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PROBLEMS OF JURISDICTION OF ONLINE DEFAMATION CASES IN EUROPEAN UNION LAW

Master thesis

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LIST OF ABBREVIATIONS

Brussels Ibis	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 (recast) OJ L 351
Brussels I Regulation	Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 12
Brussels Convention	1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters OJ L 299
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union C 326/391
Convention	European Convention of Human Rights
ECHR	European Court of Human Rights
CJEU	Court of Justice of the European Union
Rome II	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) OJ L 199
ICCPR	International Covenant on Civil and Political Rights

INTRODUCTION

"The Internet has no borders—its natural habitat is global. "[1]

"Our reputations have become more enduring and yet more ephemeral. "[2]

The relevance of the master thesis. The relevance of scientific examination of the legal characteristics of online defamation and the need for specific recommendations regarding the revision of Article 7(2)[3] of the Brussels Ibis[4] stems from several factors. The Internet has radically changed human life. It has triggered new challenges by breaking physical boundaries. More significantly, the Internet has given way to online defamation cases when harmful information is published online and accessible by anyone around the globe. The defamatory information placed online is borderless and timeless: it quickly becomes accessible to anyone and everywhere. A recent scientific study revealed that false information online spreads "farther and faster than the truth."[5] Thus, the incidence of online defamation has considerably increased.

Litigation in the case of defamation on the Internet claims raises particular problems in cross-border cases. In cross-border online defamation cases, the central question arises as to which state the courts have jurisdiction to hear the dispute. How do we determine the court which has jurisdiction to hear such a dispute? First, there is no uniform concept of defamation in EU law. Second, Brussels Ibis, which is the main act in determining the jurisdiction of cross-border civil and commercial matters, regulates torts, including online defamation, under Article 7(2), which until now remains unchanged and is based on Article 5(3) of the Brussels *(1968)*[6] Convention.[7] The author argues that Article 7(2) of the Brussels Ibis does not correspond to the emerging challenges of online defamation cases. This is supported by the fact that during 2015-2022, Article

[1] "Google Inc. *v* Equustek Solutions Inc., 2017 SCC 34, [2017] 1 S.C.R. 824," Supreme Court of Canada, accessed 1 June 2024, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/16701/index.do.; *see also* Symeon Symeonides, *Private International Law: Idealism, Pragmatism, Eclecticism*, (Leiden, The Netherlands ; Boston: Brill Nijhoff, 2021), 333.

[2] David S Ardia, "Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law," *Harvard Civil Rights-Civil Liberties Law Review* 45 (2012): 262, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689865#. Shay Buckley, "Defamation Online - Defamation, Intermediary Liability and the Threat of Data Protection Law," Hibernian Law Journal 19 (2020): p. 84.

[3] *Ibid.*, Art. 7(2).

[4] "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 (recast)," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215.

[5] Soroush Vosoughi, Deb Roy, and Sinan Aral, "The Spread of True and False News Online," *Science* 359, 6380 (2018): 1, https://doi.org/10.1126/science.aap9559

[6] *Emphasis added.*

[7] "1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. Consolidated version CF 498Y0126(01)," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:41968A0927(01), Art. 5(3).

7(2) of Brussels Ibis was the second-most frequently addressed preliminary reference by the CJEU regarding the interpretation of Brussels Ibis.[8]

Establishing jurisdiction on online defamation cases in EU law has become less certain and predictable for litigants, especially for defendants, since the Internet, disregarding geographical borders,[9] has made it hard to identify the place where the harmful event occurred.

Following Article 7(2) of Brussels Ibis, the claimant, "in matters relating to tort, delict or quasi-delict", may sue the EU-domiciled defendant in the courts of the Member State for the place where the harmful event occurred or may occur.[10] The special rule of jurisdiction does not provide a uniform forum for online defamation cases. As established by the CJEU in the *Shevill* case[11] A harmful event covers both places: where the event gave rise to the damage that occurred and where damage was suffered.[12] Given this, the claimant's choice to file a claim against the defendant in the courts of either of those places incites forum shopping.[13] Furthermore, the CJEU added additional sub-heads of jurisdiction over the years instead of providing a uniform approach. The author of the thesis claims that the latter approach does not align with the main aims of the Brussels Ibis Regulation, which are reflected in Recitals 15[14] and 16[15], namely legal certainty for litigants, predictability and minimisation of the risk of concurrent proceedings.[16]

Since 1968, the wording of Article 7(2) of Brussels Ibis remains the same. Confusion concerning the localisation of the damages in cases regarding the infringement of personality rights has not been resolved but has increased in light of online defamation cases. More importantly and apparently, the interpretation and application of Article 7(2) of Brussels Ibis is left to the CJEU and its criteria formed over 20 years. The CJEU has addressed various complex cases regarding defamation, which have been published in newspapers and online. Accordingly, the CJEU has provided several jurisdictional rules. However, none of the addressed questions and provided criteria by the CJEU gave food for thought to drafters to revise Article 7(2) of Brussels Ibis or even provide a new jurisdictional rule on online defamation.

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[8] Burkhard Hess et al., "The Reform of the Brussels Ibis Regulation," *SSRN Electronic Journal*, 6 (2022): 20, https://doi.org/10.2139/ssrn.4278741; *see also* Martina Mantovani, "EU Private International Law before the ECJ: A Look into Empirical Data, September 19, 2022, EU Private International Law before the ECJ: A Look into Empirical Data – EAPIL.

[9] Symeonides, *supra note*, 1 : 334.

[10] "Brussels Ibis," *supra note*, 3: Art. 7(2).

[11] "Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA., Case C-68/93," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61993CJ0068.

[12] *Ibid.*, ¶¶ 20, 33; *see also* "Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA., Case 21-76," EUR-Lex, accessed 01 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CJ0021 , ¶¶ 24-25.

[13] Peter Mankowski et al., *Brussels I-bis Regulation* (Münich: Sellier European Law Publishers, 2016), 324, ¶ 365.

[14] "Brussels Ibis," *supra note*, 3: Rec. 15.

[15] *Ibid.*, Rec. 16.

[16] Mankowski, *op. cit.*, 596, ¶ 11.

Therefore, the topic bears great significance for legislative purposes and the development of judicial practice in the EU private international law. Nevertheless, it reveals the need to adopt and develop a uniform standard to protect all parties' rights and legal interests effectively.

Scientific research problem. The analysis of relevant available legal sources and legal doctrine shows that the emergence of the Internet was like opening Pandora's box, which triggered challenges and uncertainties regarding how the drafters of Brussels Ibis and the CJEU should react to the effects of the Internet on defamation cases and keep up with significant changes in the determination of a competent court in online defamation cases. The author argues that the main problem in this regard is that, till now, the jurisdictional issues of online defamation remain an unresolved part of EU private international law, which gives rise to uncertainty and affects the main principles of legal proceedings, most importantly, the right to a fair trial. The leitmotiv of scientific research is not only identifying the main reasons and existing problems but also analysing the development of the CJEU and ECHR judgments on online defamation cases and providing recommendations and solutions.

Thus, the scientific research problems which the thesis aims to address are formulated as follows:

1. The lack of a uniform concept of defamation in EU law and the implications of online defamation on the determination of a competent court in online defamation cases;

2. The compliance of the developed criteria on the interpretation and determination of the competent court in online defamation cases by the CJEU, with the main objectives of Brussels Ibis;

3. The effects of ambiguity and misinterpretation of Article 7(2) of Brussels Ibis on the principle of equality of arms and sound administration of justice

The level of the analysis of the research problem. The scope of the thesis is jurisdictional problems of online defamation cases in the EU law, which includes examining and analysing peculiarities of online defamation and reasoning that online defamation needs a special rule to be established in the Brussels Ibis. The research focuses on the primary and secondary resources of EU law. It also analyses the relevant case law of the CJEU and ECHR case law, as well as legal doctrine. The analysis of online defamation is based on the commentaries of Brussels Ibis.[17] Furthermore, numerous academic papers and publications written by Oster Jan[18],

[17] *Ibid.*

[18] Jan Oster, "Rethinking Shevill. Conceptualising the EU Private International Law of Internet Torts against Personality Rights," *International Review of Law, Computers & Technology* 26*,* 2-3 (2012): 113-128.

Sakolciová Sandra[19], Kohl Uta[20], Lutzi Tobias[21], and Kuipers Jan-Jaap[22] will be examined during the scientific study. Although the listed authors explored the research problem, there is still a lack of deep scientific and legal analysis conducted to investigate the reasons, assessing the established criteria by the CJEU and the consequences of jurisdictional challenges of online defamation cases.

The scientific novelty of the master thesis. The vagueness of Article 7(2) of Brussels Ibis has led to discussions and differences of opinion in judicial and academic spheres. The CJEU case law regarding determining the jurisdiction in online defamation cases is inconsistent. Even though many researchers have previously assessed the established criteria by the CJEU, there is still a lack of a common approach to identifying the proper criteria for the jurisdiction of online defamation cases. The scientific novelty of the research is in its intention to evaluate interpretations by the CJEU and scholars and find a uniform rule for establishing jurisdiction of online defamation. The thesis does not only require and focus on pointing out the reasons why online defamation is a problematic aspect for the determination of the competent court in the EU under Article 7(2) of Brussels Ibis but also scrutinises main interpretative case law and assesses them in light of main objectives of Brussels Ibis and right to access to a court. In other words, the thesis examines each criterion provided by the CJEU during these years, demonstrating the main advantages and disadvantages and comparing them. Furthermore, the research intends to offer significant conclusions for better comprehension and interpretation of online defamation in EU law and make output in enhancing Brussels Ibis. Therefore, the study analyses the available case law and literature and finds the main points decision-makers, courts, and lawyers can share regarding addressing online defamation cases.

The master thesis aims to determine whether the rule on jurisdiction in Article 7(2) of the Brussels Ibis Regulation is compatible with the principle of legal foreseeability and the right to a fair trial (the right to effective access to a court) and propose the solutions for the practical defence of infringed personality rights on the Internet.

The objectives of the master thesis. To achieve the aim of the current scientific research, the following tasks are set out to be accomplished:

1. to analyse the nature of defamation claims and the challenges of the application of Article 7(2) of Brussels Ibis and determine the peculiarities of online defamation;

[19] Sandra Sakolciová, "Defamation on Social Media: Challenges of Private International Law," *Bratislava Law Review* 5, 1 (2021): 121-134.
[20] Uta Kohl, "Jurisdiction in Cyberspace," in *Research Handbook on International Law and Cyberspace*, Nicholas Tsagourias, Russell Buchan (Cheltenham: Edward Elgar Publishing, 2017): 30-54.
[21] Tobias Lutzi, "Internet Cases in EU Private International Law - Developing a Coherent Approach," *International and Comparative Law Quarterly* 66, 3 (2017): 687-721.
[22] Jaap Kuipers, "Towards a European Approach in the Cross-Border Infringement of Personality Rights," *German Law Journal* 12, 8 (2011): 1681–1706.

2. to identify the problems of the application of Article 7(2) of Brussels Ibis to determine jurisdiction in case of online defamation and foreseeability of jurisdiction;

3. to find out whether the existing rules on the jurisdiction of online defamation claims are compatible with the right to a fair trial (access to a court) and provide possible solutions to ensure the right to a fair trial in such cases.

The practical significance of the master thesis. The research will be of assistance to EU scholars and academicians interested in analysing online defamation cases and carrying out scientific research studies in this area. The study will be helpful for practitioners who prepare documents for litigation and represent their clients concerning online defamation cases and generally in civil law cases due to the importance of avoiding possible misinterpretation of Article 7(2) of the Brussels Ibis.

The Master thesis will also be relevant for students studying civil law to gain a better understanding of Article 7(2) of the Brussels Ibis and CJEU judgements on the latter provision, which will help them utilise their knowledge for scientific and practical purposes.

Most importantly, the current study aims to gain significant value for legislators and judges. In particular, the thesis intends to initiate a possible amendment to the Brussels Ibis, which will constitute an addition to one special jurisdictional rule on online defamation. The research will contribute to judges giving a clear interpretation of Article 7(2) of the Brussels Ibis, determining the nature and decisive elements of online defamation, and developing court practice most effectively.

Last but not least, the current work will be undoubtfully practical for both parties should be aware of the forum where a claim may be filed: claimants to effectively protect their personality rights and for defendants to duly defend himself/herself before the courts.

Methods used in the master thesis. The research study will include different scientific methods:

1. One of the essential methods to effectively achieve the aim of the research is the method of resource collection and analysis, which will be used to search and analyse the relevant resources and underline the importance and actuality of the research topic. Since cross-border civil and commercial matters, mainly online defamation cases, are governed by Brussels Ibis, the research will focus on the latter EU regulation, which will be interpreted with the help of case law study and legal doctrine.

2. The comparative method will be applied to identify, compare and assess the decisive factors established by CJEU case law to determine “the place where the harmful event occurred” and their compatibility with the objectives of Brussels Ibis.

3. Teleological, systematic, and logical methods will be helpful to consider the legal system's hierarchy and the legislator's purpose during the analysis of specific provisions and ensure the compliance of the thesis with them, as well as formulate scientific research conclusions reasonably and logically.

The structure of the master thesis. The research involves the following stages:

The first part of the thesis will include an overview of the legal characteristics and specificities of online defamation and the application of Article 7(2) under the Brussels Ibis. The second part of the study will examine the established criteria of the CJEU, from newspaper to online defamation cases and their compliance with the main objectives of Brussels Ibis. The third part will be devoted to examining and evaluating the CJEU and ECHR case law on issues of separated jurisdiction for the compensation, rectification, and removal of allegedly harmful online publications and its impact on the right to access a court.

Defended statement. The application of Article 7(2) of Brussels Ibis is incompatible with the right to access to a court since it does not provide the legal foreseeability in which court the dispute should be heard.

CHAPTER 1. WITHIN THE LABYRINTH OF DEFAMATION: EU LAW AVENUES

To start with, the respective chapter concerns the notion of defamation and its modern form – online defamation. The author identifies the nature and characteristics of online defamation. The chapter's main focus is to assess the application of the special jurisdictional rule established under Article 7(2) of Brussels Ibis in cases of torts resulting from online defamation.[23] This chapter aims to showcase the complexity and difficulty of applying and interpreting Article 7(2) of Brussels Ibis in order to determine the competent court where a claim on online defamation should be seized.

1.1. Notion of Defamation in EU law

Before going to the legal analysis of defamation in EU law, it is important to look at the linguistic interpretation of defamation itself. For instance, the Cambridge Dictionary considers defamation as "the action of damaging the reputation of a person or group by saying or writing bad things about them that are not true." [24] While the Oxford Dictionary is more precise in defining the same: "the action of impugning a person's good name or reputation; the action or fact of denigrating or disparaging someone."[25] The latter opts for more narrow definition, however the former is easier to comprehend, but more general and abstract. Overall, using different ways, both definitions lead a person to the same idea that defamation generally stands for – unlawful attack on a person's honour, dignity and reputation.

Further, considering the history of the defamation law, one can agree that it has undergone significant changes over time.[26] The concept of defamation emerged in the ancient times. The civil law interpretation of defamation comes from the Roman *acto injuriarum*, which regarded defamation as deliberate and unjustified infliction of emotional harm rather than damage to public reputation.[27] While, today, defamation has a reversed meaning: defamation should be a publicly

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[23] "Mittelbayerischer Verlag KG v SM, Case C-800/19," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0800, ¶ 28; *see also* "Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB, Case C-194/16," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CJ0194, ¶ 28.

[24] "Defamation," Cambridge Dictionary, accessed 1 June 2024, https://dictionary.cambridge.org/us/dictionary/english/defamation.

[25] "Defamation," Oxford English Dictionary, accessed 1 June 2024, https://www.oed.com/search/dictionary/?scope=Entries&q=defamation&tl=true.

[26] Bonnie Docherty, "Defamation Law: Positive Jurisprudence," *Harvard Human Rights Journal* 13 (2000): 265.

[27] *Ibid.*

made statement causing reputational damage to a third party.[28] Defamation has two forms: written (libel) and oral (slander).[29]

To better understand and analyse the research problem, it is essential to examine defamation not as a solely standing concept but systematically scrutinise it. To be more precise, first and foremost, one should understand, especially those who are and will become victims of defamation, where the place of defamation is in the international, especially in the EU legal system. Does EU law recognise, guarantee and ensure that victims of defamation have any rights and mechanisms? Suppose a victim who suffered damages from defamation would like to bring a claim against a tortfeasor. In that case, he/she must know which right is violated and the concurrent right the tortfeasor exceeded. In defamation cases, the right concerned is a right to a reputation and the right that the victim challenges is freedom of expression.

