The Forum Delicti and Personality Rights: an Overall Assessment in View of the Brussels Ibis Reform

El forum delicti y los derechos de la personalidad: una evaluación global en vista de la reforma del Reglamento Bruselas I bis

GIACOMO MAROLA

Ph.D. in Public Law, Criminal and International Justice (University of Pavia)
LL.M. in European and International Law (Europa-Institut, Saarland University)

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Abstract: The paper offers a fresh analysis of a delicate issue in European private international law: the application of the forum delicti under Article 7(2) of the Brussels Ibis Regulation to disputes arising from infringements of personality rights. It first outlines the principles underlying the f*orum delicti* and reconstructs the interpretative solutions developed by the European Court of Justice from *Shevill* to *Gtflix.* It then critically assesses the coherence of the Court's solutions and reviews the principal proposals for reform discussed in the literature, while also advancing an alternative approach. Overall, the paper seeks to contribute to the search for a balanced and coherent regulatory response to this unsettled issue in view of the forthcoming recast of the Brussels Ibis Regulation.

Keywords: International jurisdiction, Brussels Ibis Regulation, Forum delicti, Place where the harmful event occurred or may occur, Personality rights.

Resumen: El trabajo ofrece un nuevo análisis de una cuestión delicada del derecho internacional privado europeo: la aplicación del *forum delicti* en virtud del artículo 7, apartado 2, del Reglamento Bruselas I bis a los litigios derivados de infracciones de los derechos de la personalidad. El artículo expone, en primer término, los principios que fundamentan el *forum delicti* y reconstruye las soluciones interpretativas elaboradas por el Tribunal de Justicia de la Unión Europea desde *Shevill* hasta *Gtflix*. Asimismo, evalúa críticamente la coherencia de dichas soluciones y examina las principales propuestas de reforma debatidas en la doctrina, proponiendo además un enfoque alternativo. En definitiva, el trabajo pretende contribuir a la búsqueda de una respuesta normativa equilibrada y coherente a una cuestión todavía no resuelta, con vistas a la futura refundición del Reglamento Bruselas I bis.

Palabras clave: Jurisdicción internacional, Reglamento Bruselas I bis, Forum delicti, Lugar donde se haya producido o pueda producirse el hecho dañoso, Derechos de la personalidad.

I. Introduction

1. The resolution of conflicts of jurisdiction over civil law disputes arising from the infringement of rights relating to personality – that is, the right to reputation and the right to privacy – remains one of the most delicate issues in European private international law.[1]

2. Unsurprisingly, the Report on the application of Regulation (EU) No 1215/2012 (the so-called "Brussels Ibis Regulation"), published by the European Commission on 2 June 2025, devotes some attention to the topic.[2] After having recalled some of the criticisms raised in legal literature and practice against the case law of the European Court of Justice ("ECJ" or "the Court") from *Shevill*[3] to *Gtflix*[4] on the interpretation of the special ground of jurisdiction in matters relating to tort under Article 7(2) (the so-called "*forum delicti*"), the Report concludes that a future review of the Regulation could consider ways to simplify and modernise Article 7(2).[5]

3. The forthcoming recast of the Brussels Ibis Regulation offers a valuable opportunity to comprehensively revisit the case law of the ECJ on the interpretation of the *forum delicti* in personality rights disputes and to engage with the alternative approaches proposed in the literature. Against this background, the paper undertakes a critical examination of the Court's interpretative solutions and a review of the main proposals for reform advanced in legal literature. Building on this analysis, it also puts forward an alternative proposal on how the *forum delicti* might be reformed with respect to personality rights disputes. In doing so, the paper aims to contribute to the search for appropriate regulatory responses to a particularly delicate and unsettled issue within European private international law.

4. To this end, the paper is structured in five sections. Section II provides an overview of the *forum delicti*, its underlying principles, and the general theories developed by the ECJ in interpreting this ground of jurisdiction. Section III describes the Court's case law on personality rights disputes from *Shevill* to *Gtflix*. Section IV analyses the main criticisms raised by the Court's interpretative solutions. Section V outlines the alternative jurisdictional models proposed in the literature. Finally, Section VI concludes by presenting an alternative proposal on how the *forum delicti* might be reformed as regards personality rights disputes.

II. The *Forum Delicti*: Underlying Principles and General Theories of Interpretation

5. While Article 4(1) of the Brussels Ibis Regulation confers international jurisdiction on the courts of the Member State where the defendant is domiciled (the so-called "*forum rei*"), Article 7(2) –

[1] P. Mankowski, "Art. 1", in U. Magnus and P. Mankowski (eds.), *Rome II Regulation – Commentary*, vol. 3, Cologne, Verlag Dr. Otto Schmidt, 2019, p. 116.

[2] 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 of 20 December 2012, p. 1; European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, COM(2025) 268 final, 2 June 2025, pp. 9-10.

[3] ECJ 7 March 1995, *Shevill and Others v Presse Alliance SA*, Case C-68/93, ECLI:EU:C:1995:61.

