Polish Civil Code. According to the case law, personality rights include the protection of national identity and national dignity and the right to respect for the truth about the history of the Polish nation. Therefore, Mittelbayerischer's untrue claims about the Nazi death camps allegedly violated the personality rights of those who survived them. These individuals have standing to bring an action under the applicable law. These rights can be violated not only by statements directed against a person individually, but also by statements that affect a larger group of people, including an entire nation.

The CJEU should interpret legal concepts in EU regulations and directives autonomously, but with a view to their uniform application throughout the EU.[40]

[40] D. Chalmers, *European Union Law*, Cambridge University Press, Cambridge: 2014, pp. 179-183.

The interpretation of legal concepts such as personal rights should take into consideration the definitions of concepts and localisation of damage under the applicable national substantive law. A starting point for a definition of personality rights under EU law is chapter 1 of the Charter of Fundamental Rights of the European Union (EU Charter), which protects the dignity and integrity of the person: Arts. 7 and 8 of the EU Charter on respect for private and family life and the protection of personal data; and Art. 8 of the ECHR on respect for private and family life. Inspiration should be drawn from the various laws of the Member States on personality rights, even though the EU definition must be formally independent from the national laws.[41]

It should be mentioned that indeed the rules of jurisdiction should be predictable (Recital 15 of the Brussels I bis Regulation). This is also true in cases of jurisdiction over infringements of personality rights. However, the specific type of tort (infringement of personality rights) allows one to argue that even in a case like *Mittelbayerischer*, which included a number of specific references to a concrete member state (Poland), the wrongdoer (defendant) may reasonably expect that a violation of the personality rights would be alleged in such member state since the plaintiff has place of residence there. Moreover, it is debatable whether the notion of centre of main interest ensures predictability. In such case the wrongdoer may not be able to identify where the plaintiff's centre of interests is located.

With the *Mittelbayerischer* judgment in mind, we propose that the scope of the new jurisdictional provision should include violation of all personality rights (as understood by the national regulations), and not just defamation. Of course this concept should be subject to autonomous interpretation, but it is required that the position of the national laws be taken into account. This also means that it could cover breaches of personal data leading to non-contractual obligations on the part of the data controller or the processor, which may make the separate grounds for jurisdiction in Art. 79 of the GDPR redundant. On the other hand, it is not required to distinguish Internet infringements in the proposed jurisdictional rule.

CONCLUSIONS

The EU rules of special jurisdiction which are currently applied to infringements of personality rights are backward when viewed in light of the rules of private international law for non-contractual obligations. The improvement made in this respect in the Rome II Regulation with regard to the law applicable to non-contractual obligations serves as a model for amendment of the EU jurisdictional rules.[42]

[41] Lundstedt, *supra* note 29, p. 1035.

[42] *Cf.* J. von Hein, *Protecting victims of cross-border torts under Article 7(2) Brussels Ibis: towards a more differentiated and balanced approach*, 16 Yearbook of Private International Law 241 (2015).

The criticism of the Rome II Regulation stems from their conservativeness rather than the change itself.[43] This mainly concerns the exclusion of infringements of personality rights from its scope and the overly rigid regulation of infringements of intellectual property.[44] This can be corrected in parallel with the jurisdictional rules. Even though the conflict of law rules of the individual Member States with respect to infringements of personality rights are now widely divergent, a common denominator is that they often lead to the application of a single law as opposed to an application of the laws where the content was distributed or accessible.[45] Consistency may be seen as an imperative to take into account the options given by the Rome II Regulation when interpreting the Brussels I bis Regulation. The law applicable to a given dispute can also have an influence on the expediency of the proceedings and sound administration of justice in general.[46]

Due to the technological progress that has taken place since 2001 (in fact since 1968, when the Brussel Convention was adopted[47]), the improvement, or even overhaul, of jurisdictional rules is highly needed. The jurisdiction rules indeed require a fundamental change, and in particular separate types of torts should be distinguished and separate grounds of special jurisdiction need to be established.

[43] A. Dickinson, *The Rome II Regulation*, Oxford University Press, Oxford: 2009; R. Plender, M. Wilderspin, *European Private International Law of Obligation*, Sweet & Maxwell, London: 2009; J. Ahern, W. Binehy, *Rome II Regulation on Law Applicable to Non-Contractual Obligations* Martinus Nijhoff, The Hague: 2009; J. Fawcett, M. Carruthets, G.P. North, *Private International Law* (14th ed.), Oxford University Press, Oxford: 2008; G. Calliess (ed.), *Rome Regulations: Commentary on the European Rules of the Conflict of Law* (Part Two), Wolters Kluwer, Cham: 2011, pp. 358-654; P. Huber (ed.), *Rome II Regulation*, Munich 2011; A. Rushworth, A. Scott, *Rome II: Choice of law for non-contractual obligations*, Lloyd's Maritime and Commercial Law Quarterly 274 (2008); S. Leible, M. Lehmann, *Die neue EG-Verordnung über aufervertragliche Schuldverhältnisse anzuwendende Recht (Rom II)*, 53 Recht der Internationalen Wirtschaft (2007); T. Graziano, *Das auf aufservertragliche Schuldverhältnisse anzuwendende Recht nacht Inkraftreten der Rom II – Verordnung*, 73 RabelsZ 1 (2009); T. Dornis, *When in Rome, do as the Romans do? - A defense of the lex domicilii communis in the Rome II Regulation*, 4 European Legal Forum 152 (2007); S. Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 American Journal of Comparative Law 173 (2008); P. Kozyris, *Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' Missed Opportunity*, 56 American Journal of Comparative Law 471 (2008); M. Carruthers, E. Crawford, *Variations on a theme of Rome II. Reflections on proposed choice of law rules for non-contractual obligations: Part I*, 9 Edinbourgh Law Review 65 (2005); *Part II*, 9 Edinburgh Law Review 238 (2005).