Few international human rights instruments aim to safeguard a person's reputation. This underlines the legal importance of recognising and providing individuals with certain rights to defend themselves against defamation at the international level. For instance, given Article 12 of the Universal Declaration of Human Rights[30] and Article 17 of the ICCPR[31], defamation refers to the act of making an unlawful attack on a person's honour and reputation. The latter provisions declare the need to protect individuals from such unlawful attacks. Article 19 of the ICCPR safeguards the rights and reputation of others, which is considered as a legitimate ground for limiting freedom of expression.[32]

At the EU law level, there are two main human rights instruments: the Convention[33] and the EU Charter.[34]. It is worth noting that the meaning and scope of the rights in the EU Charter are based on the Convention and the interpretation given by ECHR and the CJEU on the Convention provisions[35] Thus, the provisions of the EU Charter and the Convention align with each other.[36]

Before determining the competent court where to bring an action, the alleged victim must understand whether the behaviour which has caused harm to his/her personality rights is

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[28]"The Complete Guide to Online Defamation Law," Minc Law, accessed 1 June 2024, https://www.minclaw.com/online-defamation-law-guide/.
[29] Docherty, *op. cit*., 264.
[30] "Universal Declaration of Human Rights," United Nations, accessed 1 June 2024, https://www.un.org/en/about-us/universal-declaration-of-human-rights, Art. 12; *see also* Richard Carver, *Freedom of Expression, Media Law and Defamation* (Vienna: International Press Institute, 2015), 23.
[31] "International Covenant on Civil and Political Rights," United Nations, accessed 1 June 2024, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights, Art. 17.
[32] Carver, *op. cit*., 23.
[33] "European Convention on Human Rights," Council of Europe, accessed 1 June 2024, https://www.echr.coe.int/documents/d/echr/Convention_ENG.
[34] "Charter of Fundamental Rights of the European Union," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012P%2FTXT.
[35] *Ibid.,* Art. 52 (3).
[36] Manon Julicher, "Protection of the EU Charter for Private Legal Entities and Public Authorities? The Personal Scope of Fundamental Rights within Europe Compared," *Utrecht Law Review* 15, 1 (2019): 2.

considered to fall under the concept of defamation and whether he/she is protected under the EU law against such behaviour; whether the behaviour is unlawful and restricts his/her personality rights; whether the EU law provides him/her any legal defence mechanisms and remedies. This is especially important when the litigation is cross-border; the alleged victim cannot refer to one specific law of the Member State and should determine international jurisdiction for bringing the claim for suffered damages.

The main guidelines for the victims in cross-border litigation in order to give qualification for the two interests at stake are the EU Charter and the Convention. The latter acts should give a general framework for whether a person is generally protected against defamation under the EU law: what behaviour(s) may be understood as defamation, how defamation is interpreted by the courts, in this case, by the ECHR, to determine what is the legal understanding, scope and limits of defamation on human rights level. The alleged victim who considers that his/her personality rights have been/are infringed should know where the borderline is between protecting the latter and restricting another human right. Analysing what is protected against which right, the alleged victim also should know what legal remedies are available to protect his/her rights and prevent future damages. The uniform and consistent approach to interpretation of the legal framework of defamation is also worth considering for individuals, such as journalists, who enjoy a wider margin of appreciation of freedom of expression.

Looking at the Convention, it is uncertain how the latter EU law document protects individuals from defamation. It is still debatable whether Article 8[37] (right to private and family life) of the Convention encompasses a right to a reputation[38] since ECHR does not have a consistent approach in this regard. Firstly, in *Pfeifer v. Austria*[39], the ECHR considered the right to a reputation to fall under the scope of Article 8 of the Convention. Two years later, in *A v Norway*[40] and *Karako v. Hungary*[41], the ECHR changed its view, stating that defamation must seriously interfere in order to "undermine personal integrity."[42] In the judgement *Sipos v. Romania*[43], the court interpreted honour and reputation under the scope of the right to private life.[44]

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[37] "European Convention on Human Rights," *supra note* 33.
[38] "White v. Sweden, Application no. 42435/02," ECHR, accessed 1 June 2024, https://hudoc.echr.coe.int/eng?i=001-76894 , ¶ 26; *see also* "Pfeifer v. Austria, Application no. 12556/03," ECHR, accessed 1 June 2024, https://hudoc.echr.coe.int/eng?i=001-83294 , ¶ 35; *see also* "A v. Norway, Application No. 28070/06," ECHR, accessed 1 June 2024, https://hudoc.echr.coe.int/eng?i=001-92137, ¶ 64.
[39] "Pfeifer v. Austria," *op. cit*., ¶ 35; *see also* Oster, *supra note* 18: 114.
[40] "A v. Norway," *op. cit*., ¶¶ 64, 66.
[41]"Karako v. Hungary, Application No. 39311/05," ECHR, accessed 1 June 2024, https://hudoc.echr.coe.int/eng?i=001-92500.
[42] "Karako v. Hungary," *op. cit*., ¶¶ 23, 28; *see also* Oster, *supra note* 18: 114.
[43] "Sipos v. Romania, Application No. 26125/04," ECHR, accessed 1 June 2024, https://hudoc.echr.coe.int/eng?i=001-104665, ¶¶ 30, 34, 38.
[44] Carver, *supra note,* 30: 17; *see also* "Sipos v. Romania," *op. cit.*

Considering the mentioned cases, it may be argued that the ECHR in *Pfeifer v. Austria* broadly interpreted the right to a reputation. However, in later judgements, the ECHR restricted the limits of the latter right and set a higher threshold for the right to be affected by defamation. Hence, the ECHR should maintain a balance when interpreting the scope of the rights concerned since if the right of reputation is interpreted too broadly, it can cause abuse of rights from the claimants' side. On the other hand, raising the threshold may result in depriving the victims of access to a court and a judicial remedy. This is strongly linked with jurisdictional matters of defamation cases. The higher the level of interference to infringe personality rights, the fewer claims are to be rendered admissible, which increases the chances that the claimants are not protected, compensated and prevented from defamation and its consequences.

Thus, the ECHR, as a main interpretative body for both EU human right documents, should maintain a uniform and consistent approach that not to impair the right to a fair trial so that it does not turn litigation into Franz Kafka's Trial.

Why has ECHR not developed a uniform practice with respect to defamation? Should defamation be regarded as being within the scope of private life? The author of the thesis argues that the reason lies in the lack of a common definition in the EU law, meaning that it is up to each Member State to define and decide what kind of actions constitute defamation and determine to what extent defamation should limit freedom of expression.[45]

In view of this, the qualification and limits of defamation vary in different jurisdictions of Member States.[46] The variations come from diverse cultural and political identities.[47] Some legal systems grant a wider margin of appreciation to freedom of expression; some legal systems criminalise defamation, including invoking criminal punishments on media representatives.[48] On the other hand, in Member States like Germany, Spain, Italy, and Belgium, defamation is still a criminal offence punishable by imprisonment.[49] Furthermore, the majority of Member States do not wish that defamation cases, either alleged actions or reputation, of their citizens or public officials to be adjudicated by foreign courts under foreign laws.[50]

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[45] "Treaty on the Functioning of the European Union," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/EN/legal-content/summary/treaty-on-the-functioning-of-the-european-union.html , Art. 67.
[46] Docherty, *supra note*, 26: 267.
[47] Sakolciová, *supra note,* 19: 131.
[48] Scott Griffen et.al., *Out of Balance - Defamation Law in the European Union* (Vienna: International Press Institute, 2015), 6-7, 11.
[49] Griffen, *supra note,* 48: 6.
[50] Dan Jerker B. Svantesson and Symeon C. Symeonides, "Cross-border internet defamation conflicts and what to do about them: Two proposals," *Journal of Private International Law* 19, 2 (2023): 139; *see also* Sakolciová, supra note, 19: 131.

In EU civil procedure law, Brussels Ibis is the main, directly applicable legal instrument[51] in EU Member States (except Denmark) to establish the courts of Member States where cross-border civil and commercial cases (including online defamation) should be heard.[52] The Brussels Ibis facilitates the free movement of judgement[53], access to justice[54] (access to the rules)[55] and "unification of the rules of conflict of jurisdiction in civil and commercial matters".[56]

Brussels Ibis is the third generation of the Brussels regime. Initially, the Brussels I regime was established by the Brussels Convention with the continuation of the Brussels I Regulation[57] resulting finally in the formation of Brussel Ibis.[58] The basis of the Brussels I regime was Article 220 of TFEU and the mutual objective to adopt the common and harmonised jurisdictional rules that would ensure legal certainty.[59] Despite important changes made, Brussels Ibis ensures the continuity of the Brussels Convention and the Brussels I Regulation, as well as the interpretation of these regulations by the CJEU.[60] For this purpose, Brussels Ibis inherited from its predecessors the foundations, such as legal certainty and proper administration of justice. "It is sometimes said that the Brussels I regime deters (or should seek to deter) forum shopping."[61] More importantly, not only does Brussels Ibis remain its cornerstone, but it also remained unchanged and almost identical to the provision regarding matters relating to tort, in particular, the interest of this thesis – online defamation.[62] The main question arising from the latter conclusion is: has not world and, therefore, legal understanding moved onward since/after 1968?

The scope of Brussels Ibis is limited to civil and commercial matters. Article 1(2) of Brussels Ibis limits its application even more by providing an exhaustive list of certain legal relationships and matters, such as insolvency or arbitration proceedings and divorce.[63]

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[51] "Treaty on the Functioning of the European Union," supra note, 45: Art. 288; see also "Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (5 March 1979)," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1979:059:FULL, 7.
[52] "Brussels Ibis," *supra note*, 3: Rec. 3, Rec. 8.
[53] *Ibid.*: Rec. 1, Rec. 6.
[54] *Ibid.*: Rec.1, Rec. 3; *see also* "Treaty on the Functioning of the European Union," *supra note*, 45: Art. 67, Art. 81.
[55] "Brussels Ibis," *supra note*, 3: Art. 6.
[56] Ibid.: Rec. 4; see also "Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc, Case C-185/07," EUR-Lex, accessed 1 June 2024, EUR-Lex - 62007CJ0185 - EN - EUR-Lex (europa.eu), ¶ 24.
[57] "Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, " EUR-Lex, accessed 1 June 2024, Regulation - 44/2001 - EN - Brussels I Regulation - EUR-Lex (europa.eu).
[58] Andrew Dickinson and Eva Lein, *The Brussels I Regulation Recast* (Oxford University Press, 2015), 1.
[59] "Brussels Ibis," supra note, 3: Rec. 7; see also "Report by Mr P. Jenard on the Convention of 27 September 1968," op. cit., 3.
[60] *Ibid.*: Rec. 34.
[61] Dickinson, *op. cit.,* 2.
[62] The only change which has been made since the Brussels Convention in regard to the provision regulating defamation is 1. Adding three words: "..or may occur." The remaining part was left unchanged. 2. Numeration of provision – in the Brussels Convention, defamation was covered by Article 5(3), while the Brussels Ibis regulates it by Article 7(2).
[63] "Brussels Ibis," *supra note*, 3: Art. 1(2).

Furthermore, Brussels Ibis is, "in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the claimant is domiciled in a non-member country."[64] Therefore, Brussels Ibis is applicable between Member States.

Provisions of Brussels Ibis should be interpreted autonomously and independently.[65] Autonomous interpretation of the provisions is closely connected to achieving the uniform application and interpretation of rules. Also, autonomous interpretation makes litigation more transparent and predictable. This is expressed not only in Recital 15 and evidenced in Article 63 of Brussels Ibis, where the latter establishes an autonomous definition of domicile but also in the CJEU judgements, especially when defining tort and harmful event and the place where the harmful event occurred.[66]

Brussels Ibis does not address online and offline defamation cases specifically and does not differentiate them. It mentions defamation only once in Recital 16, which refers to defamation as a personality right causing a violation of non-contractual obligation. However, the position of EU policymakers on whether disputes related to defamation claims should fall under the scope of EU law is unclear since Article 1(2)(g) of Rome II [67] which establishes the rules of applicable law (conflict of law rules) in civil matters excludes defamation, as a non-contractual obligation which creates problems with determination of applicable law in online defamation cases.[68] Recital 6 of Rome II requires that the substantive scope and the provisions of this regulation should be consistent with Brussels I (Brussels Ibis) and the instruments dealing with the law applicable to non-contractual obligations. Thus, though the defamation claims fall under the Brussels Ibis, they fall outside the scope of Rome II. This creates problems in applying these two legal instruments in a coherent manner.

Therefore, in this regard, the author of thesis contends that Brussels Ibis is in need to establish autonomous definition of defamation.

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[64] "Group Josi Reinsurance Company SA and Universal General Insurance Company (UGIC), Case C-412/98," EUR-Lex, accessed 1 June 2024, EUR-Lex - 61998CJ0412 - EN - EUR-Lex (europa.eu), ¶ 35.

[65] "Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA, Case C-189/08," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX%3A62008CJ0189, ¶ 17; "eDate Advertising GmbH and Others v X and Société MGN LIMITED, Joined Cases C-509/09 and C-161/10," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62009CJ0509, ¶ 38.

[66] "Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA," *op. cit*., ¶ 17; *see also* Lorna Gillies, "Jurisdiction for cross border breach of personality and defamation: eDate Advertising and Martinez," *International and Comparative Law Quarterly* 61, 4 (2012): 1008.

[67] "Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32007R0864.

[68] Sakolciová, *supra note,* 19: 131.

1.2. The Legal Characteristics and Effects of Article 4(1) and Article 7(2) of Brussels Ibis

Brussels Ibis provides the general and special rules of jurisdiction in cross-border civil and commercial matters. For the interest of the scope of the thesis, the author focuses on Article 4 and Article 7(2) of Brussels Ibis. Article 4(1) is a general rule of jurisdiction based on the defendant's domicile[69] irrespective of its nationality. Article 4(1) of the Brussels Ibis is not circumscribed by the nature of the claim. Determining the place of court on the basis of the defendant's domicile allows the defendant to have access, defend and litigate in the court of his/her domicile.

Article 7(2) of the Brussels Ibis is a special rule and it is only applicable when there is a close connection between the court and the action, in particular, when there is a dispute on the basis of tort. Following this, the claimant has the right to choose between Article 4(1) and Article 7(2) of the Brussels Ibis.[70] On one hand, one can argue that Article 7(2) of Brussels Ibis legally permits forum shopping. On the other hand, the given choice to the claimant can be explained by ensuring and maintaining the balance between the rights of the defendant and the claimant due the fact that Article 4 (1) of the Brussels Ibis gives strong protection to the defendant.

The problem which the author of the thesis identifies and raises is not the balance of protected interests enshrined in Article 4(1) and Article 7(2) of the Brussels Ibis, but the ambiguity of Article 7(2) of the Brussels Ibis itself which gives claimant flexibility to choose the court based on incurred damages given the fact that damages were suffered in more than one Member State. The given choice to the claimant is balanced by giving the defendant the possibility to defend himself/herself in the court of his domicile. However, how the balance is maintained in cases of online defamation even if application of Article 4(1) of Brussels Ibis is excluded provided by the fact that the CJEU has given the claimant the possibility to choose the court according to the place of suffered damages. Hence, not only claimant has right to choose between Article 4(1) and 7(2) of Brussels Ibis, but he/she has been given a choice between the place of the event giving rise to damage or the place where the damage occurred.

It should be kept in mind that Article 7 (2) of Brussels Ibis is the successor to Article 5(3) of the Brussels Convention and Article 5 (3) of Brussels I Regulation and, therefore, interpretation of the former provisions, Article 5(3) of Brussels Convention and Brussels I Regulation by the CJEU is applicable to Article 7(2) of Brussels Ibis. Article 7(2) provides the *lex loci delicti* rule, which should be read and interpreted in light of Recital 16 of Brussels Ibis. Under Recital 16 of

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[69] "Brussels Ibis," *supra note*, 3: Art. 4(1).
[70] "Wikingerhof GmbH & Co. KG v Booking.com BV, Case C-59/19," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0059 , ¶ 29; *see also* Dickinson, *supra note*, 61: 132.

Brussels Ibis, an alternative ground of jurisdiction derives from a close connection between the court and the alleged action. The CJEU in *Wikingerhof*[71] and *Zuid-Chemie*[72] cases confirmed that special jurisdictional rule is based on the existence of a particularly close link between the dispute and the court responsible for hearing and determining the case.[73] Recital 16 of Brussels Ibis explicitly underlines the significance of close connection and its impact on legal certainty and foreseeability in cases related to infringement of personality rights, including defamation. Given Recital 16 of Brussels Ibis and the interpretation of Article 7(2) of Brussels Ibis by CJEU case law and legal doctrine, online defamation is covered by a tort.[74] Article 7(2) of Brussels Ibis should be interpreted restrictively. According to the latter provision, "in matters relating to tort, delict, or quasi-delict," the claimant may sue the defendant in "the courts for the place where the harmful event occurred or may occur."[75] The latter provision refers to the courts of the place and not of the Member State. Hence, Article 7(2) of Brussels Ibis not only determines international jurisdiction but also territorial jurisdiction.