[4] ECJ 21 December 2021, *Gtflix Tv v DR*, Case C-251/20, ECLI:EU:C:2021:1036.

[5] European Commission, *Report on the application of Regulation (EU) No 1215/2012*, cit., p. 20.

mirroring the equivalent provisions enshrined in Article 5(3) of the 1968 Brussels Convention and the Brussels I Regulation[6] – provides an additional head of jurisdiction in matters relating to tort, delict or quasi-delict, allowing the plaintiff to bring proceedings before the courts of «the place where the harmful event occurred or may occur».[7]

6. Hence, the «harmful event» is designated as the relevant element of a non-contractual obligation to determine international and territorial jurisdiction in tort disputes.[8] Yet the notion has been left undefined since the 1968 Brussels Convention.[9] To fill the legislative gap, the ECJ relies on a «principle-based» interpretation, drawing on two overarching objectives – procedural proximity and legal certainty – now expressly referred to in the preamble of the Brussels Ibis Regulation.[10] As to procedural proximity, the case law has repeatedly held that the *forum delicti* is «based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant's domicile, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings».[11] As to legal certainty, the ECJ has stressed that the *forum delicti* must be read in light of the Brussels I regime's objective of «strengthening of the legal protection of persons established in the Community, by enabling the claimant to identify easily the court in which he may sue and the defendant reasonably to foresee in which court he may be sued».[12] It must also be construed so that the court seised is «readily able to decide whether it has jurisdiction, without having to consider the substance of the case».[13] To this latter effect, it is often said that the Brussels I regime seeks to establish "hard-and-fast" rules of jurisdiction.[14]

7. These principles are consistently invoked by the ECJ both to delineate the substantive scope of Article 7(2) – namely, the concept of «matters relating to tort, delict or quasi-delict» – and to clarify the relevant connecting factor, that is, the «harmful event».[15] Moreover, the ECJ interprets Article 7(2) in light of the following criteria: (i) the need for an autonomous interpretation; (ii) the need for a restrictive

[6] Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, *OJ* L 299 of 31 December 1972, p. 32; 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 of 16 January 2001, p. 1.

[7] Since the 1968 Brussels Convention, the English-language version of the provision has been amended only once, when the Brussels I Regulation added a reference to the place where harm «may occur» alongside the original «place where the harmful event occurred». cfr. ECJ 1 October 2002, *Verein für Konsumenteninformation v Henkel*, Case C-167/00, ECLI:EU:C:2002:555, paras 44-50. The ECJ has consistently held that its interpretation of Article 5(3) of the Brussels Convention and Brussels I Regulation also applies to Article 7(2) of the Brussels Ibis Regulation; cfr. ECJ 9 July 2020, *Verein für Konsumenteninformation v Volkswagen AG*, Case C-343/19, ECLI:EU:C:2020:534, para 22.

[8] ECJ 15 July 2021, *RH v AB Volvo and Others*, Case C-30/20, ECLI:EU:C:2021:604, para 33; ECJ 2 December 2025, *Stichting Right to Consumer Justice and Stichting App Stores Claims v Apple Distribution International Ltd and Apple Inc*, Case C-34/24, ECLI:EU:C:2025:936, para. 50.

[9] Report by Mr P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, *OJ* C 59 of 5 March 1979, p. 26.

[10] Recitals 15 and 16 of the Brussels Ibis Regulation. The notion of «principle-based» interpretation is used by J.A. Pontier and E. Burg, *EU Principles on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters according to the Case Law of the European Court of Justice*, The Hague, T.M.C. Asser Press, 2004, p. 8.

[11] See, e.g., ECJ 11 January 1990, *Dumez France SA and Tracoba SARL v Hessische Landesbank and Others*, Case C-220/88, ECLI:EU:C:1990:8, para 17; ECJ 16 July 2009, *Zuid-Chemie BV v Philippo's Mineralenfabriek NV/SA*, Case C-189/08, ECLI:EU:C:2009:475, para 24; ECJ 10 March 2022, *ZK v BMA Braunschweigische Maschinenbauanstalt AG*, Case C-498/20, ECLI:EU:C:2022:173, para 29.

[12] See, e.g., ECJ 10 June 2004, *Rudolf Kronhofer v Marianne Maier and Others*, Case C-168/02, ECLI:EU:C:2004:364, para 20; ECJ 25 October 2012, *Folien Fischer AG and Fofitec AG v Ritrama SpA*, Case C-133/11, ECLI:EU:C:2012:664, para 33; ECJ 12 May 2021, *Vereniging van Effectenbezitters v BP plc*, Case C-709/19, ECLI:EU:C:2021:377, para 33.

[13] See, e.g., ECJ 28 January 2015, *Harald Kolassa v Barclays Bank plc*, Case C-375/13, ECLI:EU:C:2015:37, paras 61-62; ECJ 4 July 2024, *MOL Magyar Olaj- és Gázipari Nyrt. v Mercedes-Benz Group AG*, Case C-425/22, ECLI:EU:C:2024:578, para 45.