[44] The exception in Art. 1(2)(g) of the Rome II for non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, should arguably be given a restrictive interpretation that does not go beyond the reason for the exception, which dealt with conflicts between the freedom of expression and the right to privacy (Lundstedt, *supra* note 29, p. 1035).

[45] European Commission, *Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality*, 2009, JLS/2007/C4/028. Final Report, pp. 79-112.

[46] E. Fronczak, *Cuius legislatio, eius iurisdictio? The emerging synchronisation of European private international law on tort*, 17 ERA Forum 173 (2019).

[47] Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, OJ 1990 C 189, at. 2 (consolidated).

National courts should be offered an unambiguous basis for special jurisdiction that flows directly from the provisions of the Brussels I bis Regulation, and not from the CJEU's misplaced concepts. The solutions proposed by the CJEU are neither creative nor do they serve to make jurisdiction more predictable in cases of Internet infringements. This deepens the state of confusion for the national courts and triggers unpredictability of the outcome of litigation. As rightly pointed out in the doctrine,[48] the Internet is not just an incredibly powerful means of communication – it now represents the pulsing heart for the vast majority of social relationships and commercial transactions, as well as being the main instrument of storage and management of digital content of any kind.[49] It is increasingly affecting the rights of individuals and the activities of businesses worldwide.[50]

The current 'mosaic system' created by the CJEU in an attempt to adapt the *forum commissi delicti* of Art. 7(2) of Brussels I bis to the peculiarities of online infringements deviates from the general purposes of legal certainty and foreseeability, as pursued by the Regulation. Moreover, it collides with the specific objective of Art. 7(2), namely the proximity between the dispute and the forum, as well as the sound administration of justice.[51] The CJEU also did not provide parameters through which the place of the centre of interests of the victim should be determined, creating the need for an overall factual assessment of the concrete circumstances of the case. The CJEU's approach is likely to lead not only to jurisdiction being exercised on unsubstantiated connections, but also to a high incidence of parallel and related proceedings.

The proposed solution is to adopt the unambiguous and stable connecting factor based on the victim's place of habitual residence. This approach responds to the need for rules establishing jurisdiction in favour of one single court which is significantly connected to the situation at stake and which is therefore in the best position to assess the impact of the Internet content on the affected individual's rights.[52] The proposed rule, in establishing a genuine close connection between the

[48] In the context of private international law, see in particular the fundamental monographs of P. De Miguel Asensio (*Conflict of Laws and the Internet*, Edward Elgar, Cheltenham: 2020) and T. Lutzi (*Private International Law Online*, Oxford University Press, Oxford: 2020).

[49] O. Feraci, *Digital Rights and Jurisdiction: The European Approach to Online Defamation and IPRs Infringements*, in: E. Carpanelli, N. Lazzerini (eds.), *Use and Misuse of New Technologies* (eds.), Springer Nature Switzerland, Cham: 2019, p. 277.

[50] C. Nagy, *The Word Is a Dangerous Weapon: Jurisdiction, Applicable Law and Personality Rights in EU Law – Missed and New Opportunities*, 2 Journal of Private International Law 251 (2012); S. Marino, *Nuovi sviluppi in materia di illecito extracontrattuale on line*, 4 Rivista di diritto internazionale privato e processuale 879 (2012).

[51] Feraci, *supra* note 49, p. 301.

[52] A similar approach, with respect to conflict-of-laws, has been adopted by the recent Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (adopted at the 17th session of the Standing Committee of the 11th National People's Congress on 28 October 2010), which entered into

infringement at stake and the territory of a certain state, could identify the court best placed to assess and compensate victims for the entirety of their damages. This approach would satisfy the needs for procedural proximity and efficiency. It ensures that litigation takes place where the gathering of evidence is easiest and where proceedings are most likely to be efficiently managed.

The proposed new jurisdictional rule would preserve predictability for both parties party to the dispute. It would also be consistent with the reasonable expectations of both parties and based on a strong connecting factor. The arguments of potential infringers (in a majority of cases media companies operating on the Internet) to limit the scope of jurisdiction do not merit consideration. The previous solutions are disadvantageous to the victims because they allow infringers (i.e. mostly media companies) to organize their activities in such a way as to subject their potential liability for their actions to the law offering the lowest standard of protection. The connecting factor of the habitual residence of the victim, or in the case of legal entities their registered office, makes the connection simple and clear. It also safeguards predictability for infringers by enabling publishers to foresee the courts before which they could face liability. Additionally, new digital technologies allow for a mitigation of the borderless nature of the Internet by the media companies. In particular, the so-called 'geolocation technologies' nowadays make it possible to ascertain the geographical location of Internet users with a high degree of accuracy.[53]

To conclude, the rules on jurisdiction in the Brussels I bis Regulation applicable to Internet cases should be based on considerations related to the sound administration of justice and the efficacious conduct of proceedings, whereby the applicable substantive law is based on political, economic, and moral considerations concerning the balancing of conflicting interests. The preference towards the *forum actoris* would balance the competing interests of the parties involved, thus creating predictability in Internet disputes.

force on 1 April 2011. The law in fact provides for a technology-specific provision on Internet defamation, stating that: "Where such personal rights as the right of name, portrait, reputation and privacy are infringed upon via network or by other means, the laws at the habitual residence of the infringed shall apply" (Art. 46).

[53] D. Svantesson, *Geo-location Technologies and Other Means of Placing Borders on the "Borderless" Internet*, 23 John Marshall Journal of Computer and Information Law 101 (2008); D. Svantesson, B. Jerker, *Time for the Law to Take Internet Geolocation Technologies Seriously*, 3 Journal of Private International Law 473 (2012).