The author of the thesis does not challenge the qualification of online defamation. The author argues that the issue lies in Article 7(2) of Brussels Ibis itself creating uncertainty regarding the determination of the place of damage.[76]

1.3. The Concept of Online Defamation

Apart from the divergent approach of Member States of the EU towards defamation, another important reason why the determination of the jurisdiction in defamation cases, in particular, localization of the suffered damages, is problematic because it became part of the Internet.[77]

Through the time and development of technology, defamation changed dramatically. Defamation, besides traditional source of information, like newspapers, appeared in the Internet platforms. The Internet has transcended territorial and physical borders. It made communication easier and information more spreadable and accessible around the world. "An internet user can simultaneously be present everywhere in the world."[78] In view of this, substitution of traditional

[71] "Wikingerhof GmbH & Co. KG v Booking.com BV," *op.cit.,* ¶ 28.
[72] "Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA," *supra note*, 68: ¶ 24.
[73] Dickinson, *supra note*, 61: 132-133.
[74] Mankowski, *supra note*, 13: 273, ¶ 248.
[75] "Brussels Ibis," *supra note*, 10: Art. 7(2).
[76] *See* Gillies, *supra note*, 68: 1010.
[77] Sakolciová, *supra note,* 19: 121.
[78] "[t]he Internet has the ability to exert an effect in many places at once," *cited in* Muhammad Usman, "Does Cyberspace Outdate Jurisdictional Defamation Laws?" (doctoral dissertation, University of Bradford, 2019), 266-268, http://hdl.handle.net/10454/17461.

means of information by digital platforms has increased the scale and coverage of defamation which as a result turned into more overarching concept,[79] "Online Defamation" - defamation that occurs online.[80] Thus, it became more complicated to identify where the damages were suffered and, therefore, the competent court for adjudicating online defamation cases.

We are living in a time of information. The Internet has become a place where all kinds of information are gathered and therefore, it is main source of knowledge and information. It superseded newspapers, radio and even television. People on the Internet are not only readers and recipients of information. They are also the creators of information. Nowadays more and more people use the Internet as a tool for mass propaganda and competition, aiming to form people's opinion, compete with others by spreading false information. Due to this, especially, in recent years, the number of online defamations has increased.

The amount of time people spend surfing the Internet has vividly increased over the past few years.[81] In 2022, 84% of people in the EU used the Internet every day.[82] This survey highlights how the Internet has become an integral part of people's daily lives, with many individuals devoting a considerable amount of their time to engaging with Internet platforms.

Furthermore, apart from speed and accessibility of information on the Internet, online websites give users possibility to create their own blogs where they can express themselves by writing posts without any prior examination and checking, any censorship and supervision. Some people take advantage of given freedom and publish false statements about third parties. For instance, popular and one of the frequently-used internet platforms, including Facebook[83], Instagram, Reddit, TikTok and other social interaction platforms give the same possibility to people by writing a post, commenting or posting a video which has more chance to go viral. Thus, the information is spreadable in a blink of an eye and endures time meaning that it can be accessible constantly.[84]

Last but not least, one of the specificities of online defamation is that it might derive from anonymous or pseudonymized internet users.[85] *Delfi AS v. Estonia*[86] demonstrated that anonymous

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[79] Jerca Kramberger Škerl, "Jurisdiction in On-Line Defamation and Violations of Privacy: In Search of a Right Balance," *LeXonomica* 9, 2 (2017): 95.
[80] "The Complete Guide to Online Defamation Law," *supra note,* 28.
[81] Sakolciová, *supra note,* 19: 122.
[82] "Share of daily internet users in the European Union (EU-27) from 2013 to 2022," Statista, accessed 1 June 2024, https://www.statista.com/statistics/1238307/eu-european-union-internet-users-use-accessed-internet-daily/.
[83] Sakolciová, *supra note,* 19: 121-122.
[84] "Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online[…]" *cited in* "Delfi AS v. Estonia, Application no. 64569/09," ECHR, accessed 1 June 2024, https://hudoc.echr.coe.int/eng?i=001-155105; *see also* Buckley, *supra note,* 2:83; *see also* "Opinion of Advocate General Cruz Villalón Delivered on 29 March 2011 in Case C-616/10," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CC0616, ¶ 43.
[85] Buckley, *op. cit*., 84.
[86] "Delfi AS v. Estonia," *op. cit.*;

comments are more offensive and summon more attention than those made by registered users. Also, identifying the source to find out the alleged tortfeasor is related to technical difficulties.[87] Thus, in such cases, it is more challenging to identify the defendant and the competent court where the claim should be filed.

In conclusion and in view of the abovementioned circumstances, first, the absence of a common notion of defamation and discrepancies, and second, the specificities of online defamation triggers three main issues:

1. forum shopping, when the claimant has possibility to choose the most profitable jurisdiction to file a claim[88];

2. risks of irreconcilable judgements; and

3. lack of foreseeability and inconsistent formation of judicial practice.

[87] Sakolciová, *supra note,* 19: 121-122.

[88] "Report by Emeric Prévost, "Study on Forms of Liability and Jurisdictional Issues in the Application of Civil and Administrative Defamation Laws in Council of Europe Member States, " Council of Europe, accessed 1 June 2024, https://rm.coe.int/study-on-forms-of-liability-and-jurisdictional-issues-in-the-applicati/168096bda9.

CHAPTER 2. FROM NEWSPAPER TO ONLINE WORLD: EVOLUTION OF CASE LAW IN DEFAMATION CASES

Article 7(2) of the Brussels Ibis does not explicitly specify the location where the harmful event took place.[89] Over the years, the CJEU has established a prolonged line of decisions relating to the interpretation of a particular place in the context of assessing damages. The CJEU's interpretation dates back to 1976 and has been confirmed repeatedly since then. According to the CJEU, a place can be comprehended in two ways: firstly, it can be considered as the place where the harmful event that gave rise to the damage occurred; secondly, it can also be perceived as the place where the actual damage took place.[90]

While jurisdictional rules in Brussels Ibis are based on domicile[91], online defamation is spread in whole EU, over the globe. Online defamation concerns not only material, financial losses but also non-material, such as damage to honour, reputation, and dignity. The chance that a person will suffer damages in more than one Member State is higher in online defamation cases due to its ubiquitous nature. The person can suffer from reputational damage in one Member State leading to financial damage in another Member State(s) simultaneously. Consequently, the place where online defamation occurred is hard to identify. The respective chapter will focus on assessment of criteria regarding localization of the suffered damages. Since Article 7(2) is ambiguous and silent on this aspect, the analysis will be mainly based on the CJEU case law and its development. The author of the thesis opens the discussion with *Shevill*'s judgement and continues with examination of the CJEU case law on online defamation in light of the principle of foreseeability.

2.1. Exploring Foreseeability and Forum Shopping

To apply teleological and systemic means of interpretation, which the CJEU[92] has invoked when interpreting provisions of Brussels Ibis, the discussion of the topic should begin with considering its core and foundations of Brussels Ibis. This will help the author of the thesis to identify the main problems of applying jurisdictional rules in online defamation cases. Hence,

[89] Mankowski, *supra note*, 13: 276.
[90] *Ibid*.
[91] "Brussels Ibis," *supra note*, 3: Arts. 62-63.
[92] "Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others, Case 189/87," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61987CJ0189, ¶ 16; *see also* "Fonderie Officine Meccaniche Tacconi SpA v Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS), Case C-334/00," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62000CJ0334, ¶ 19; *see also* "ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV., Case C-147/12," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0147, ¶ 29-30.

when applying provisions of Brussels Ibis, one should comply with its scheme and objectives which are reflected in its Recitals.[93]

One of the objectives of Brussels Ibis is to ensure legal certainty. In other words, rules of jurisdiction in Brussels Ibis should be foreseeable for both parties: the claimant should easily determine in which court of Member State to file a claim, and the defendant should reasonably predict in which court he/she may be sued.[94] For this purposes, Brussels Ibis mainly basis the principle of jurisdiction on defendant's domicile. The CJEU has taken a significant role in fostering legal certainty as one of the main pillars of Brussels Ibis. The author of the thesis argues that Article 7(2) of Brussels Ibis lacks foreseeability in respect of defamation, especially, in online defamation cases and will prove relevant argumentations in the respective chapter.

Parallel proceedings in a different court on the same matter may lead to different judgements giving rise to irreconcilable judgements which goes against of mutual trust and cooperation between Member States. For the purposes of facilitating free and easy movement of judgements in the common market, the objective of Brussels Ibis is to avoid concurrent proceedings to the greatest extent. This also is in favour of legal predictability and efficient and sound administration of justice. The very objective is especially essential and worth considering while interpreting and applying Article 7(2) of Brussels Ibis in online defamation cases.

The starting point of the discussion regarding the place where the harmful event occurred in defamation and even online defamation cases is the *Shevill* case[95], even though the latter case concerns the libel in a newspaper article and not in online space. This is because the *Shevill*'s judgement is one of landmark cases from CJEU judgements where the defamation originated in the physical, tangible world. Assessing *Shevill*'s case helps the author to demonstrate the difference between the nature and legal consequences of defamation and online defamation, therefore, the need that these differences require and lead to important changes in Brussels Ibis.

Why *Shevill* is different from its predecessor cases? As an example, the one can compare *Shevill* case with *Bier v Mines de Potasse d'Alsace*[96], in which CJEU draws the line between the place where the damage arises from the place where the damage results. First, the most vivid and biggest difference between these two judgements is the circumstances given in *Shevill* case. The fact that defamation was published in a newspaper in one Member State but was also distributed in other Member States is the reason why the *Shevill* case bears relevance when analysing online defamation. The relevance comes from the complexity of the abovementioned situation itself which inspired CJEU to develop the "Mosaic Approach" being also invoked in further cases on

[93] "Opinion of Advocate General Cruz Villalón Delivered on 29 March 2011," *supra note*, 85: ¶ 5.
[94] "Brussels Ibis," *supra note*, 3: Rec. 16.
[95] Sakolciová, *supra note,* 19: 121, 123.
[96] "Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace Sa, Case 21/76," *supra note*, 12: ¶¶15-19, ¶¶ 24-25.

online defamation.[97] As Advocate General Darmon assessed in his opinion and with which the author of the thesis agrees, is that in such cases, "causal event gives rise to more than one instance of damage."[98] It means that considering the fact that in order for the damage to be sustained and trigger civil liability, both the unlawful act – harmful event and the result – harm should be taken into account, however, in such cases, those two elements are geographically separated and do not originate from one Member State.[99]

2.2. Exploring the Principle of Ubiquity from the Defamation Perspective

The CJEU in *Shevill*'s case considered the "place where the harmful event occurred" covered by the place where the damage was suffered and the place which gave rise to the damage. The court also gave the claimant the right to choose between the mentioned places.

Considering the CJEU's decision from the defendant's position, the following question should be raised: does not giving the claimant the right to choose between the defendant's domicile and the place where he/she sustained damage, a priori mean that *forum actoris* would prevail in most cases meaning that the claimant would always choose the court where he/she resides? As Professor Dickinson argues in his commentary such choice would lead to unnecessary claims making it challenging for defendant to defend themselves and avoidance of favouring the jurisdiction of the courts of the claimant's domicile was intention of drafters of the Brussels Convention.[100]

However, for fairness, the rationale behind the CJEU's decision should also be discussed. The CJEU explained its decision on the beliefs that opting for the place of the event giving rise to the damage would devoid general rule of jurisdiction. What would be the consequences if the CJEU favoured only the place of the event giving rise to the damage? Would it be devoid of Article 7(2) of Brussels Ibis of its effects? Is always the place of the event giving rise to the place where defendant is domiciled? From the perspective of the *Shevill*'s case, the answer to the latter question is affirmative. In this regard, the CJEU pronounced in para 24 that since libel, therefore, harmful event derived from the place where the defendant was established, the place of the event giving rise to damage is the defendant's domicile. Such a conclusion led the CJEU to assert that

[97] "eDate Advertising GmbH and Others v X and Société MGN LIMITED," *supra note,* 67: ¶¶ 51-52.
[98] "Opinion of Advocate General Darmon Delivered on 19 April 1994," EUR-Lex, accessed 1 June 2024, https://curia.europa.eu/juris/showPdf.jsf?docid=98681&doclang=en, ¶¶ 51-52.
[99] *Ibid*., ¶¶ 53.
[100] Dickinson, *supra note*, 61: 140, ¶ 4.26.

interpreting the "place where the harmful event occurred" meaning as defendant's domicile would cause confusion between Articles 4(1) and 7(2) of Brussels Ibis.[101]

The author of the thesis agrees with the CJEU's choice due to the following reasons:

First, the essence of freedom of choice is to protect the victim and if the victim is not given this choice, the balance between the parties would be impaired. Second, the CJEU made its assessment based on the circumstances given in the *Shevill*'s case, in particular, the author assumes that the decisive factor for the CJEU to render such judgement was influenced by the fact that the place of the event giving rise to damage is the place where the libel was published, which is, in this case, defendant's domicile. Thus, considering the fact that the place of publication and distribution is identifiable in the *Shevill*'s case, the CJEU's interpretation brought more certainty and counterbalance between the claimant and the defendant than considering the "place where the harmful event occurred" as the defendant's domicile could have brought in such circumstances. Thus, the CJEU by its decision avoided possible chaos between Articles 4(1) and 7(2) of Brussels Ibis.

Assessment of CJEU in *Shevill*'s judgement can also be justified taking into account the diversity between the national laws of Members States in regards to defamation and how each legal system ascertained which court should have been competent in hearing defamation cases when *Shevill*'s case was being adjudicated. For instance, German law favoured both the courts where the publication occurred and the courts where the distribution took place, as long as the publisher was aware of or had the ability to foresee the distribution.[102] However, in the Netherlands, jurisdiction was granted to courts where the defendant is domiciled or resides. If they are neither domiciled nor resident in the Netherlands, *forum actoris* is adopted.[103]

According to the laws of Spain and Italy, the courts responsible for the place where a publication was printed and initially distributed have jurisdiction to award compensation for the entire damage, regardless of where the damage occurred. This means that there is a central forum designated for such matters.[104]

[101] *Ibid.,* 132; "Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA," *supra note,* 11: ¶¶ 22, 27.
[102] Kuipers, *supra note,* 22: 1697, 1699.
[103] "Opinion of Advocate General Darmon Delivered on 1f9 April 1994," *supra note*, 99: ¶ 39.
[104] *Ibid*., ¶ 36.

2.3. The "Mosaic Approach": a Close Connecting Factor for the Determination of Jurisdiction for Non-material and Material Damages in Defamation Cases

Determination of the factor where the damage sustained is closely and directly linked to the identification of the place where a claim for such damages should be filed which gives rise to different considerations from the CJEU and scholars' side.

The Advocate General Darmon provides the readers with the opinions of the scholars at a time when the online defamation was not yet widespread. It is essential to consider the latter to be understand scholars' approach before and during the *Shevill* case was rendered. For instance, Mrs. Gaudemet-Tallon argues that the domicile of the victim, as the place of where the damage sustained should be regarded as such a factor. She further elaborates in this regard that causal event and harm itself is covered by the concept of distribution and, therefore, damage arises in the place where the victim is domiciled.[105] Furthermore, Professor Bourel explains that publication and distribution both result in civil liability. However, the place where victim is domiciled is the place where the tort is given practical effects and results.[106]

The point made by the Advocate General Darmon on the assumption that the place where the victim is domiciled, being regarded as a forum where the harmful event occurred, does not meet the requirement provided by the example of the United Kingdom.[107] The example refers to an Italian actor domiciled in England, but is totally unknown. Should the Advocate General argue by the latter example that the place of the victim's domicile does not correspond because the actor is unknown in his domicile, therefore, damages cannot be suffered by him/her, the author of the thesis respectfully disagrees due to the fact that defamation and the protection of reputation should not be measured by the degree and number of the people heard of a person in the respective place. Defamation is an unlawful attack on human dignity, being inseparable and protected regardless of how much the person can be known or unknown in the society.[108] Such a person still sustains non-material damage. Interestingly, professor Kuipers in this regard asserts that suffered damages are restricted to one Member State in case of non-famous man.[109]

The CJEU in the *Shevill*'s case developed the "Mosaic Approach".[110] The court pronounced that the claimant can file a claim for the damages that were incurred within the jurisdiction of the Member State where the court is seized and it is not possible to claim

[105] "Opinion of Advocate General Darmon Delivered on 19 April 1994," *supra note,* 99: ¶ 42.
[106] *Ibid.*, ¶ 43.
[107] *Ibid.*, ¶ 46.
[108] *Ibid.*, ¶ 21.
[109] Kuipers, *supra note*, 103: 1684.
[110] "Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA," *supra note,* 11: ¶ 31.

compensation for worldwide damages. This means that if damage occurred in one Member State that resulted in damages or losses in another Member State, legal action can only be taken only in that Member State where such damage occurred.[111] The "Mosaic Approach" even in absence of online defamation caused difference of opinion and still was and is a subject of discussion. For better understanding the broader picture of legal community of when the defamation still was associated with newspaper, opinions of scholars as of that time should also be taken into account. For instance, Geimer, Schutze, and Kropholler considered the that courts of the place where the damage arose were competent to adjudicate on claims pertaining to the entire damage, irrespective of whether it occurred within their own territorial limits or in other Contracting States.[112]

On the other hand, Mr Lagarde raised and underlined the points in favour of the "Mosaic Approach". His main argument was that there should be a connection between damage caused and the court which hears the claim pertaining to such damage.[113]

The Advocate General Darmon also refers to French court and German authors that have controversial positions. While French court do not consider having authority to adjudicate and order compensation for damages which were suffered by claimant in other Member States, German scholars argue that asking for compensation for the entire damages sustained in one forum is in favour of the claimant who would avoid filing claims against defendant in each of the court of Member State where he/she suffered damage. The Advocate General Darmon himself/herself agrees with the "Mosaic Approach" and explains his view based on the arguments that the court in the territory where the damage was sustained is the most competent to determine the degree of harm inflicted upon the claimant's reputation. He further elaborated that by implementing this criterion, the occurrence of simultaneous legal proceedings in multiple forums can be avoided. This is achieved by limiting the jurisdiction of each court to the damages that have arisen within their respective judicial districts. This approach ensures that each court is empowered to make decisions only on the issues that fall within their geographic boundaries, thus preventing any potential conflicts of interest or overlapping claims. Also, Advocate General Darmon asserts that the "Mosaic Approach" was foreseeable based on the argumentation that since the defendant is aware of the location where the newspapers are distributed, he/she can determine which court or courts he/she may be sued in and which arguments they can make in their defence, based on the applicable law.