[14] See, e.g., C. Kohler, "Practical Experience of the Brussels Jurisdiction and Judgments Convention in the Six Original Contracting States", *International and Comparative Law Quarterly*, vol. 34, no. 3, 1985, p. 563.

[15] Pontier and Burg, cit., p. 180; M. Requejo Isidro, E. Wagner and M. Gargantini, "Art. 7", in M. Requejo Isidro (ed.), *Brussels Ibis: A Commentary on Regulation (EU) No 1215/2012*, Cheltenham, Edward Elgar, 2022, pp. 110-111.

interpretation, since it constitutes an exception to the general forum of the defendant's domicile; (iii) the need to preserve the *effet utile* of the *forum delicti*; (iv) the absence of a protective rationale; and (v) the objective of consistency with the Rome II Regulation.[16]

8. In light of these interpretative standards, the ECJ has progressively developed different theories on the interpretation of the «harmful event». Most notably, since *Mines de Potasse*, the Court has consistently held that, in distance torts, the «place where the harmful event occurred or may occur» covers both the place of the causal event and the place of damage (the "ubiquity" rule), thereby allowing the plaintiff to sue in either place at their discretion (the "optio fori" rule).[17] The ubiquity rule is sometimes criticised for overextending the scope of the *forum delicti*, multiplying heads of jurisdiction, and facilitating forum shopping.[18] Yet the ubiquity rule retains significant normative weight. By reflecting the constituent elements of tort liability, it confers jurisdiction to courts situated where the relevant evidence is most likely to be found, thereby aligning with procedural proximity.[19] It also promotes equality of arms between the litigants.[20] The choice between *forum actus* and *forum damni* is open not only to alleged victims but also to alleged tortfeasors seeking negative declaratory relief.[21] As the causal event often occurs where the tortfeasor is domiciled and the damage typically occurs where the victim is domiciled, the ubiquity rule often enables either party to bring proceedings both in their own home State and in the home State of the adversary. Finally, the dual solution ensures equal adjudicative authority to the courts of the different Member States involved in a distance tort.[22]

9. Against this background, the Court has never abandoned the ubiquity rule, which has emerged as the paradigmatic solution for interpreting the *forum delicti*, nor has it been challenged by the EU legislator in the previous recasting procedures.[23] At the same time, after *Mines de Potasse*, the Court has progressively sought to narrow down the scope of the connecting factors of the «event giving rise to the damage» and the «damage».[24] Regarding the place of the causal event (*locus actus*), the Court has held that, where several acts or omissions occur in different Member States, only one act in the causal chain is relevant for jurisdiction.[25] Jurisdictional relevance should be given to the act or omission that lies at the «origin» of the damage.[26] The relevant act or omission must constitute the «necessary precondition» of the harm and bear a direct causal link to the damage.[27] The place of the damage (*locus damni*) is «where the event giving rise to the damage produces its harmful effects, that is to say, where the damage actually

[16] See, e.g., ECJ 16 July 2009, *Zuid-Chemie*, cit., para 17; ECJ 11 January 1990, *Dumez*, cit., paras 16-17; ECJ 19 September 1995, *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*, Case C-364/93, ECLI:EU:C:1995:289, para 12; ECJ 25 October 2012, *Folien Fischer*, cit., para 46; ECJ 16 January 2014, *Andreas Kainz v Pantherwerke AG*, Case C-45/13, ECLI:EU:C:2014:7, para 20; ECJ 29 July 2019, *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v DAF Trucks N.V.*, Case C-451/18, ECLI:EU:C:2019:635, para 35.

[17] ECJ 30 November 1976, *Handelskwekerij G. J. Bier BV v Mines de Potasse d'Alsace SA*, Case 21/76, ECLI:EU:C:1976:166, paras 24-25.

[18] See, e.g., E. Lein, "Art. 7(2)", in A. Dickinson and E. Lein (eds.), *The Brussels I Regulation Recast*, Oxford, Oxford University Press, 2015, p. 156; P. Mankowski, "Art. 7", in U. Magnus and P. Mankowski (eds.), *Brussels Ibis Regulation – Commentary*, vol. 1, Cologne, Verlag Dr. Otto Schmidt, 2023, p. 261.

[19] Pontier and Burg, cit., pp. 184-185; Lein, cit., pp. 156-157; R. Monico, *La giurisdizione in materia extracontrattuale nello spazio giudiziario europeo*, Torino, Giappichelli, 2022, p. 332.

[20] J. Carrascosa González, "Distance Torts: the *Mines de Potasse* Decision Forty Years On", *Yearbook of Private International Law*, vol. XVIII, 2016/2017, pp. 37-38; Monico, cit., pp. 187-190.

[21] ECJ 25 October 2012, *Folien Fischer*, cit., para 47.

[22] Carrascosa González, "Distance Torts", cit., p. 37.

[23] cfr. *ibidem*, pp. 22 and 27; T.C. Hartley, "Jurisdiction in Tort Claims for Non-physical Harm under Brussels 2012, Article 7(2)", *International and Comparative Law Quarterly*, vol. 67, 2018, pp. 988, 997-998 and 1003; Monico, cit., p. 181.

[24] Requejo Isidro, Wagner and Gargantini, cit., p. 119.

[25] ECJ 5 July 2018, *AB flyLAL-Lithuanian Airlines v Starptautiskā lidosta Rīga VAS and Air Baltic Corporation AS*, Case C-27/17, ECLI:EU:C:2018:533, para 56.

[26] cfr. ECJ 7 March 1995, *Shevill*, cit., paras 20 and 24.

[27] cfr. ECJ 5 February 2004, *DFDS Torline A/S v LO Landsorganisationen i Sverige*, Case C-18/02, ECLI:EU:C:2004:74, para 34.

manifests itself».[28] It covers only the place where the «initial» damage is suffered by «direct» victims.[29] In *Shevill*, the ECJ has established that, in case of harm occurring in multiple countries (so-called "scattered" harm), a court seised on the basis of the *locus damni* has jurisdiction only over the portion of harm occurring in the forum State (so-called "mosaic" approach).[30] To date, the Court has expressly endorsed this solution only for specific categories of torts, most notably infringements of personality rights and intellectual property rights.[31]

10. A core difficulty in localising the «harmful event» for different torts lies in balancing procedural proximity and predictability. The preamble to the Brussels Ibis Regulation provides that a close connection between the dispute and the forum should ensure predictability of jurisdiction, especially for the defendant, which is particularly important in personality rights disputes.[32] In practice, however, proximity and predictability may conflict.[33]

11. On the one hand, proximity is best secured when the *locus actus* and the *locus damni* are determined through a thorough assessment of the facts of the case, so as to identify the court procedurally best placed to adjudicate. Yet this may undermine legal certainty, as the court seised could establish jurisdiction only after a comprehensive taking of evidence, and the parties' ability to identify the competent court would be highly dependent on the circumstances of the individual dispute. In essence, a too facts-oriented approach risks turning the search for the *locus actus* and the *locus damni* into a jurisdictional inquiry akin to a *forum (non) conveniens* analysis.[34]

12. On the other hand, legal certainty is generally enhanced when the *locus actus* and the *locus damni* are defined by abstract connecting factors that can be readily applied in individual cases. Proximity may still be pursued by selecting a connecting factor that, in principle, reflects a close link between a national legal order and the category of non-contractual obligations at stake. In practice, however, reliance on abstract connecting factors may assign jurisdiction to courts that lack a meaningful connection with the dispute. Moreover, reliance on such factors will often localise the *locus actus* at the tortfeasor's domicile, as this is commonly where the wrongful act is committed, and the *locus damni* at the victim's domicile, as this is frequently where the victim's damaged assets are located. This weakens the *effet utile* of the *forum actus*, since the tortfeasor's home courts will typically already have jurisdiction under the *forum rei*. In turn, the *locus damni* will enable the victim to sue in their home country, thereby establishing a *forum actoris* that sits uneasily with the general rule of the *forum rei*.

13. In addition to the tension between proximity and predictability, the localisation of the *locus actus* and *locus damni* in torts against personality rights is confronted with two layers of complexity specific to this category of torts.

14. First, personality rights disputes are culturally and politically sensitive. Since infringements of personality rights are usually committed in connection with the production and dissemination of me-

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[28] ECJ 16 July 2009, *Zuid-Chemie*, cit., para 27.

[29] ECJ 11 January 1990, *Dumez*, cit., para 20; ECJ 19 September 1995, *Marinari*, paras 14-15.

[30] ECJ 7 March 1995, *Shevill*, cit., paras 30 and 33. The term "mosaic" approach originated in German literature ("*Mosaikbetrachtung*") but is now widely used in legal literature to denote the limitation of the territorial scope of the *forum damni* affirmed in *Shevill*.

[31] Monico, cit., p. 215; cfr. Carrascosa González, "Distance Torts", cit., p. 29; Requejo Isidro, Wagner and Gargantini, cit., pp. 124-125.

[32] Recital 16, second and third sentences, of the Brussels Ibis Regulation. The specific mention of personality rights disputes at recital 16 of the Brussels Ibis Regulation was introduced upon the initiative of the European Parliament, with the view to overrule the *Shevill* case law. See further M. Reymond, *La compétence internationale en cas d'atteinte à la personnalité par Internet*, Genève, Schulthess Médias Juridiques SA, 2015, pp. 200-202.

[33] M. Poesen, "Is Specific Jurisdiction Dead and Did We Murder It? An Appraisal of the Brussels Ia Regulation in the Globalising Context of the HCCH 2019 Judgments Convention", *Uniform Law Review*, vol. 26, no. 1, 2021, pp. 1-2; Monico, cit., p. 53.