[111] *Ibid.,* ¶¶ 28-33; *see also* Mankowski, *supra note*, 13: 278, ¶ 257.
[112] "Opinion of Advocate General Darmon Delivered on 19 April 1994," *supra note,* 99: ¶¶ 31-32, ¶ 61.
[113] *Ibid.*, ¶ 62.

It is worth to mention that the same approach is concurred by the scholars as of today. For instance, J. Oster considers that the "Mosaic Approach" maintains the balance between the claimant and defendant as the places of publication was identifiable by both parties.[114]

In favour of the "Mosaic Approach", one can contend that the "Mosaic Approach" restricts the jurisdiction of courts to the place where the damage or harm occurred. The principle is based on the idea that each Member State has the right to apply its own laws within its own territory, and that other Member States should not have unrestricted or "universal" jurisdiction over matters that occur within another Member State's borders. Without the "Mosaic Approach", courts in any member State could potentially claim jurisdiction over a matter that occurred in a different Member State, resulting in a global impact.[115]

2.4. Defamation: Examining Varied Conclusions on Comparable Content in Legal Discourse

In the *Shevill*'s case, the CJEU tackled another important question regarding whether the decision of the court, where the claimant filed a claim, to assume jurisdiction should be dependent on the possibility of other Member States' courts, which also have jurisdiction, rendering at a different conclusion.

In this regard, the CJEU admitted that different courts adjudicating different aspects of the same dispute is a problematic aspect of the "Mosaic Approach". However, the CJEU gave the solution to this problem by giving the claimant right to choose: to bring their entire claim to either the courts where the defendant is domiciled or the courts where the publisher of the defamatory material is located.[116]

2.4.1. Defamation Dilemma: The Risks of Irreconcilable Judgments

Article 30[117] of Brussels Ibis deals with the issue of irreconcilable judgments and governs all cases that have the potential to lead to inconsistent verdicts in different EU member states. The article applies to judgments that reach different conclusions but are legally compatible. Its purpose is to ensure coordination in adjudication across the EU, and promote uniformity of decisions. Article 30 of Brussels Ibis regulates related proceedings, where legal issues are the same, to avoid

[114] Oster, *supra note,* 18: 115.
[115] Mankowski, *supra note*, 13: 281.
[116] "Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA," *supra note,* 11: ¶ 32.
[117] "Brussels Ibis," *supra note*, 3: 22.

inconsistent judgments. Thus, there is no competition for enforcement due to different legal objectives.[118]

In this regard, Advocate General Darmon argues that Article 30 of Brussels Ibis is not applicable and refers to Mrs Gaudemet-Tallon stating that Article 30 of Brussels Ibis does not apply If it is agreed that the courts in the place where the damage occurred do not have jurisdiction over any other damages based on the same cause but arising in a different Member State.[119]

Advocate General Garmon raised a question whether there is a risk that different courts may make opposite decisions when it comes to a compensation claim. The concern is that some courts may rule in favour of the victim while others may not, creating a conflict of legal decisions. However, the CJEU in *Hoffmann v Krieg*[120] judgment has clarified that for two judgments to be irreconcilable, they must have mutually exclusive legal consequences. In the latter case, a decision ordering a husband to pay maintenance to his wife was irreconcilable with a decision in another Member State pronouncing the divorce. In the present case, although the decisions may be contradictory, they would not be irreconcilable. Therefore, the recognition of the jurisdiction of the court where the damage arises cannot be compromised, even if there's a risk of conflict with a court in another Member State that has jurisdiction to order compensation for the damage occurring within its judicial district.[121]

The fragmentation of jurisdiction can result in different courts in different Member States arriving at different verdicts if different parts of the damage occurred in different locations. This can lead to irreconcilable judgments. However, this only happens if the damage is spread in such a way that it is worthwhile for the victim to pursue legal action in different jurisdictions. In most cases, the majority of the damage will occur in one jurisdiction while another jurisdiction may have little to no damage. Pursuing legal action in every state concerned to collect part of the damage is too expensive and not worth the victim's effort. Without restricting the competence of the courts, every court seized would rule over the global damage. This means that it would not be necessary to commence litigation in every state concerned, as every court could rule over the global damage. This does not increase the danger of irreconcilable judgments, but rather reduces it. the "Mosaic Approach" is not unfair to the claimant either, as they have an option to sue the alleged tortfeasor for the global damage sustained either at the latter's domicile or at the place where the relevant activity can be located. Fairness is safeguarded and guaranteed by the two other elements of the overall system. The alleged victim still has an opportunity to recover their global

[118] Mankowski, *supra note*, 13: 134.
[119] "Opinion of Advocate General Darmon Delivered on 19 April 1994," *supra note,* 99: ¶ 99.
[120] "Horst Ludwig Martin Hoffmann v Adelheid Krieg, Case 145/86," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61986CJ0145.
[121] Ibid., ¶ 22; *see also* "Opinion of Advocate General Darmon Delivered on 19 April 1994," *supra note,* 99: ¶¶ 100-103.

damage, either at the alleged perpetrator's domicile or at the place where the alleged perpetrator displayed their activities. The victim is not without protection and has a forum where they can claim all in one.[122]

The jurisdiction of courts in a Member State is limited to the extent of the damage that occurred within their judicial district. Therefore, in cases where two courts are called upon to hear compensation claims for the same causal event, they do not have concurrent jurisdiction.[123]

In conclusion, in *Shevill*'s case, the damages were sustained in limited number of Member States. In online defamation cases, the damage can be suffered in multiple Member States, especially when the claimant is well-known. It is important to note that the option to sue wherever damage was sustained still provides the claimant with a significant advantage and is favourable enough for him/her. This option allows the claimant to seek compensation wherever they suffered harm, which may include multiple jurisdictions and thus increases their chances of recovering damages. However, this advantage should not come at the expense of the defendant's legitimate interests, which must also be taken into account in any decision that is made.[124]

2.4.2. Avenues for Future Development

In light of foreseeability, the following question should be posed: is the "Mosaic Approach" predictable for the defendant? The author of the thesis concludes that in *Shevill*'s case legal certainty for the defendant was ensured due to the fact that the defendant had control over the places where the newspaper was distributed.[125] While the situation and picture changes in online defamation cases, when defendants are not aware of the places where the information has been and can be spread., the defamatory content can circulate in one Member State or more than one Member State.[126]

Thus, the CJEU's choice in *Shevill*'s judgement met legal foreseeability: it corresponded with its time, needs, and requirements until the defamation was not yet digitalized, the *Shevill* and the "Mosaic Approach" was invoked and transferred to online defamation cases.

Last but not least, *Shevill*'s case left the following questions: is *Shevill* case still relevant[127]? What implication does *Shevill* have on online defamation cases? What changes in online defamation cases? What if the claimant is a legal person? What if the claimant is not

[122] Mankowski, *supra note*, 13: 279-280.
[123] "Opinion of Advocate General Darmon Delivered on 19 April 1994," *supra note,* 99: ¶ 98.
[124] Mankowski, *supra note*, 13: 279.
[125] Oster, *supra note,* 18: 115.
[126] Sakolciová, *supra note,* 19: 124; *see also* Kuipers, *supra note,* 103: 1685.
[127] Sakolciová, *supra note,* 19: 124.

identifiable? What if the claimant seeks not only compensation but removal of defamatory content from the Internet?

eDate Advertising judgement[128] is the first case from where the author should start giving answers to the above raised questions, because the latter case is one of the first judgements seized by CJEU on online defamation cases and, therefore, it is very relevant judgement for understanding and analysing how application and interpretation of Article 7(2) of Brussels Ibis has changed from defamation to online defamation cases: whether the CJEU managed to ensure main principles of Brussels I regime, more importantly legal certainty and sound administration of justice, especially if one considers that Brussels Convention was substituted with Brussels I Regulation. Did the Internet cause any impact on the further development of CJEU case law in online defamation cases?

First and foremost, it should be kept in mind that although Brussels Convention was replaced by Brussels I Regulation, the text of Article 5(3) of Brussels I Regulation remained the same, except the addition of the phrase "or may occur" to the ending of the provision. Article 5(3) of Brussels I Regulation is identical to Article 7(2) of Brussels Ibis. Second, since Brussels I Regulation replaced the Brussels Convention and they are considered equivalent, the interpretation provided by the CJEU regarding the provisions of the Brussels Convention is also applicable to the provisions of the Brussels I Regulation and Brussels Ibis.[129]

2.5. *Shevill*'s Legacy: The Relevance of the "Mosaic Approach"

eDate Advertising case slightly amended the CJEU's approach in *Shevill* case regarding the interpretation of the "place where the harmful event occurred" and pronounced it covers both places: the places where the damage originated and where the damage resulted.[130] The CJEU correctly pointed out one of the main characteristics of defamatory content placed on the Internet and its influence on determination of the criteria to identify the court where the claim should be filed. In this regard, the CJEU stated that content placed on the Internet has ubiquitous nature which makes it difficult to use the criterion of distribution as a reliable measure, as online content can potentially reach a universal audience. Additionally, the CJEU rightly assessed that it can be challenging to accurately quantify the distribution of content within a specific Member State, making it difficult to assess the damage caused exclusively within that Member State.[131] Therefore, the CJEU's assessment resulted in formulating additional criterion that the court where the

[128] "eDate Advertising GmbH and Others v X and Société MGN LIMITED," *supra note,* 67: ¶ 30.
[129] *Ibid.,* ¶ 39; *see also* "Zuid-Chemie BV v Philippo's Mineralenfabriek NV/S," *supra note,* 68: ¶ 18.
[130] "eDate Advertising GmbH and Others v X and Société MGN LIMITED," *supra note,* 67: ¶ 41.
[131] *Ibid.*, ¶¶ 45-47.

claimant has centre of his/her interests should have the jurisdiction to hear the case where claimant's personality rights have been affected by online material.

In this regard, one must mention the possible influence Opinion of Advocate General Cruz Villalon made on the CJEU's decision making process, which is apparent from the text of the judgement itself. [132] In particular, the Advocate General in his Opinion suggested the CJEU to adopt *Shevill* judgement by extending the scope of the latter judgement to "other means of communication" and by establishing additional criterion centre of gravity of the conflict.[133] The Grand Chamber partially concurred Advocate General's opinion and adapted *Shevill* case by providing new approach: centre of claimant's interest.[134]

There are different approaches regarding the relevance of *Shevill* case in online defamation cases. Still, the CJEU in *eDate Advertising* case received main criticism not for creating a new concept centre of interests as a sole criterion to determine which court should hear online defamation cases, but for establishing it as an addition to the "Mosaic Approach".[135] Mostly, scholars criticize *eDate Advertising* case because they argue that *Shevill*'s judgment no longer attunes and corresponds to digitalized reality and, therefore, a new criterion of centre of interests should have substituted *Shevill*'s the "Mosaic Approach."[136] As an example, Professor Buonaiuti states that the "Mosaic Approach" in times of online defamation cases is more challenging to invoke and outdated for today's online world.[137]

The main issues, which scholars underline, refers to forum shopping and lack of foreseeability, resulting in imbalance struck between the rights of the claimant and the defendant.[138] For instance, S. Sakolciova questions the relevance of *Shevill* judgement in online defamation cases and states that the bringing number of claims in multiple Member States increases risks of forum shopping which supresses freedom of expression and endangers the right to a fair trial and an effective remedy.[139] Professor Jokubauskas and Świerczyński, in their recent article, hold an opinion that CJEU by keeping the "Mosaic Approach", creates issues in online defamation cases due to its universal nature of the Internet and by preferring *forum actoris*

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[132] *Ibid.*, ¶¶ 44, 47.
[133] "Opinion of Advocate General Cruz Villalón Delivered on 29 March 2011," *supra note*, 85: ¶¶ 39, 54, 58.
[134] *Ibid.*, ¶ 67; "eDate Advertising GmbH and Others v X and Société MGN LIMITED," *supra note,* 67: ¶ 52.
[135] "eDate Advertising GmbH and Others v X and Société MGN LIMITED" *supra note,* 67: ¶¶ 51-52.
[136] Oster, *supra note,* 18: 113-114,117; *see also* Remigijus Jokubauskas and Marek Świerczyński, "Special Jurisdiction in Infringements of Personality Rights," *Polish Yearbook of International Law,* 41 (2021), 240.; "Opinion of Advocate General Cruz Villalón Delivered on 29 March 2011," *supra note*, 85: ¶ 54.
[137] Fabrizio Marongiu Buonaiuti, "Jurisdiction Concerning Actions by a Legal Person for Disparaging Statements on the Internet: The Persistence of the Mosaic Approach," *European Papers - A Journal on Law and Integration* 7 (2022): 348, 360; *see also* Škerl, *supra note*, 80:99.
[138] Elena Carpanelli and Nicole Lazzerini, *Use and Misuse of New Technologies: Contemporary Challenges in International and European Law* (Cham: Springer International Publishing, 2019), 289.
[139] Sakolciová, *supra note,* 19: 116, 124, 128; *see also* Oster, *supra note,* 18: 117.

undermines *actor sequitur forum rei*.[140] Furthermore, J. Oster shares the same spirit, though develops the same conclusion from different angle, which is also endorsed by the author of the thesis, that circulation of defamatory content makes a claimant already a "celebrity" in different Member States. In view of this, especially in online defamation cases, the "Mosaic Approach" allows a claimant to file a claim in each EU Member State. Thus, invoking the "Mosaic Approach" gives claimant possibility of forum shopping making rules of jurisdiction unpredictable.[141]

On the other hand, there are scholars supporting the opposite. Among them is an Assistant Professor Kuipers who provides rather interesting reasoning in favour of maintaining the "Mosaic Approach". To support his opinion, he argues that traditional and online publication of defamatory statement does not have different outcome and does not make difference to private international law. the "Mosaic Approach" by putting burden of proof on the claimant and requiring to prove the existence of inflicted harm, precludes claimant from taking advantage of the given choice for materialistic purposes.[142] Lorna Gillies develops similar approach by asserting that *Shevill* case still bears relevance since given three options to a claimant, he/she is still able to file a claim at the place where the damage originated or direct damage was sustained, if he/she cannot establish damage in territory where he/she has centre of interests based on objective criteria. [143]

Surprisingly, the CJEU kept the "Mosaic Approach" in its judgement even though it acknowledged that the Internet due to its universal nature, made it impossible to measure the sustained damage in a certain Member State. What is interesting is that the CJEU made the latter assessment on the impact of the Internet only for the purposes of adopting distribution criterion. It is notable that the court modified distribution criterion in the "Mosaic Approach" by replacing it with new criterion, namely, the place of accessibility of online content.[144] In fact, the court only made a terminological alteration due to the emergence of online defamation and the online platforms where the harmful content can be published. Reconsideration of the term is logical.

However, the author of the thesis argues that it does not affect on the essence of the criterion itself, if not making its scale wider and more difficult to control the dissemination of defamatory material because defamatory content on the Internet is accessible across 27 Member States of the EU. While in cases of newspaper libel, the publisher is aware of the number of published newspapers and the places of distribution. The difference lies in way of gaining access (to read, get to know to) to defamatory material and depends on whether it is published in print or online. Online content from its nature cannot be distributed and to gain access (to read) defamatory

[140]Jokubauskas and Świerczyński, *op. cit.*, 240; *see also* "Report by Mr P. Jenard on the Convention of 27 September 1968," *supra note*, 55: 18.
[141] Oster, *supra note*, 18: 116.
[142] Kuipers, *supra note,* 103: 1684.
[143] Gillies, *supra note*, 68: 1015.
[144] Carpanelli and Lazzerini, *supra note,* 139: 287.

content, one should access to particular platform where such content is published. Like in the *eDate Advertising* case where both cases involved defamation published in newspaper articles that were also accessible online through the defendants' websites. While distribution can only happen when it refers to traditional way of publication, such as printing a newspaper, as it was in *Shevill* case.