[34] cfr. Requejo Isidro, Wagner and Gargantini, cit., pp. 124-125.

dia content, such disputes ultimately involve a conflict between two competing fundamental rights: the right to reputation or privacy, on the side of the victim, and the right to freedom of expression, on the side of the tortfeasor.[35] In this context, the jurisdictional analysis is confronted with the delicate tasks of promoting equal treatment between the parties' competing fundamental rights and accommodating the different national conceptions at the European level regarding the proper balance between the two rights.

15. Second, personality rights infringements are characterised by a degree of geographical independence that is difficult to reconcile with the strictly territorial connecting factor adopted by the *forum delicti*, that is, the «harmful event». On the one hand, personality rights protect intangible assets of the victim's personal sphere, namely their moral integrity, and the harm arising as a result of the infringement is primarily non-pecuniary or ideal in nature.[36] On the other hand, in today's European information society, personality rights infringements are typically committed by means of the Internet.[37] Due to its attributes of ubiquity and virtuality, the Internet has increased the potential for cross-border violations of personality rights while simultaneously challenging the application of traditional private international law rules based on geographical connecting factors.[38]

III. The Interpretation of the «Place of the Harmful Event» in Personality Rights Disputes according to the ECJ Case Law

16. Back in 1995, in the seminal case *Shevill*, the ECJ was first asked to provide guidance on how to interpret the notion of «harmful event» – under Article 5(3) of the 1968 Brussels Convention – in a case of defamation committed through the press. After reaffirming the ubiquity rule, the ECJ held that, in the case of a libel committed by a newspaper article distributed in several Contracting States, the *locus actus* coincides with the «place where the publisher is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation».[39] The courts of the place where the publisher is established have jurisdiction «for all the harm caused by the allegedly defamatory material».[40] As regards the *locus damni*, the ECJ held that the damage is deemed to occur in the «places where the publication is distributed and where the victim is known in those places».[41] By upholding the view of Advocates General (AGs) Darmon and Léger, the ECJ ruled that the «courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State», as these courts «are territorially the best placed to assess the libel committed in that State and to determine the extent of the corresponding damage».[42]

17. In 2011, in the landmark joined cases *eDate Advertising and Martinez*, the ECJ first addressed the interpretation of the «place of the harmful event» in personality rights infringements committed via the Internet.[43] After having recalled the solutions upheld in *Shevill* for press defamation, the ECJ

[35] J.-J. Kuipers, "Personality Rights", in J. Basedow *et al.* (eds.), *Encyclopedia of Private International Law*, Cheltenham, Edward Elgar, 2017, p. 1351; P. A. de Miguel Asensio, "Protection of Reputation, Good Name and Personality Rights in Cross-Border Digital Media", *GRUR International*, vol. 71, no. 11, 2022, p. 1019.

[36] J. Carrascosa González, "The Internet – Privacy and Rights Relating to Personality (Volume 378)", in *Collected Courses of the Hague Academy of International Law*, Leiden, Brill Nijhoff, 2016, pp. 355-356.

[37] *ibidem*, pp. 281-286.

[38] S. C. Symeonides, *Cross-Border Infringement of Personality Rights via the Internet: A Resolution of the Institute of International Law*, Leiden, Brill Nijhoff, 2021, pp. 12-14.

[39] ECJ 7 March 1995, *Shevill*, cit., para 24.

[40] *ibidem*, para 25.

[41] *ibidem*, para 29.

[42] *ibidem*, paras 30-31. See Opinion of AG Darmon, 14 July 1994, *Fiona Shevill and others v Presse Alliance SA*, Case C-68/93, ECLI:EU:C:1994:303, paras 34, 62-64 and 71-79; Opinion of AG Léger, 10 January 1995, *Fiona Shevill and others v Presse Alliance SA*, Case C-68/93, ECLI:EU:C:1995:1, paras 54-57.

[43] ECJ 25 October 2011, *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited*, Joined Cases C-509/09 and C-161/10, ECLI:EU:C:2011:685.

held that these solutions also apply «to other media and means of communication and may cover a wide range of infringements of personality rights recognised in various legal systems».[44] Nevertheless, consistently with the emphasis placed by AG Cruz Villalón on the exceptional characteristics of the Internet, the Court considered that the placing online of content, differently from the dissemination of information through conventional media such as the press, is meant to ensure the «ubiquity of that content».[45] Online content «may be consulted instantly by an unlimited number of Internet users throughout the world, irrespectively of any intention on the part of the person who placed it [online]… and outside that person's control».[46] Not only does the Internet «reduce the usefulness of the criterion of distribution» relied upon in *Shevill*, given that «the scope of the distribution of content placed online is in principle universal», but for online content it is «not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State».[47] The difficulties in giving effect to the criterion of "distribution" in the online environment are further exacerbated by the «serious nature of the harm which may be suffered by the holder of a personality right», given that the injurious information «is available on a world-wide basis».[48]