Thus, the CJEU by reiterating the "Mosaic Approach" from *Shevill* case, established that the latter approach is still applicable to online defamation cases. The author of thesis believes that the CJEU's view in this regard was decisive. First, it was the first judgement relating to online defamation adjudicated by Grand Chamber of CJEU. Second, after 16 years the CJEU revived *Shevill* approach once again regardless of changed circumstances in human development, especially in regards to the advancement of forms, ways and speed of dissemination and gaining access to information. Therefore, the Grand Chamber should have considered the importance and further influence of its assessment and decision on forming the approach, way of interpretation of "where the harmful event occurred" and determination of competent forum in online defamation cases. Considering this, the CJEU should have considered that maintaining the "Mosaic Approach" could increase the risks of forum shopping, fragmentation of jurisdictions and lack of legal certainty.

2.6. Online Defamation: Centre of Interests vs. Centre of Gravity of the Conflict

In quest to find the proper criterion for determination of the competent court to hear online defamation cases, it is required to not only to assess the centre of interests criterion solely but to compare it with the criterion centre of gravity of the conflict proposed by the Advocate General Villalon in his Opinion[145] and demonstrate which criterion complies with the legal certainty and proper administration of justice.

Advocate General Villalon suggested the Court additional connecting factor centre of gravity of the dispute to determine jurisdiction in online defamation cases.[146] The Advocate General based the latter connecting factor on two cumulative elements: 1. the centre of claimant's interests which should be the place where the claimant conducts his/her life activities and enjoys with his personality rights so that the place is easily identifiable; and 2. the objective relevance and nature of information which determines where the "highest level of damage" occurred.[147] Importantly, the Advocate General elaborated on the second element and provided with

[145] "Opinion of Advocate General Cruz Villalón Delivered on 29 March 2011," *supra note*, 85.
[146] *Ibid.*, ¶ 55.
[147] *Ibid.*, ¶¶ 59-61.

unexhausted list of indicators, including and emphasizing on the language, level of domain name, subject-matter of defamatory content on Internet. [148]

Notwithstanding the foregoing, the Grand Chamber only endorsed the Opinion of Advocate General to some extent. The CJEU accepted proposed criterion centre of gravity of dispute only in regards of claimant's centre of interests.[149] In contrast to the given element by the Advocate General, the court applied rather simplified version of centre of interests. With this purpose, the court assessed the correlation between centre of interests and habitual residence and stated that a person's centre of interests usually corresponds with her/his habitual residence. Reading between the lines, the court explained its decision on choosing centre of interests over habitual residence criterion by reasoning that centre of interests criterion demonstrates close ties with Member States more and it aligns with the objective of ensuring the proper administration of justice and is foreseeable for both parties: for claimant to easily determine the court where to file a claim and defendant to predict before which court he/she might be sued.[150]

Without a doubt, *eDate Advertising* judgement is an exceptional case because apart from adapting *Shevill* case, it provided the new criterion and its interpretation on connecting factor and the jurisdiction of the court where the online defamation cases can be best adjudicated.[151] The Court's attempt and step further to unify the forum for assessing all suffered damages should be also appreciated.[152] The biggest advantage of the claimant's centre of interests criterion is that it gives a possibility to seek pecuniary or non-pecuniary damages in its entirety and courts 'competence is not limited to the suffered damage occurred in that Member State.[153]

However, the CJEU's findings raise doubts.

The solution proposed by the Court may not provide foreseeability of cross-border disputes concerning online defamation and creates risks for forum shopping. The Court introduced the new criterion though did not provide indicating factors which would determine the claimant's centre of interests. The court itself acknowledged that centre of interests does not align with habitual residence when a person performing professional activities in other Member State has strong connection to that Member State.[154]

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[148] *Ibid.*, ¶¶ 64-65.
[149] "Opinion of Advocate General Bobek Delivered on 23 February 2021," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62019CC0800 , ¶ 65.
[150] "eDate Advertising GmbH and Others v X and Société MGN LIMITED," *supra note,* 67: ¶¶ 48, 50.
[151] *Ibid.*, ¶ 48.
[152] *Ibid*.
[153] *Ibid.*, ¶ 52.
[154] *Ibid.*, ¶¶ 48-49; *see also* "Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB, Case C-194/16," *supra note*, 23: 40; *see also* Susanna Lindroos-Hovinheimo, "Jurisdiction and Personality Rights - in Which Member State Should Harmful Online Content Be Assessed?, " *Maastricht Journal of European and Comparative Law* 29, 2 (2022): 208.

Nowadays, having several connecting factors, like pursuing economic and/or professional activities, in multiple Member States may be common, since the internal market is based on freedom of movement, people, capital and goods. Hence, the more connecting links the claimant has with different Members States, the easier it is to rebut the presumption that person's centre of interest has one centre of interest and harder is to decide with which Member State claimant has created stronger connection. Similarly, Mills asserts that centre of interests criterion is ambiguous and can have bad impact on online content publishers.[155] More specifically, Professors Jokubauskas and Świerczyński argue that the court's approach is unclear owing to the fact that a person's place of centre of interests might differ, especially if they change location and place of residence to another country, therefore, a person may have more than one centre of interests.[156]

Considering that Grand Chamber did not clarify the criteria how the claimant's place of the interest is to be identified, O.Feraci favours centre of gravity of the dispute arguing that the court should have accepted the latter criterion which aimed simplification of the regulation and avoidance of forum shopping.[157] Likewise J. Oster also supports the same opinion that the centre of the gravity of the dispute determines the place of the court where the online defamation cases can be assessed at best.[158]

Therefore, one can assume that the Court did not include the second element because the circumstances of the given case indicated the relevance of information in claimants' domiciles.[159] However, this does not mean that the CJEU's decision should have been so narrow and limited to the circumstances of the case. This restricted approach prevented the CJEU from thinking outside of the box and considering that the established centre of interests may not be sufficient if there is the no clear indication of where the claimant's centre of interests can be located.

2.7. Legal Consequences of *Bolagsupplysningen* Case

In 2017, 6 years after the *eDate Advertising* ruling, in *Bolagsupplysningen* [160] judgement, Grand Chamber addressed two main issues. First the Court dealt with the applicability of centre of interests in respect to legal persons and second jurisdiction of the competent court to seize the proceedings regarding an injunction and a claim for compensation.[161] The case concerned an

[155]Alex Mills, "The law applicable to cross-border defamation on social media: whose law governs free speech in 'Facebookistan'?," *Journal of Media Law* 7, 1 (2015): 21.
[156] Jokubauskas and Świerczyński, *supra note*, 137: 241.
[157] Carpanelli and Lazzerini, *supra note,* 139: 288.
[158] Oster, *supra note,* 18: 120.
[159] "Opinion of Advocate General Bobek Delivered on 23 February 2021," *supra note,* 150: 65.
[160] "Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB," *supra note,* 155.
[161] *Ibid.*, ¶ 21.

Estonian company that instituted proceedings against Swedish trade association before the Estonian courts for rectification of information, removal of comments from a website and compensation for inflicted harm. In view of continuing the line of discussion regarding centre of interests criterion, in the respective Chapter the foreseeability of the ruling will be only assessed from the point of the first issue.

The court followed the *eDate* approach and extended the application of the centre of interests on legal persons and pronounced that the centre of interest of a legal person constitutes the place where a legal person conducts its main economic activities. The court affirmed that habitual residence is considered as a factor to determine the claimant's centre of interests. The CJEU explained further that such place may reflect the place of registered office of the legal person.[162] Interestingly, Grand Chamber clarified that in cases when the registered office and the place where the main economic activities are performed do not coincide, the latter should be regarded to be the centre of interests of the legal person since "any injury to that reputation would be felt most keenly there."[163]

Speaking of registered office and the place where the main economic activities are performed, one must determine the correlation of court's judgement with Article 63(1) of Brussels Ibis.

It served to be keep in mind that Article 63(1) of Brussels Ibis gives autonomous definition of domicile of a company or other legal entities.[164] Differing from Article 60 of Brussels I Regulation, Article 63(1) remained identical just as its predecessor, Article 60(1) of Brussels I Regulation.[165] It is also worth to mention that Article 63(1) of Brussels Ibis establishes the exhaustive list of three alternative criteria: (a) statutory seat, (b) central administration or (c) principal place of business. Contrary to central administration and principal place of business, statutory seat is more foreseeable since it is a fixed place prescribed in the bylaws of the legal person and publicly available in commercial registers of certain Member States. Even so, the fact that these criteria are equal and a legal person can be registered in A Member State, having central administration in B Member State and carrying out its main business activities in C Member State, it is hard, especially for the defendant, to draw the line and identify the claimant's centre of interests. With this regard, the Advocate General Bobek is of the idea that the decision where to file a claim should be left to the claimant which can lead to application of *lis pendens*.[166]

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[162] *Ibid.*, ¶ 41.
[163] *Ibid.*, ¶ 42; *see also* Symeonides, *supra note,* 1: 369.
[164] Mankowski, *supra note*, 13: 994.
[165] *Ibid.*, 990.
[166] "Opinion of Advocate General Bobek Delivered on 13 July 2017 in Case C-194/16," EUR-Lex, accessed 1 June 2024, EUR-Lex - 62016CC0194 - EN - EUR-Lex (europa.eu), ¶ 117.

Following the understanding that statutory seat is equivalent to the place of incorporation, central administration refers to the "real seat" and principal place of business corresponds to the place of main business activities, the CJEU in *Bolagsupplysningen* case referred to the statutory seat as the "registered office" and the principal place of business as the "the place of main part of legal person's activities.". The CJEU did not follow the Opinion of Advocate General Bobek to give the claimant right to choose the forum either based on its registered office or the place of main part of its activities. Vise versa, the CJEU still decided that the latter criterion had more relevance than the former. Furthermore, it came as a surprise that the CJEU pronounced that the right to seek compensation for all damages suffered depends on clear evidence that the court hearing the claim is in the same place of the claimant's centre of interests.[167]

Thus, it may be argued that the factors what CJEU emphasized on, namely that the claimant's centre of interests is the place where the commercial reputation is mostly vividly felt, should not be regarded as decisive criterion because it is only foreseeable for the claimant, but not for the defendant.

In conclusion, the assessment of the CJEU case law demonstrated that while keeping up with the challenges of online defamation by providing new criteria, the CJEU is still clinging to applying *Shevill*'s doctrine, which leads to fragmentation of fora, forum shopping and undermines legal certainty. The CJEU in *eDate Advertising* case missed the chance to establish uniform jurisdictional rule for online defamation cases. However, *Bolagsupplysningen* case is more promising because the CJEU based its interpretation only on the centre of interests criterion and abandoned the "Mosaic Approach".

Last but not least, following the analysis and comparison between centre of interests and centre of gravity of the conflict, the author favours the centre of gravity of the conflict criterion since the determination of the competent court in online defamation cases is dependent on the localization of the suffered damages and the latter identifies the place where the claimant could have suffered the damages at the most significant level, which shows the strongest connecting factor between the action in question and the competent court.

[167] "Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB," *supra note,* 155: 43.

CHAPTER 3. EXPLORING REMEDIAL DISCREPANCIES AND CONFLICTING JUDGMENTS IN LEGAL PROCEEDINGS ON CASES OF ONLINE DEFAMATION

Once defamatory content is placed on the Internet, it can be accessible anytime and everywhere by anyone around the globe. It is important to note that the information remains publicly available and may be kept in the servers of the publisher of information forever. Considering this, when it comes to infringement of personality rights by the content placed online, there is always risk that the claimant may suffer additional damages from the same content in the future. In such situations, seeking compensation for material and non-material damages does not suffice because it only has compensatory purposes. In this regard, compensation does not have any practical outcome: it does not bar the defendant from publishing the defamatory information about the claimant and, therefore, it does not prevent the claimant from future damages after the legal proceedings are over. In view of this, the claimant needs additional defence mechanism to prevent violation of his/her personality rights again and incur additional damages in the future. For these purposes, the claimant not only requests compensation from the defendant, but also as a preventive remedy, he/she also seeks injunction, such as removal (rectification) of defamatory information.

The present chapter analyses the jurisdictional aspects of two types of remedies in defamation cases, namely when a claimant seeks compensation and injunction relying mostly on the relevant case law of the CJEU. In analysed cases below, there are different scenarios, where claimants claim for 1) injunction; 2) compensation; 3) compensation and injunction. Since the Brussels Ibis Regulation is silent whether the rules on jurisdiction depend on the nature of the claim and the legal remedy which the claimant seeks to invoke, the question arises whether the choice of certain types of remedies affect on the determination of the jurisdiction under Article 7(2)of Brussels Ibis and how to ensure legal foreseeability, sound administration of justice and proper balance of both parties' interests when determining jurisdiction in regards of different types of remedies.

3.1. Understanding the Significance of Retention of Close Connecting Factors in Legal Jurisdiction

The right to a fair trial is guaranteed under Article 6 of the Convention.[168] It includes the right to access to a court[169] which should be assessed when determining the jurisdiction of online defamation cases under Article 7(2) of Brussels Ibis. The aim to ensure legal certainty and

[168] "European Convention on Human Rights," *supra note* 33: Art. 6.
[169] Ricardo Lillo Lobos, *Understanding due process in non-criminal matters*, (Cham, Springer: 2022), 122.

minimize the risks of forum shopping serve the very idea and aim to protect right to fair trial, in particular the right to access to a court. This is vividly demonstrated by ECHR in *Arlewin v. Sweden*[170] case.

The case concerned Mr. Arlewin, a Swedish citizen who filed a claim against X, a Swedish citizen, seeking damages for defamation. More precisely, in the claim, Mr. Arlewin argued that during the TV show, anchored by X, he was accused of involvement in multiple serious crimes.[171] The Stockholm District Court dismissed the claim stating that the latter court was not competent to adjudicate the case since the harmful event (TV programme) did not derive from Sweden. The same was upheld by the Court of Appeal which pronounced that the jurisdiction of the claim was in British courts. Further, the Supreme Court rejected Mr. Arlewin's referral request for preliminary ruling was rejected.[172] Finally, Mr. Arlewin in his application against Kingdom of Sweden before ECHR claimed that Swedish courts did not ensure his right to access to a court.[173]

Surprisingly, each instance of Swedish court held the similar opinion, reasoning the same that the British courts had jurisdiction to hear the claim because before TV programme was eventually broadcasted, it was sent by Satellite link to British company which was in charge of deciding programme content, and therefore was in fact responsible for the programme content.[174]

In view of the Swedish courts' reasoning and the government's allegations, presumably, having considered the domicile of Viasat Broadcasting UK Ltd, the Swedish courts invoked general jurisdiction, Article 2(1) of Brussels I Regulation. There are several arguments why the Swedish Court breached the claimant's right to access to a court.

First, having mind that the claimant argued violation of his personality rights, namely, defamation, the courts should have considered and applied Recital 12 of Brussels I Regulation, which explicitly underlines the importance of special link between the forum and the alleged action, aiming to foster sound administration of justice. It seems that the courts disregarded the existing connecting factors between the alleged damage and Swedish courts and only emphasized on British company's domicile, which the courts decided that it was in London.[175] Nonetheless, the mere facts that both the claimant and the defendant, against whom the claim was filed, were Swedish nationals, being domiciled in Sweden, the programme was produced and broadcasted by Swedish company, in Sweden for Swedish audience, in Swedish language should have been sufficient to at least not exclude application of Article 5(3) of Brussels I Regulation, therefore not

[170] "Arlewin v. Sweden., Application No. 22302/10," ECHR, accessed 1 June 2024, https://hudoc.echr.coe.int/?i=001-160998.
[171] *Ibid.,* ¶ 5-8.
[172] *Ibid.,* ¶ 15.
[173] *Ibid.,* ¶ 50.
[174] *Ibid.,* ¶ 11.
[175] *Ibid.,* ¶ 31.

to reject the claim based on lack of jurisdiction. In addition, the are other factors that made also obvious that the Swedish courts should have deviated from applying Article 2(1). For instance, the fact that the programme was funded by the companies competing in the Swedish market. The claimant was businessman in Sweden and he was accused of involvement in number of serious crimes in Sweden.

Considering the abovementioned circumstances and the fact that the programme must have been watched in United Kingdom by a limited number of viewers, the damage suffered there would be meagre. Therefore, claimant suffered the highest level of damage in Sweden and Swedish courts had jurisdiction to hear the claim. It should be mentioned that in the presence of provided circumstances, the Swedish courts by applying the main rule of jurisdiction, put Article 5(3) under the risk of *effet utile*.[176]

Should the British courts be also competent to adjudicate the claim, it should be considered that since the alternate jurisdictional ground, in this case, Article 5(3) of Brussels I Regulation and Article 2(1) are equally applicable and the former does not take precedence over the latter, it was up to the claimant to decide in which forum to sue the defendant, in British or Swedish courts.[177]

Last but not the least important, the Swedish courts, by rejecting to exercise jurisdiction over the claim stating that applicant could file the claim before a British court,[178] invoked *forum non conveniens* doctrine. It should be noted that the CJEU in *Owusu* judgement[179] declared that the latter doctrine is not compatible with Brussels I regime.[180] Thus, by applying *forum non conveniens*, the Swedish courts precluded the claimant to exercise the right to access to a court.

Therefore, the ECHR in *Arlewin v. Sweden* case affirmed the relevance of a strong connecting factor between the court and the alleged action by stating that such connection requires the compliance with Article 6 of the Convention and ensures an effective access to court and legal certainty for the defendant.[181] *Arlewin v. Sweden* case demonstrated the great importance of considering the factors like the nature, subject-matter, relevance and language of online content

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[176] Jan Von Hein, "Protecting Victims of Cross-Border Torts under Article 7 No. 2 Brussels Ibis: Towards a More Differentiated and Balanced Approach," in *Yearbook of Private International Law Vol. XVI*, ed. Petar Sarcevic et al. (Verlag Dr. Otto Schmidt, 2015), 244-245; *see also* "Bier v. Mines de Potasse d'Alsace SA, C-21/76," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61976CJ0021, ¶ 20; *see also* "Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA," *supra note,* 68*:* 31; *see also* Mankowski, *supra note*, 13: 45-46, 156.

[177] Vladimir Lazić, "Regulation Brussels I bis and regulation creating a European enforcement order," paper presented at the Legal English seminar, Judicial Academy, Zagreb, 5-9 June 2017, 11-12.

[178] "Arlewin v. Sweden," *supra note*, 171: 13.

[179] Mankowski, *supra note*, 13: 109-110; "Owusu v. Jackson et al., Case C-281/02," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62002CJ0281, ¶¶ 37-46.; Lazić, *op. cit.,* p. 11.

[180] Mankowski, *supra note*, 13: 12, 109; *see also* Kuipers, *supra note*, 103: 1689.

[181] "Arlewin v. Sweden," *supra note*, 171: ¶¶ 72-73; Study on forms of Liability and jurisdictional issue in online defamation cases, p. 14-15.

and approved the advantages of the established criterion centre of gravity of the dispute by the Advocate General Villalon in his Opinion for *eDate Advertising* case.

3.2. A Legal Analysis of the *Mittelbayerischer* Case: Effects on Online Defamation

The ambiguity and gaps left by the CJEU in *eDate Advertising* judgement were addressed by the CJEU in *Mittelbayerischer* judgement[182] after 10 years. The circumstances of the given case the CJEU had to assess and the questions to be resolved were unusual and therefore demanded reconsideration of already established and developed approach, and even bringing a new way of thinking. The issues put before the court were as follows: 1) whether the claimant who was not particularly named and mentioned in alleged harmful online content is to be protected under Article 7(2) of Brussels Ibis and 2) circumstances, like the audience, language, play role in determination of the place where the damages occurred. In a nutshell, the questions challenged and raised doubts about centre of interests criterion.

Many argue[183], and the author of the thesis shares the same opinion, that the raised question whether the claimant is really a victim and what is the scope of personality rights, is regulated by a particular national law and goes to the merits of the case since it does not deal with the assessment of applicability of Article 7(2) of Brussels Ibis. Furthermore, it should be also considered that Article 7(2) of Brussels Ibis, at the stage of determining the jurisdiction of the court, does not establish a requirement for claimant to prove that he/she is a victim. The answer on the substantial questions such as whether a claimant based on the particular circumstances of the case is considered to be a victim and at what extent his/her personality rights are protected, lies in national law. Consequently, the court assessed the matter which is not in the competence of Brussels Ibis, but it rests on legal systems of each Member State.

If one takes a case more broadly, here is a rhetorical question: did the court by this decision make preference over the freedom of expression to the right to reputation?[184] On the other hand, it also should be mentioned that by admitting the given case for preliminary ruling, even though not fulfilling the expectations, the raised issues itself triggered reconsideration and the doubts about the relevance and effectiveness of centre of interests criterion.

This case demonstrated that the latter criterion could not endure and keep up with the unusual facts of the case because the criterion was wholly based on the theory the claimants are the alleged victims who should be directly mentioned by the defendants, so that, defendants can

[182] "Mittelbayerischer Verlag KG v SM, Case C-800/19," supra note, 23.
[183] Susanna Lindroos-Hovinheimof, supra note, 155: 244.
[184] "Mittelbayerischer Verlag KG v SM, Case C-800/19," *supra note* 180: ¶ 42.

predict the identity of the claimant and foresee the place where they can defend themselves. *Mittelbayerischer* case turned this theory upside down. The CJEU unfortunately did not consider that the criterion required refinement and additional elements. The application of outdated criterion led to wrong understanding of legal certainty and predictability. The court slipped away the possibility to develop the centre of interest criterion so that it would also endure and keep up with more complex circumstances like in a given case and reduce the probability of misinterpretation and misapplication of Article 7(2) of Brussels Ibis.

The court established that infringement of personality rights should be established on objective and verifiable elements.[185] If this was the case, why would it fall under the scope of Article 7(2) of Brussels Ibis which is based on close connection between the court and the alleged action?[186] In this regard, the same approach is held by Jokubauskas and Świerczyński, stating that infringement of personal rights is *sui generis* tort.[187]

The court also saw the risks of multiplication of fora[188] and pronounced that Article 7(2) of Brussels Ibis is not applicable to the claimant belonging to a vast identifiable group of people since the centre of interests of the members of such group can be located in different Member States. It is not clear why the court assessed this hypothetical scenario and argued that application of Article 7(2) of Brussels Ibis in such case does not ensure legal certainty and foreseeability since the present case concerned only one Polish citizen's centre of interests because the claimant sought actions for violation of his personal rights, not behalf of all Polish citizens' personal rights. The decision by putting new precedent, not only bar sole claimants to seek remedies in case of not being mentioned in alleged harmful online publication, but it also precludes infringed group of people defending their rights of reputation, dignity or other personality rights.

If one follows the same logic, the following question arises: even if the proceedings were instituted by several members of an identifiable group of people, having centre of interests in different Member States, it also means that Article 7(2) of Brussels Ibis does not apply to collective actions and several members of an identifiable group of people do not have the right to defend themselves against the violation of their personal rights? Is the problem in lack of close connection or in the approach that the centre of interests criterion is circumscribed to the "places which the defendant would have subjectively foreseen"[189] because *eDate Advertising* did not provide any specific factors to determine claimant's centre of interests?

[185] "Brussels Ibis," *supra note*, 3: Rec. 16.
[186] Jokubauskas and Świerczyński, *supra note*, 137.
[187] "Mittelbayerischer Verlag KG v SM, Case C-800/19," *supra note* 180: ¶ 39.
[188] "Mittelbayerischer Verlag KG v SM, Case C-800/19," *supra note* 180: ¶ 39.
[189] "Opinion of Advocate General Bobek Delivered on 23 February 2021," *supra note,* 150: ¶ 47.

As a result, the CJEU established a new requirement, therefore an obstacle for claimants under Article 7(2) of Brussels Ibis, which does not fall within the jurisdictional matters. The CJEU by restricting claimants to seek preventive and compensatory remedies for the infringed personality rights, and not only in online defamation cases, deprives the right to have an access to the court and hinders the fair trial. The court, instead, focused on the foreseeability criterion. When the answer of the question lies within the national substance law, no defendant can fully foresee and be aware of the rules of each Member State.

In reference to the conclusion regarding the *eDate Advertising* case, it is worth to note that the failure to take a comprehensive view at the circumstances of the case and provide further clarification on how the claimant's centre of interests should have been identified led the CJEU to misinterpret the latter criterion under Article 7(2) of Brussels Ibis, even after ten years. What could be the possible solution and better way out?

The Advocate General Villalon's suggestion should be more appreciated in this regard.[190] He provided with the criterion which would be suitable for both of the judgements. The relevance of assessing additional factors, such as the language, subject-matter of defamatory publication, was revealed especially in *Mittelbayerischer* case. Importantly, the centre of gravity of dispute was subscribed by the Advocate General Bobek.[191]Applying the factors namely nature, relevance, subject matter of information, the language of the alleged harmful publication emphasized by Advocate General Villalon in Opinion for *eDate Advertising* case and then concurred by the Advocate General Bobek, would demonstrate and guide the court to the following conclusion that German publisher publishing an online article in German and mentioning "Polish extermination camp of Treblinka" while being it accessible and understandable in Poland, could reasonably foresee that the statement which refers to the special Polish place, having a particular historical destination, would summon at least one Polish citizen's attention, if not the interests of whole nation and trigger particular interest where if not in Poland.

Thus, assessment the given case only based on the legal certainty was not sufficient. The fact that under Polish law, the protection of national identity, dignity and respect for the truth about the history of the Polish nation fall under the scope of personality rights of Polish nationals and the court's decision to bring a new element, requirement to Article 7(2) of Brussels Ibis which is a matter of each legal system to decide itself, and also to pronounce that the claimant should be individually identifiable, can be assumed as disagreement with Polish law[192] and poses risks how Brussels Ibis and particularly Article 7(2) of Brussels Ibis should function.

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[190] Lindroos-Hovinheimo, *supra note*, 155: 213-214.
[191] "Opinion of Advocate General Bobek Delivered on 23 February 2021," *supra note,* 150: ¶ 62.
[192] Lindroos-Hovinheimo, *supra note*, 155: 211-212.

3.3. An Analysis of the Need of Injunction Regarding the Future Damages

Injunction is one of the types of remedies which is sought by the claimant to prevent and protect himself/herself from future violation and damages by the defendant's unlawful behaviour. In online defamation cases, the injunction plays important role because it has practical effects. For instance, if the claimant's request, that the defendant should refrain from future publication of defamatory statement, is satisfied, he/she will be confident that damages which could have arisen from the same defamatory material in the future, will be avoided.[193]

One of the first cases concerning online defamation which coped with the claim regarding injunction is *eDate Advertising*. Two linked different cases were heard in *eDate Advertising* cases: i) Case C-161/10 concerned the claim for compensation for alleged defamatory information[194], ii) in Case C-509/09 the claimant sought an injunction against the defendant to refrain from future publication of alleged defamatory information, sought in claimant's centre of interests.[195] Since in Case C-509/09 Italian government contested the admissibility of the referral for a preliminary ruling[196], CJEU had to decide on whether the claim regarding injunction fell under the scope of Article 5(3) of Brussels I Regulation, and if the jurisdiction of injunction should be determined according to the place where website is accessible regardless of the place where the operator of the website is established.

The CJEU assessed the injunction only in admissibility part and even though rendered the action admissible[197], did not answer the question on the jurisdiction of injunction. Undoubtedly, the CJEU made an important note in respect of admissibility of injunction that the claims preventing a repetition or continuation of the alleged label or slander fall under the scope of Article 5(3) of Brussels I Regulation and it does not require current existence of damage.[198]

The CJEU extended the CJEU's approach in *Henkel*[199] judgement to infringement of personality rights, especially to online defamation cases despite the fact that CJEU in *Henkel* case was called upon to determine the legal nature of the relationship between the consumer protection

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[193] Prévost, *supra note,* 155: 30.
[194] "eDate Advertising GmbH and Others v X and Société MGN LIMITED," *supra note,* 67: ¶¶ 25-26.
[195] *Ibid.,* ¶ 18.
[196] *Ibid.,* ¶ 31.
[197] *Ibid.,* ¶ 36.
[198] *Ibid.,* ¶ 35; *see also* "Opinion of Advocate General Cruz Villalón Delivered on 29 March 2011," *supra note*, 85: ¶ 27.
[199] "eDate Advertising GmbH and Others v X and Société MGN LIMITED," *supra note,* 67: ¶ 35*;* "Verein für Konsumenteninformation v Karl Heinz Henkel, Case C-167/00," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62000CJ0167, ¶¶ 48-49.

organization against a trader seeking injunction to prevent using unfair terms in consumer contracts and applicability of Article 5(3) of the Brussels Convention on this matter.[200]

The *Henkel* case deserves proper attention and bears relevance in regards of assessing injunction as a remedy for prevention of repetition of the alleged libel and/or slander since the CJEU interpreted Article 5(3) of the Brussels Convention as provision encompassing not only the cases where the harmful even has occurred, but also where it may occur.[201] According to the CJEU the application of Article 5(3) of the Brussels Convention is not dependent on the actual existence. What is more interesting, to support its position, the CJEU made a reference to newly[202] enforced Brussels I Regulation and its new version of Article 5(3) which included the additional wording: "may occur." The CJEU's intention to form and develop the consistent interpretation of the latter provision equalled as safeguarding the claimant's effective access to the court not only in presence of cases when the claims are filed after the enforcement of Brussels I Regulation, but also before that.

Thus, by following the same approach, the CJEU in *eDate Advertising* provided the claimant with the right to access to the court. This was done by rendering the injunction admissible which aims to prevent the repetition of the same alleged defamatory action, even no damages had occurred.

3.4. Compensation Claims and Injunctions for Comment Removal and Information Rectification

In addition to interpreting "the place where the harmful event occurred", the CJEU in *Bolagsupplysningen* case dealt with other relevant issues related to determining jurisdiction in online defamation cases. The CJEU provided important clarifications not only about the interpretation of legal person's centre of interest under Article 7(2) of Brussels Ibis, but also regarding the claims sought for compensation and injunction for removal of the comments and rectification of the information.

In this case Svensk Handel AB, a Swedish trade association, mentioned Bolagsupplysningen, an Estonian company operating most of its activities in Sweden, on a "blacklist" published on its website and accused the company of performing fraud and deceit activities.[203] As a result, two claimants Bolagsupplysningen and Ms. Ilsjan, an employee of the company started proceedings against Svensk Handel before District Court of Estonia.

[200] "Verein für Konsumenteninformation v Karl Heinz Henkel, Case C-167/00," *op. cit*., ¶ 24.
[201] *Ibid.*, ¶¶ 48-49.
[202] *Ibid.*, ¶ 49. The CJEU rendered judgement in Henkel on 1 October 2002, whilst the Brussels I Regulation entered into force on 1 March 2002.
[203] "Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB," *supra note,* 155: ¶ 10.

Interestingly, Bolagsupplysningen's primarily request was rectification and removal of the alleged defamatory material from defendant's website and only, as a secondary basis, compensation for suffered damages. Ms. Ilsjan claimed compensation for non-pecuniary loss. [204]

The District Court of Estonia dismissed the claim due to the lack of jurisdiction stating that Swedish courts had jurisdiction over the claim.[205] The Appeal Court upheld the latter decision. Bolagsupplysningen and Ms. Ilsjan lodged an appeal arguing that the Estonian courts had jurisdiction to hear the claim according to the claimant's centre of interest criterion. The referring court disjoined the claims of Bolagsupplysningen from Ms. Ilsjan, satisfied Ilsjan's appeal, set aside the order of Appeal and First Instance court and referred back to the First Instance court.

On one hand the referring court acknowledged that Estonian courts had jurisdiction to hear Bolagsupplysningen's claim in respect of compensation. On the other hand, the referring court questioned whether the Bolagsupplysningen, who sought action for infringement of good name and reputation, could seek rectification of incorrect information and removal of the comments in Estonian courts with compensation for the entirety(whole) of the damage. The referring court noted that even though seeking entire suffered damage was possible in the courts of the claimant's centre of interests established by CJEU in *eDate Advertising* case, centre of interests criterion was only applicable to a natural person and not to a legal person.

The CJEU addressed the following questions: does a person have right to file a lawsuit seeking for rectification of the alleged defamatory information and deletion of the alleged defamatory comments before the courts of any Member State in which the alleged defamatory content on the Internet is or was accessible in respect of the suffered damage in that Member State? Can a legal person file a lawsuit seeking for rectification of the alleged defamatory information, deletion of the alleged defamatory comments and for damages for the compensation before the courts of Member State in which the legal person has its centre of interests?

Noteworthy, the CJEU abandoned the "Mosaic Approach" and opted for the centre of interests criterion, instead, and extended the application of the same criterion on a legal person. More precisely, answering the questions, the CJEU clarified that the claimant does not have the right to bring the claim for rectification of the alleged defamatory information and deletion of the alleged defamatory comments before the courts of each Member State in which the information published on the Internet is or was accessible.[206] Also, according to the CJEU's judgement, a legal person, equally to a natural person, can bring proceedings for removal of defamatory comments,

[204] *Ibid.,* ¶ 9.
[205] *Ibid.,*¶ 11.
[206] *Ibid.,*¶ 49.

rectification of alleged defamatory information and compensation concerning entire sustained damages before his/her centre of interests.[207]

3.4.1. The Compensation: Legal Remedy and Implications

Before analysing the CJEU's decision, the reasoning behind the different approaches of the first two Estonian courts and the referring court should not be left unnoticed and the possible consequences of their decisions should be identified. The courts of Estonia found Bolagsupplysningen's and Ms. Ilsjan's joined claim inadmissible due to the reasoning that alleged defamatory information and comments were published in Sweden, the fact that the defamatory content was accessible was not a decisive factor, and therefore, the damage did not occur in Estonia.[208] Considering the latter argumentation, it is author's position that the rationale is based on adopted version of the "Mosaic Approach" by CJEU in *eDate Advertising* case.[209] On the other hand, if one focuses on the reasons why the referring court found Ms. Ilsjan's claim admissible and referred back to the First Instance of Estonia, the conclusion is that the referring court applied claimant's centre of interests criterion. Ms. Ilsjan's claim perfectly complied with the latter criterion – she was a natural person and sought only compensation.