18. Against this background, the ECJ agreed with AG Cruz Villalón that, compared to *Shevill*, an additional connecting factor should have been introduced in case of personality rights infringements committed through the Internet. AG Cruz Villalón proposed granting full jurisdiction to the courts of the Member State where the «centre of gravity of the dispute» is situated.[49] According to the AG, this centre of gravity was to be determined on the basis of two cumulative elements: one concerning the «individual whose personality rights have allegedly been infringed», intended to identify where that person has their «centre of interests», and one concerning the «nature of the information», intended to establish whether that information is «objectively relevant» or «newsworthy» in a particular Member State.[50] The ECJ remained silent on the second prong of the jurisdictional test proposed by AG Cruz Villalón and held that the victim of an online infringement of a personality right may bring proceedings, in respect of «all the damage» suffered, before the courts of the Member State where that person has their «centre of interests».[51]

19. According to the ECJ, the place where a person has their centre of interests corresponds in general to their habitual residence, but a person may also have the centre of their interests in a different Member State, insofar as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.[52] The attribution of jurisdiction to the courts at the victim's centre of interests aligns with the principle of procedural proximity, as these courts are best placed to assess the impact which a material placed online is liable to have on an individual's personality rights.[53] It is also said to fit consistently with the aim of predictability, since the publisher of online content is, at the time of uploading, in a position to know the centre of interests of the person who is the subject of the content.[54]

20. The ECJ further considered that the adaptation, to the online context, of the criterion of the place where the damage occurred, as interpreted in *Shevill*, requires that jurisdiction limited to the «damage caused in the territory of the Member State of the court seised» under the "mosaic" approach

[44] *ibidem*, para 44.

[45] *ibidem*, para 45. See Opinion of AG Cruz Villalón, 29 March 2011, *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited*, Joined Cases C-509/09 and C-161/10, ECLI:EU:C:2011:192, paras 42-48.

[46] ECJ 25 October 2011, *eDate Advertising and Martinez*, cit., para 45.

[47] *ibidem*, para 46.

[48] *ibidem*, para 47.

[49] Opinion of AG Cruz Villalón on *eDate Advertising and Martinez*, cit., paras 58, 59 and 82.

[50] *ibidem*, paras 58-60 and 63.

[51] ECJ 25 October 2011, *eDate Advertising and Martinez*, cit., para 48.

[52] *ibidem*, para 49.

[53] *ibidem*, para 48.

[54] *ibidem*, para 50.

must be given to the «courts of each Member State in the territory of which content placed online is or has been accessible».[55]

21. Accordingly, the ECJ concluded that, in the event of an infringement of personality rights by means of online content, the victim may bring proceedings on the basis of the *forum delicti* either before the courts of the Member State where the publisher is established, the courts of the Member State where the victim has their centre of interests, or the courts of any Member State where the online content is or has been accessible. The latter courts have jurisdiction over the damage suffered by the victim on the territory of the Member State where the court seised is situated.[56]

22. In *Bolagsupplysningen*[57], the ECJ introduced two main innovations: it extended the jurisdictional ground of the "victim's centre of interests" to personality rights claims brought by legal persons, and it excluded the availability of the "mosaic" jurisdiction where the plaintiff seeks rectification or removal of online content.

23. As regards the extension of the victim's centre of interests to legal persons, the ECJ reasoned that whether the damage arising from the infringement of personality rights is material or non-material has no bearing on the determination of jurisdiction.[58] Moreover, this ground of jurisdiction reflects the place where «the damage caused by the online material occurs most significantly», given the reputation enjoyed by the relevant person there.[59] As such, this jurisdictional option is «justified in the interests of sound administration of justice and not specifically for the purposes of protecting the applicant».[60]

24. In *Bolagsupplysningen*, the ECJ was confronted with the identification of the «centre of interests» of a company incorporated in one Member State (Estonia) that conducted most of its business in another Member State (Sweden). Consistently with the opinion of AG Bobek, the ECJ reasoned that a company has its centre of interests in «the place where it carries out the main part of its economic activities», as this is where its commercial reputation is most firmly established and thus where any injury to that reputation would be felt most keenly.[61] At the same time, it held that a company's centre of interests «may coincide» with the place where the company has its registered office «when it carries out all or the main part of its activities in the Member State where that office is situated», but the place of registration is not «a conclusive criterion».[62] Furthermore, the Court added that, in the case at hand, the courts of the Member State where the claimant conducted its main economic activities (Sweden) were best placed to assess the existence and scope of the harm, «particularly given that» the injury to its reputation arose from online information and comments published on «a professional site managed» in that Member State and written in a «language» (i.e. Swedish) meant «to be understood by people living in that Member State».[63] At the same time, the ECJ held that, in circumstances «where it is not clear from the evidence» available at the jurisdictional stage whether the legal person mainly conducts its economic activity in a given Member State, such that its centre of interests «cannot be identified», that person «cannot benefit from the right to sue» at its centre of interests.[64]

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[55] *ibidem*, para 51.