Thus, in a simple scenario when a natural person claims compensation for non-material damages in online defamation cases, two different approaches can lead to two controversial legal consequences. According to the first approach, if one applies the "Mosaic Approach", in order for the claim to be admissible, the claimant should seek compensation for all damages only in the court of the defendant's domicile or to file claim before the courts of Member States where the alleged defamatory material was places or was accessible and seek only the damages limited to the latter court's jurisdiction. In hypothetical scenario, seeking a collecting compensation in each court of Member State where the alleged defamatory content was accessible and where the claimant suffered damaged would not be foreseeable for the defendant, and time and money efficient for neither of parties. In Ms. Ilsjan's case, since she did not file claim in Sweden and sought all damages in Estonia, the first two instance Estonian court did not admit the claim.

However, the referring court applied the second approach: claimant's centre of interest criterion based on which the claimant can seek all the damages in his/her centre of interests. accordingly, Ms. Ilsjan's appeal to the referring court was satisfied by which decision her right to access to the court was repaired.

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[207] *Ibid.,*¶ 44.
[208] *Ibid.,*¶ 11.
[209] "eDate Advertising GmbH and Others v X and Société MGN LIMITED," *supra note,* 67: ¶ 52.

What happens when the situation is more complicated, meaning that, the claimant: 1) is a legal person and 2) seeks not only compensation, but also injunction? How the application of Article 7(2) of Brussels Ibis be compatible with the right to access to the court and legal foreseeability for the place of international litigation?

Though the issue regarding the legal person's personality rights is not at the core of the thesis, it still requires certain level of attention and analysis because it concerns the applicability of Article 7(2) of Brussels Ibis: whether a legal person can enjoy the right to claim compensation for non-material damages apart from material under the latter provision. This is especially problematic because Recital 16 of Brussels Ibis only mentions: "violations of privacy and rights relating to personality, including defamation."[210], but does not specify if it encompasses legal personality.

The decisions of the two instance court of Estonia resulted in different treatment of legal and natural persons: the courts rendered Ms. Ilsjan's claim admissible, but Bolagsupplysningen's claim – inadmissible. Bolagsupplysningen was not provided with right to access to the court because as courts stated, Bolagsupplysningen, as a legal person, did not have the right to seek compensation for non-material damages. However, later, the referring court raised question before the CJEU whether Bolagsupplysningen could seek compensation for all suffered damages before Estonian courts.[211]

The CJEU in *Bolagsupplysningen* case did not differentiate legal person from natural person and clarified that legal person has right to bring action to the court of their centre of interests in regards of all, material or non-material damages.[212] Interestingly, the CJEU in *Shevill*'s case made an important point that a natural as well as legal person, along with the possibility to file a claim in the courts of the defendant's domicile, could file a lawsuit for the suffered damage to its honour, reputation and good name in each Member State where the defamatory publication was distributed.[213]

First and foremost, it is worth to mention that Article 263 of the TFEU provides legal persons with the right to bring proceedings to the CJEU.[214]

The special attention deserves ECHR case *Steel and Morris v. the United Kingdom* where the court stated that a legal person should not be "deprived of the right to defend itself against defamatory allegations" not only for the interest of its shareholders, employees, commercial

[210] "Brussels Ibis," *supra note*, 3: Rec. 16.
[211] "Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB," *supra note,* 155: ¶ 19.
[212] *Ibid*., ¶ 38.
[213] "Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA," *supra note* 11: ¶¶ 29-30.
[214] "Treaty on the Functioning of the European Union," *supra note*, 45: Art. 263.

reputation and success, but also "wider economic good."[215] Indeed, the right to access to the court by allowing a legal person to bring an action for material and non-material damages in online defamation cases decides the entity's good standing, reputation in a market, further performance and conduct of a business.[216] Most importantly, it affects on exercise of other fundamental rights. This can be supported by the CJEU and ECHR case law where both courts acknowledged that legal persons enjoy number of fundamental rights, including, the freedom to conduct a business[217], the right to an effective judicial remedy[218], the right to a defence[219], freedom of expression.[220] Even more, personality rights are intertwined with the other fundamental rights, like right to property and freedom to conduct business.

The question is: if the legal persons enjoy all the above-mentioned substantive and procedural rights which ensure and contribute that the legal person's commercial reputation is protected, why the legal person should not have right to file a claim and seek compensation for non-material damages under Article 7(2) of the Brussels Ibis?

Thus, when applying the latter provision, for full enjoyment of the aforementioned rights and freedoms, a legal person should have right to protect its personality rights.[221] This means that legal and natural persons should equally be given the same access to judicial remedies and to the court as natural persons have. To be more precise, in this case, legal persons should have right to seek compensation for non-material and material damages under Article 7(2) of the Brussels Ibis.

3.4.2. The Interplay Between Injunctions and Compensation

How does the applying the "Mosaic Approach" in online defamation cases, like *Bolagsupplysningen*, affect legal certainty in terms of different types of remedies? Does it create

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[215] "Steel and Morris v. the United Kingdom, Application no. 68416/01," ECHR, accessed 1 June 2024, https://hudoc.echr.coe.int/eng?i=001-68224 , ¶ 94.
[216] Mariana Tavadze, "The concept of business reputation of the legal entity," *Journal of Law* 1, 1 (2018): 31.
[217] "Samira Achbita v G4S Secure Solutions NV, Case-157/15," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CJ0157, ¶ 38; *see also* "AGET Iraklis v Ypourgos Ergasias, Case C-201/15," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62015CJ0201 , ¶¶ 66-69.
[218] "Trade Agency Ltd v Seramico Investments Ltd, C-619/10," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62010CJ0619, ¶¶ 37-43, 59-60; "Judgment of 16 May 2017, "Berlioz Investment Fund SA v Directeur de l'administration des contributions directes, Case C-682/15," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62015CJ0682 , ¶ 48.
[219] "Groupe Gascogne SA v European Commission, Case C-58/12 P," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0058 , ¶ 29; "AkzoNobel Chemicals and Akcros Chemicals v Commission, Case C-550/07," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62007CJ0550 , ¶ 92.
[220] "Axel Springer AG v. Germany, Application no. 39954/08," ECHR, accessed 1 June 2024, https://hudoc.echr.coe.int/eng?i=001-109034; *see also* "Opinion of Advocate General Bobek Delivered on 23 February 2021," *supra note,* 150: ¶ 43.
[221] "Opinion of Advocate General Bobek Delivered on 23 February 2021," *supra note,* 150: ¶ 49.

the risks of irreconcilable judgements? In other words, did the CJEU's choice over the claimant's centre of interest criterion to the "Mosaic Approach" make any positive shifts in safeguarding legal certainty and sound administration of justice in online defamation cases? If yes, how is it reflected?

The analysis below only assesses the possible impacts on the legal certainty of the litigation when: 1) the "Mosaic Approach" and 2) the centre of interests criterion are applied to the actions regarding the injunction and compensation for suffered damages.

The "Mosaic Approach" was established in times when the means of dissemination of traditional source of information, such as newspaper, was distribution which made easy to identify what number of defamatory materials were distributed and sold in which Member States. in hypothetical scenario of newspaper libel, what if a claimant files a lawsuit before the courts of each Member State where he/she suffered damages due to the distribution of alleged defamatory material and requests not only compensation for suffered damages but also removal of alleged libel from distribution and market circulation each Member State? the "Mosaic Approach" will still ensure legal predictability. This is because the defendant knows the possible Member States where he/she can be sued and in case of claimant's success, ordered to remove the defamatory material.[222] On the other, such fragmentation of proceedings will raise the risks of forum shopping and will lead to costly proceedings.[223]

In online defamation cases, due to the ubiquitous nature of the Internet, can the defendant reasonably foresee in which courts of Member State, the claimant would file a claim for removal and rectification of alleged defamatory content from the Internet? The answer is obvious and negative. In such cases, the defendant cannot predict in which courts of 27 Member States he/she would be sued for the purposes of removal of alleged defamatory material.[224]

In *Bolagsupplysningen*'s context, if the CJEU applied the "Mosaic Approach" to the injunction of removal of alleged defamatory information and rectification of alleged defamatory comments content from the defendant's website, this decision would adversely affect the defendant and the principle of legal certainty.

Thus, by invoking the criterion of centre of claimant's interests, which allows the claimant to seek injunction of deletion/rectification of the alleged defamatory material in respect of all suffered damages in the courts of claimant's centre of interest, the CJEU, in this regard, complied with legal foreseeability and proper balance between the claimant and the defendant and set an

[222] The logic behind the removal of already distributed and/or sold defamatory material by the time the judgment is rendered is a different subject of analysis, which will be discussed below.
[223] "Brussels Ibis," *supra note*, 3: Rec. 15; "Opinion of Advocate General Hogan Delivered on 16 September 2021 in Case C-251/20," InfoCuria, accessed 1 June 2024, https://curia.europa.eu/juris/document/document.jsf?docid=246102&doclang=en, ¶ 53.
[224] *Ibid.,* ¶ 50.

important precedent for further interpretation and application of Article 7(2) of Brussels Ibis concerning the determination of jurisdiction of injunctions in online defamation cases.

Minimalization of concurrent proceedings and avoidance of irreconcilable judgements, as one of the objectives, enshrined in Recital 21 and Article 30 of Brussels Ibis, should be considered and complied with when interpreting as well as applying Article 7(2) of Brussels Ibis for the purposes of determining the forum for online defamation cases.

In newspaper libel cases, like *Shevill*, when the claimant seeks only compensation for the suffered damages, the application of the "Mosaic Approach" does not lead to irreconcilable judgements. Can one reach the same conclusion if the action is brought before the courts of each Member State where the claimant suffered damages from the defamatory newspaper material and requested the removal/rectification of such material from distribution or market circulation of each Member State?

The practical aspect of enforcement of such judgement is different subject of discussion, but speaking hypothetically, in this case, each competent court will adjudicate and decide solely on the damage which occurred by the alleged defamatory material distributed only in its territory. Further, if some of the courts satisfy the injunction and order the removal of defamatory materials from the market of their respective Member States, such judgments will not have exclusive legal consequences and, therefore, will not lead to irreconcilable judgements. However, it should be mentioned that multiplication of fora will not be profitable for neither of the parties, because the claimant is "forced" to request removal/rectification of defamatory material in each court of each Member State where he/she suffered damages and defendant should defend himself/herself, accordingly, in each court.[225]

In cases of online defamation, good example of which is *Bolagsupplysningen* judgement, the rectification/removal of alleged defamatory content may trigger irreconcilable judgements. The reason lies in the nature of the sought remedy. As the CJEU in *Bolagsupplysningen* case explained, such remedy is of "a single and indivisible "[226] nature. The Advocate General Bobek explained the essence of unitary nature of such kind of remedies in a comprehensive way. The rationale why each competent court cannot hear and decide on the claim concerning the removal/rectification of the alleged defamatory content from the Internet only in respect of its limited jurisdiction, is that once a material is placed on the Internet, it is accessible everywhere, in every Member State. Thus, in such cases, there is only a single, one and only content which cannot

[225] "Opinion of Advocate General Bobek Delivered on 23 February 2021," *supra note,* 150: ¶¶ 87-88.
[226] "Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB," *supra note,* 155: ¶ 48.

be divided between the courts of each Member States according to the number of damages suffered by the same alleged defamatory content. [227]

It should be also mentioned that recent technical developments, such as geo-blocking, allow to limit the accessibility of information placed online in certain Member States. However, as such method does not comply with EU policy regarding the freedom of competition, it raises different doubts. [228]

Therefore, injunctions for rectification or removal revealed the greatest weakness of the *Shevill* doctrine as such a claim could only be granted or denied in total. Because of these procedural problems, he found that the "Mosaic Approach" created disadvantages to both parties involved.[229]

3.5. Exploring the Relevance of *Gtflix Tv* Case

The CJEU in one of its recent cases, *Gtflix Tv*[230] analysed the correlation between the claim for compensation for suffered damages and the action for rectification and removal of the alleged defamatory online material: whether the jurisdiction of the latter action determines the jurisdiction of the former when the claimant seeks both remedies at the same time in online defamation cases. The rendered judgement is decisive because the CJEU had to decide on the approach and choose the way how the CJEU case law should develop further, when dealing with the claim for compensation for the damages suffered from alleged defamatory content placed on the Internet while, at the same time, the claimant requests rectification and removal of the same:

to follow *eDate Advertising* and retain the "Mosaic approach" or

opt for *Bolagsupplysningen* and abandon the "Mosaic approach".

Gtflix Tv case concerns legal proceedings between two companies. The claimant, Gtflix Tv, having its centre of interest in Czech Republic, brought an action against its competitor, a Hungarian company, DR before the French courts, requesting the court 1) to order DR to abstain from defaming Gtflix Tv and its website, 2) to publish a legal notice in French and English on each of the online forums; 3) to permit the claimant to make a comment on the forums and 4) to pay compensation for material and non-material damages, for each symbolic amount of EUR 1.[231] It

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[227] "Opinion of Advocate General Bobek Delivered on 23 February 2021," *supra note,* 150: ¶ 84, ¶¶ 125-126; "Opinion of Advocate General Hogan Delivered on 16 September 2021," *supra note,* 221: ¶ 46.
[228] Buonaiuti, *supra note,* 138: 349-350, 352-353.
[229] "Opinion of Advocate General Bobek Delivered on 23 February 2021," *supra note,* 150: ¶ 89; *see also* Anna Bizer, "International jurisdiction for violations of personality rights on the internet: Bolagsupplysningen," *Common Market Law Review* 55 (2018): 1948.
[230] "Gtflix Tv v DR, Case C-251/20," EUR-Lex, accessed 1 June 2024, EUR-Lex - 62020CJ0251 - EN - EUR-Lex (europa.eu).
[231] Ibid., ¶ 15.

should be mentioned that after the dismissal of the claim, the claimant appealed the order and increased the amount of sum from EUR 1 to EUR 10 000, claiming it as compensation for material and non-material damages incurred in France.[232]

The Appeal Court of Lyon dismissed the claim due to the lack of jurisdiction and held that mere accessibility of the alleged defamatory content could not suffice when the latter did not trigger any interest in Internet users of that Member State. Gtflix Tv challenged the dismissal before the referring court and contended that since the alleged defamatory material was accessible in France, the French courts had jurisdiction to hear its claim regarding the damages suffered in France.[233]

Interestingly, the question posed before the CJEU only referred to the determination of the jurisdiction of the claim for compensation, which was formulated as follows: does Article 7(2) of Brussels Ibis allow the claimant to bring an action, requesting not only the rectification of information and the removal of content but also compensation for material and non-material damages, before the courts of each Member State where the alleged defamatory content is or was accessible, for compensation only in regards of the harm caused in the territory of that Member State though those courts are not competent to adjudicate on the claim for deletion and rectification of alleged defamatory material or the claimant should file a claim for both types of remedies in the same court: either where the defendant is domiciled or the claimant has a centre of interests?[234]

In other words, considering that, under Article 7(2) of the Brussels Ibis, injunction should be sought either before the defendant's domicile or claimant's centre of interests because it is a single and indivisible claim[235], does a claimant have the right to simultaneously seek compensation in the courts of Member State where the content is or was accessible only in regards to damages which occurred in that Member State? Does it mean that the claimant has the right to seek a claim for injunction in a single forum and simultaneously bring one/more than one claim before the other courts of Member States for partial compensation limited to the jurisdiction of the court seized, or he/she should bring a joint action requesting both types of remedies before one competent court?

The CJEU in *Gtflix Tv* made several important points on the way of making its decision. On the one hand, the CJEU confirmed that exclusive jurisdiction of either defendant's domicile or claimant's centre of interest is justifiable for the purposes of sound administration of justice.[236] Nonetheless, the CJEU also noted that, under Article 7(2) of Brussels Ibis, unlike deletion/rectification of alleged defamatory content or part of content, which is considered as a

[232] Ibid., ¶ 16.
[233] *Ibid.,* ¶ 16.
[234] *Ibid.,* ¶ 18.
[235] "Opinion of Advocate General Bobek Delivered on 23 February 2021," *supra note,* 150: ¶ 84, ¶ 125.
[236] "Gtflix Tv v DR, Case C-251/20," *supra note*, 228: ¶ 34.

single and indivisible claim, the claimant is allowed to seek full or partial compensation in the courts of Member State where he/she claims that suffered damages.[237]

Eventually, the CJEU concluded that the claims for compensation and rectification of the information and deletion of the alleged defamatory material on the Internet cannot be heard by the single court.[238]

The CJEU based its decision on the following reasons:

First, the CJEU clarified that actions for compensation for suffered damage and injunction requesting removal and rectification of alleged defamatory information and content from the Internet have different nature (divisibility), causes and purposes even though they are based on the same facts. Following this, the CJEU stated that hearing both claims jointly in a single court does not serve any special legal purpose, having no impact on sound administration of justice.[239]

In the CJEU's view, what ensures sound administration of justice is allowing the claimant to seek compensation for damages in the courts of Member State which is the most competent to examine the case due to the damage occurred and evidence gathered within the territory of the court seized.[240]

The CJEU stated that giving possibility to claim compensation only in regards of damages occurred in the court of Member State ensures sound administration of justice especially in cases, when the claimant's centre of interests is not identifiable.[241] The CJEU explained the necessity of giving such possibility to the claimant based on the CJEU's decision in *Bolagsupplysningen* case, when the CJEU held that the claimant (a legal person) does not have right to claim compensation for all suffered damages if its centre of interests is not identifiable.[242]

Thus, the question comes down to whether the CJEU should abandon or retain the "Mosaic Approach" to claims seeking compensation when the claimant also requests removal/rectification of the alleged defamatory content from the Internet either in the defendant's domicile or in his/her centre of interests. As already mentioned above, the CJEU in *Gtflix Tv* case clearly opted for retention of the "Mosaic Approach" and justified its choice based on sound administration of justice.