[56] *ibidem*, par 52 and operative part (1).

[57] ECJ 17 October 2017, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, Case C-194/16, ECLI:EU:C:2017:766.

[58] *ibidem*, paras 36-37.

[59] *ibidem*, paras 33 and 42.

[60] *ibidem*, para 38.

[61] *ibidem*, paras 41-42. cfr. Opinion of AG Bobek, 13 July 2017, *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*, Case C-194/16, ECLI:EU:C:2017:554, paras 99-117.

[62] *ibidem*, para 41.

[63] *ibidem*, para 42.

[64] *ibidem*, para 43.

25. As regards the "mosaic" approach, the case raised the question of whether courts having "mosaic" jurisdiction based on the accessibility of harmful content in the forum State should also have had jurisdiction over actions seeking the rectification or removal of such content, in addition to actions for compensation of the harm suffered in the forum State. On this point, the ECJ did not engage with the extensive analysis of AG Bobek.[65] The AG argued that, due to the problems surrounding its application and the risk of abuses, the "mosaic" jurisdiction should have been abandoned altogether, irrespective of the remedies sought.[66] Yet the ECJ limited itself to excluding the availability of the "mosaic" jurisdiction for actions seeking the rectification and removal of online content, reasoning that these remedies are territorially "indivisible", while implicitly affirming the continuing existence of the "mosaic" jurisdiction for territorially "divisible" remedies like compensation. To this end, it held that, due to «the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal», an application for rectification and removal of online content is a «single and indivisible» remedy and can, as such, only be brought before a court «with jurisdiction to rule on the entirety of an application for compensation for damage, and not before a court that does not have jurisdiction to do so».[67]

26. In *Mittelbayerischer*, the Court ruled that a plaintiff may invoke jurisdiction at their «centre of interests» only if the harmful online content refers, directly or indirectly, to that person.[68] In the main proceedings, a former Auschwitz prisoner sued before the courts of his habitual residence (Poland) a German publisher operating a local newspaper, which, in an online article, used the adjective "Polish" to describe a Nazi extermination camp in occupied Poland. The Court held that, unlike *eDate* and *Bolagsupplysningen*, where the plaintiffs were mentioned by name in the harmful content, in *Mittelbayerischer* the victim was not referred to at all, either directly or indirectly, in the harmful online content.[69] Upholding jurisdiction at the "victim's centre of interests" in such circumstances would undermine the predictability the Brussels Ibis Regulation seeks to ensure, especially for defendants.[70] If the victim is not referred to at all in the harmful content, the publisher cannot, at the time of uploading, know the centres of interest of persons who are not referred to and thus cannot reasonably foresee where they might be sued.[71] Moreover, allowing members of a general group, such as Polish nationals, to claim jurisdiction at their own centres of interest would lead to a multiplication of potential heads of jurisdiction. The centre of interests of each individual member of the group could be located in any EU Member State, exposing the defendant to the risk of being sued in all Member States.[72] Besides conflicting with the objective of predictability, this outcome would disregard the requirement to ensure a particularly close connection between the dispute and the forum.[73] Only such a connection justifies a derogation from the general rule of jurisdiction at the defendant's domicile.[74] To comply with the objective of predictability, in personality rights disputes, the existence of such a close connection must not be based solely on subjective factors related to the individual sensitivity of the victim, but also on objective and verifiable elements that make it possible to identify, directly or indirectly, that person as an individual.[75]

27. Finally, in *Gtflix*, building on its findings in *Bolagsupplysningen*, the ECJ held that, unlike actions for rectification and removal of online content, courts with "mosaic" jurisdiction based on the accessibility of the harmful content in the forum do have jurisdiction over actions for compensation.[76] This

[65] cfr. Opinion of AG Bobek on *Bolagsupplysningen*, cit., paras 73-98.
[66] *ibidem*, paras 123 and 129.
[67] ECJ 17 October 2017, *Bolagsupplysningen*, cit., para 48.
[68] ECJ 17 June 2021, *Mittelbayerischer Verlag KG v SM*, Case C-800/19, ECLI:EU:C:2021:489, para 46 and the operative part.
[69] *ibidem*, paras 35-36.
[70] *ibidem*, para 37.
[71] *ibidem*, para 38.
[72] *ibidem*, paras 39 and 43.
[73] *ibidem*, paras 40 and 45.
[74] *ibidem*, para 41.
[75] *ibidem*, para 42.
[76] ECJ 21 December 2021, *Gtflix*, cit., para 43 and the operative part.