The main drawbacks of keeping the "Mosaic Approach" in regards of claims for compensation in online defamation cases is forum shopping and lack of foreseeability.

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[237] *Ibid.,* ¶ 35.
[238] *Ibid.,* ¶¶ 43-44.
[239] *Ibid.,* ¶¶ 36.
[240] *Ibid.,* ¶¶ 38.
[241] *Ibid.,* ¶¶ 39.
[242] "Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB," *supra note,* 155: ¶ 43.

It is important that the protection of victim do not turn into forum shopping and the balance between the claimants and defendants' rights be maintained. The chances of forum shopping especially increases when there is no uniform concept of defamation in EU law.

It should be argued that allowing claimants to bring claims for compensation for suffered damages for alleged defamatory online content before courts of each Member State where the latter content was or is accessible increases risks of forum shopping and does not ensure legal certainty. [243]

The claimant has possibility to prepare well and seek the claim before the court of Member State where his/her claim would be rendered well-founded since he/she is the one who initiates legal proceedings against the defendant and therefore chooses the competent fora. The claimant has more choice if he/she has the right to seek compensation whenever, in the EU, the alleged defamatory content was or is accessible. In such a situation, the claimant could seek compensation in each 27 Member State, which gives the claimant the right to choose between 27 Member States where he/she has more chances to succeed and better chances to gain more compensation based on the applicable Member State.

In a hypothetical scenario, when an alleged defamatory statement is qualified as defamation in A Member State, but it is not the same in B Member State, and the statement placed on the Internet was and is accessible in both A and B Member States. Also, the claimant has its centre of interests in B, where he/she seeks removal of such statement from the Internet. Most probably, the claimant would choose to file a claim for compensation for suffered damages in A Member State because the content is regarded as defamation in A Member State and was accessible there. Such development of events raises many doubts.

Now, considering the facts of the case, according to the criterion of mere accessibility, the alleged disparaging comments and website were also accessible in the Czech Republic and Hungary; why did the claimant not seek compensation in any of these Member States?

Furthermore, though the defendant, who should have considered and been aware that he/she could have been sued everywhere in the EU since the allegedly defamatory content is available online to everyone an anywhere in the EU, still is not capable to foresee that the claimant would institute proceedings for compensation other than claimant's centre of interests or defendant's domicile.

Another question arises whether keeping the "Mosaic Approach" when the claimant seeks the compensation for suffered damages from online material serves the purposes of „close connecting factor which is enshrined in Recital 16 of the Brussels Ibis. Allowing claimant to claim

[243] Buonaiuti, *supra note*, 226: 355.

for compensation whenever in the EU alleged defamatory content is or was accessible, increases the numbers of fora. How the claim can have close connecting factor with each of the Member State where the content was or is accessible? What is the purpose of "close connecting factor" if not minimization of fragmentation of legal proceedings?[244]

It is worth to analyse whether the focalisation criterion" offered by the Advocate General Hogan was better option for the CJEU, which the CJEU did not follow. the Advocate General Hogan's suggested the CJEU to take into account a "focalisation criterion" according to which for determination of the competent court in online defamation cases, mere accessibility to the alleged defamatory content on the Internet does not suffice and seized court also should consider whether the online content in question was particularly "directed towards" that certain Member State.[245]

"Focalization criterion" has several advantages if compared to simple accessibility of online content based on the "Mosaic Approach". First, it minimizes the number of competent courts. The latter criterion not only requires that the content is accessible in the Member State, but it also necessitates that the alleged defamatory material bears relevance to the residents of that Member States. In view of this, defendant is able to identify and reasonable foresee where he/she may be sued. Furthermore, in such case, the purposes of "close connecting factor" between the competent court and the action in question does not become idle and the sound administration of justice is ensured.[246]

From above, one may conclude that the CJEU missed the chance to keep the "Mosaic Approach" in regards to claims for compensation and still ensure legal certainty, maintain close connecting factor between the action in question and the court and avoid the risks of forum shopping.[247]

However, the CJEU's choice might be justified owing to the fact that the Advocate Hogan did not provide the relevant factors according to which it becomes clear that the alleged defamatory content placed online, being accessible everywhere in the EU, is directed towards, for example, in Belgium, but not France.

Thus, it is questionable what would be better solution, but it does not change the outcome of the case that the retention of the "Mosaic Approach" when the claimant seeks compensation in

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[244] "Opinion of Advocate General Hogan Delivered on 16 September 2021," *supra note,* 221: ¶ 53.
[245] *Ibid.,* ¶ 87; *see also* "Gtflix Tv v DR, Case C-251/20," *supra note*, 228: ¶ 42; *see also* "Football Dataco Ltd and Others v Sportradar GmbH and Sportradar AG, Case C-173/11," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62011CJ0173, ¶¶ 36, 39; *see also* " L'Oréal SA and Others v eBay International AG and Others, Case C-173/11," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62011CJ0173, ¶ 65; *see also* "Titus Alexander Jochen Donner, Case C-5/11," EUR-Lex, accessed 1 June 2024, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62011CJ0005, ¶ 27.
[246] "Opinion of Advocate General Hogan Delivered on 16 September 2021," *supra note,* 221: ¶ 91.
[247] *Ibid.:* ¶ 88.

online defamation cases gives rise to forum shopping and does not guarantee the principle of legal foreseeability which as a result undermines the sound administration of justice.

In conclusion, the CJEU keeps reiterating *Shevill*'s doctrine and having a narrow approach to the circumstances of the cases, not taking into account that ambiguity of Article 7(2) of Brussels Ibis gives more value and importance to the established approach and interpretation of CJEU on online defamation cases which equals as a precedent for future development of case law, compliance with objectives of Brussels Ibis and legal proceedings. This is also proved by the fact that the issues of interpretation of Article 7(2) of Brussels Ibis triggered and resulted in the second-highest number of preliminary references. In particular, under Brussels Ibis Regulation, there have been 16 preliminary references and under Brussels I Regulation – 10 preliminary references related to Article 7(2) of the Brussels Ibis.[248] Instead, it has been demonstrated and emphasized above that established approach of CJEU cause problems of forum shopping, legal foreseeability, risks of irreconcilable judgments resulting in deprivation of effective access to a court from interested parties and breach of fair trial.

[248] Hess, *supra note,* 8: 16.

CONCLUSIONS

Provided the observations, analysis and comparison of the peculiarities and problems of jurisdictional matters in defamation cases from newspaper to online environment, the following conclusions are to be made.

1. The victims of defamation are guaranteed by a key human rights instrument in the EU, namely the EU Charter, which corresponds with the Convention and interpretation of ECHR. In particular, the latter legal act acknowledges and guarantees the right to a reputation. Under Article 7(2) of the Brussels Ibis, the victims should enjoy clear jurisdictional rules for filing a claim in a competent court. However, one of the major problems that, without any doubt, influence the determination of jurisdiction on online defamation in the EU law is the lack of harmonisation between the rules on fair trial in the Convention and the rules on jurisdiction in Brussels Ibis, which should work as one system and mechanism for better recognition and safeguarding the right to a reputation against defamation. There is a risk that the lack of a uniform notion of defamation in EU law would not allow the victims to protect themselves against defamation in the courts of the Member States and the lack of certainty on the interpretation of Article 7(2) of the Brussels Ibis in which court to file a claim, would deprive the victim to exercise his/her rights and have access to a court.

2. Most importantly, when defamation occurs on the Internet, the increase in the frequency of such claims questions the clarity of Article 7(2) of the Brussels Ibis, which does not provide the criteria for determining the competent court in either newspaper or online defamation cases.

3. The analysis of the cases from the CJEU suggests that the interpretation provided by the CJEU in one judgment regarding the criteria for filing claims of online defamation has a significant impact on the content and interpretation of subsequent similar cases brought before the CJEU. The author comes to the conclusion that such impact is evident in the CJEU's case law, more precisely, the subsequent CJEU judgements on online defamation are under the influence of *Shevill*'s case, since the CJEU has not given up the "Mosaic Approach" over the years (since 1995) and is the reason why the CJEU has yet to abandon the latter approach.

4. The Internet and recent technological developments have made personality rights more fragile, making it more challenging to identify a competent court to file a claim. The ubiquitous nature of the Internet created gaps in jurisdictional matters concerning defamation cases. The main difficulties derive from the retention of the "Mosaic Approach" in online defamation cases. The author concludes that the latter approach turned into a safe harbour for the CJEU, which still maintains the "Mosaic Approach" alive. The comprehensive analysis of the

CJEU case law reveals two sides of Shevill's doctrine – on the one hand, the "Mosaic Approach" ensured legal certainty and effective legal proceedings when the defamation was not yet digitalised and it was much easier to identify the place where the damages occurred. On the other hand, the "Mosaic Approach" does not comply with the objectives of the Brussels Ibis when it is applied to online defamation cases. In particular, the "Mosaic Approach" creates risks of forum shopping and irreconcilable judgements, which do not ensure legal certainty and sound administration of justice.

5. The assessment of the CJEU case law also showed that the problem is not only a retention of the "Mosaic Approach". The CJEU created ambiguity regarding the centre of interest criterion when it did not provide factors for determining the competent court while applying the claimant's centre of interest criterion. Therefore, the CJEU, by establishing ambiguous criteria, does not ensure a better understanding, interpretation and application of Article 7(2) of Brussels Ibis. This shows that the judicial "power" of interpretation of Article 7(2) of Brussels Ibis is not sufficient when it does not have any practical implications in the refinement of the latter provision.

6. The latest CJEU judgement, *Gtflix Tv* case, revealed that the CJEU's approach is inconsistent and establishing new criteria in one judgement does not preclude application and reiterating the "Mosaic Approach" in online defamation cases in future judgements. Thus, following the above conclusion, the interpretation of Article 7(2) of the Brussels Ibis in online defamation cases by the CJEU is not sufficient to resolve the problems of determining the jurisdiction on personality rights which were created by the Internet if the drafters of the Brussels Ibis do not step in and refine Article 7(2) of the Brussels Ibis according to the recent and emerging challenges of online defamation cases.

7. The CJEU case analysis demonstrated that jurisdictional questions touch and affect the enjoyment of other fundamental rights of natural and legal persons rather than a right of reputation. The raised issues concern more than merely determining the competent court. The interpretation of the CJEU on such issues affects the right to access to a court and judicial remedy.

8. The choice of criteria determines not only the place where the claim should be filed and the defendant should defend himself/herself, but it also goes along with the merits of the case, affects the determination of applicable law, and affects the outcome of the case. Finally, it heads towards (goes down) to the balance between the right to a reputation and freedom of expression.

RECOMMENDATIONS

1. The solution to every problem starts with awareness and understanding. There were many victims whose right to a reputation was infringed by defamatory behaviour but could not make to the court simply because they were not aware that they were defamation victims. In case they did know, they could not determine the competent court and their claims were dismissed. From the defendant's perspective, because of the lack of awareness and understanding, it is possible that the defendants are not able to effectively defend themselves since they do not know the limits of the right to a reputation and, most importantly, cannot not foresee the courts where they may be sued. Raising awareness of the rights concerned is especially crucial when the online defamation is very widespread in an online environment. Therefore, first and foremost, the interested parties should be informationally prepared in order to (effectively) protect their rights since even if the legislation, for example, the provision, is perfect it may be devoid of its practical effects because of misinterpretation and misapplication of the latter by the interested parties. In this regard, to raise awareness in this regard:

- The topic and challenges of determining jurisdiction for online defamation cases should be investigated more thoroughly on an academic level to create sufficient sources as a supplement for interpreting of Article 7(2) of the Brussels Ibis, which includes not only conducting research studies, writing a paper, thesis, or book, but also publishing informational leaflets.
- Governmental and non-governmental bodies, as well as the social community, involving the scientific and judicial spheres, should organize conferences, debates, and moot courts involving students, academics, judges, and practitioners. The special target should be individuals, such as media representatives, who enjoy freedom of expression more widely.

2. During the discussion of the research topic, the author found that the interested parties need more clarity and certainty to determine the competent court of Member State in online defamation cases, which Article 7(2) of the Brussels Ibis does not ensure. This would be achieved by establishing a new special jurisdictional rule on online defamation. The new special jurisdictional rule should abandon the "Mosaic Approach" and be based on the claimant's centre of interests criterion.

3. Even though, as mentioned during the assessment of the criterion, the Author prefers the criterion centre of gravity of the dispute, the author acknowledges that the preference was made based on one specific case, which does not mean that the same criterion would have the same legal consequences and outcome in the presence of different circumstances. Hence, for legislative purposes, not to narrow down the scope of the rule, the centre of interests criterion would be a balanced choice: it would not create obstacles, such as relevance and subject matter set

by the new rule, for the claimants so that their claims are not dismissed and they have access to a court. Furthermore, the centre of interests unifies the claims for compensation and injunction in one jurisdiction which diminishes the fragmentation of the jurisdiction. Therefore, determining the competent court on claimant's centre of interests would lessen the risks of forum shopping and irreconcilable judgements and ensure legal certainty and sound administration of justice; most importantly, it would guarantee the right to a fair trial.

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ABSTRACT

The scientific study dives into the analysis of the jurisdictional problems created by Article 7 (2) of the Brussels Ibis in online defamation cases. The thesis discusses the notion of defamation in linguistic, historical, systemic approach in light of the EU's primary substantive and procedural laws, which demonstrated a lack of certainty and consistency due to the absence of common notion of defamation in EU law. The research identifies and underlines the main effects of the Internet on defamation cases and its challenges and consequences regarding determining of competent courts in EU Member States.

The conducted assessment is focused on the CJEU case law and given interpretation through the years and the development from newspaper to the online defamation, examining the problems, consequences of established criteria for determination of competent forum for online defamation. The established criteria by the CJEU are analysed in light of main objectives of the Brussels Ibis and right to fair trial. The thesis provides conclusions and recommendations based on the comprehensive research that identifies and underlines problems of determining jurisdiction in online defamation cases. The key findings of the thesis are that the created inconsistency and uncertainty derive from the non-existing uniform concept of defamation; the lack of uniform approach and clear interpretation regarding determination of competent court for online defamation requires new special rule to ensure legal certainty, predictability and sound administration of justice.

Key words: EU law, Brussel Ibis, Article 7(2), defamation, online defamation.

SUMMARY

PROBLEMS OF JURISDICTION OF ONLINE DEFAMATION CASES IN EUROPEAN UNION LAW

The author of the thesis **aims** to identify, underline and scrutinise the established criteria for interpretation of Article 7(2) of the Brussels Ibis in online defamation cases in light of the legal certainty and the right to a fair, particularly, the right to effective access to a court and propose the recommendations for the practical defence of infringed personality rights on the Internet. To achieve the aim of the thesis, the following **objectives** are set out to be accomplished:

1. to analyse the nature of defamation claims and the challenges of the application of Article 7(2) of Brussels Ibis and determine specificities of online defamation;

2. to identify the problems of the application of Article 7(2) of Brussels Ibis to determine jurisdiction in case of online defamation and foreseeability of jurisdiction;

3. to find out whether the existing rules on jurisdiction of online defamation claims are compatible with the right to a fair trial (access to the court).

The thesis encompasses **three chapters.** In the **first chapter**, the research illustrates the importance of establishing an autonomous concept of defamation in the EU law. To prove the latter, the author analyses the main legal documents of the EU law and the ECHR judgements, showing that the common approach does not exist with respect to the scope and limits of defamation. The first chapter also gives an overview of Brussels Ibis to provide background on how it functions, how it is structured and what its main objectives are.

The **second chapter** of the study scrutinises the established criteria of the CJEU, from newspaper to online defamation cases and their compliance with the main objectives of Brussels Ibis, namely, legal certainty, minimisation of the risk of irreconcilable judgements and sound administration of justice. The **third chapter** is dedicated to examining and evaluating the CJEU and ECHR case law on issues of separated jurisdiction for the compensation, rectification, and removal of allegedly harmful online publication and its impact on the right to access to a court.

To sum up, the thesis demonstrated that there is the lack of uniformity on the scope of defamation in the EU law and established criteria for the determination of a competent forum for online defamation cases are not compliant with the objectives of Brussels Ibis, which affects the rights of interested parties and the right to fair trial (access to a court).