applies even when the plaintiff, as in the main proceedings, jointly requests injunctive relief and compensation, as the remedies sought may be split if needed.[77] While actions for rectification and removal are «single and indivisible», «no such justification exists» for actions for compensation.[78] According to the Court, the availability of "mosaic" jurisdiction for compensation serves the sound administration of justice on two grounds. First, courts where the content is accessible are «perfectly capable» of assessing the existence and extent of the damage suffered within their territory.[79] Second, according to the ECJ's previous finding in *Bolagsupplysningen*, the plaintiff cannot sue at the «centre of interests» when its «centre of interests» cannot be identified. In such a situation, the "mosaic" jurisdiction ensures that victims can still bring proceedings on the basis of the *forum damni* and obtain at least partial compensation for the harm suffered.[80]

28. Furthermore, in *Gtflix*, the ECJ rejected the AG Hogan's argument that the "mosaic" approach could have been combined with "targeting", in place of "accessibility". In this way, it strengthened the view, tracing back to *eDate*, that "mosaic" jurisdiction depends on the mere accessibility of the harmful content in the forum State. In particular, AG Hogan argued that national courts should have had "mosaic" jurisdiction only if the «publication … have been specifically directed towards the territory of the Member State concerned», rather than merely because the content is or has been accessible there.[81] Against this background, the ECJ held firmly that «it must be borne in mind» that the mosaic jurisdiction «is subject to the sole condition that the harmful content must be accessible or have been accessible in that Member State».[82] On the one hand, it recalled that, unlike Article 17(1)(c) for consumer contracts, Article 7(2) of the Brussels Ibis Regulation does not require that the defendant's activity must have been "directed" to the forum State.[83] On the other hand, it warned that making jurisdiction dependent on «additional conditions» could «lead … to the de facto exclusion» of the option for the applicant to bring proceedings in the Member States where the online content is accessible, whereas a person who claims to have suffered an injury to their personality rights «must always be able to bring proceedings before the courts of the place where the damage occurred».[84]

IV. Assessment of the ECJ's Interpretation of the «Place of the Harmful Event» in Personality Rights Disputes

29. This section critically analyses the solutions developed by the ECJ in the case law from *Shevill* to *Gtflix*. It begins with the jurisdictional ground of the publisher's place of establishment as the *locus actus*. It then turns to the two jurisdictional venues available under the *forum damni*: the "mosaic" jurisdiction based on the distribution or accessibility of the harmful content in the forum State, and jurisdiction at the victim's centre of interests. Finally, it considers the merits of diversifying the interpretation of the *locus damni* depending on the medium used to perpetrate infringements of personality rights.

1. The Publisher's Place of Establishment as the *Locus Actus* in Personality Rights Disputes

30. In *Shevill* and *eDate*, the Court conferred jurisdiction based on the *locus actus* to the courts of the Member State where the publisher is established.[85] In *Shevill*, this was motivated by the ECJ on

[77] *ibidem*, paras 36, 43, and the operative part.
[78] *ibidem*, para 35.
[79] *ibidem*, para 38.
[80] *ibidem*, para 39.
[81] Opinion of AG Hogan, 16 September 2021, *Gtflix Tv v DR*, Case C-251/20, ECLI:EU:C:2021:745, para 88.
[82] ECJ 21 December 2021, *Gtflix*, cit., para 41.
[83] *ibidem*.
[84] *ibidem*, para 42.
[85] ECJ 7 March 1995, *Shevill*, cit., paras 33 and operative part (1); ECJ 25 October 2011, *eDate Advertising and Martinez*, cit., para 52 and operative part (1).

the ground that the place of the publisher's establishment was «where the harmful event originated and from which the libel was issued and put into circulation».[86]

31. Regarding the notion of "publisher", the ECJ treats it as a factual concept to designate the person or entity that, regardless of the medium used, has adopted and implemented the decision to make the harmful content available to third parties.[87] This approach reflects the circumstances of *Shevill* and *eDate*. Indeed, in both cases, the victims brought proceedings against the legal entity within whose organisation the decision to disseminate the harmful content was taken. However, depending on the circumstances, the victim may choose to bring proceedings against any other person involved at any stage of the chain of acts that ultimately led to the dissemination of the controversial content. For instance, the plaintiff might, for strategic reasons, choose to sue the author of the content rather than the person with editorial responsibility. In the online environment, where the dissemination of information is virtually open to anyone[88], often in the absence of editorial control, the plaintiff may choose to bring proceedings against the entity that provides the technical means to enable the dissemination of the relevant information on the Internet (the so-called "intermediaries")[89], rather than against the author or the publisher of the information. For the sake of proximity, the relevant "establishment" under the *forum actus* should be the establishment of the person whose liability is engaged in the specific dispute, whether it is the person that decided to make the controversial content available to third parties or any other person involved in the chain of acts leading to the dissemination of that content.[90]

32. Against this background, it is evident that the ECJ has localised the causal event in personality rights disputes primarily by reference to the tortfeasor's physical location (i.e., their place of establishment), rather than to the tortfeasor's conduct.[91] This choice reflects the intention to promote predictability in the allocation of jurisdiction.[92] In practice, identifying the causal act which, consistently with the general case law on the *forum actus*, lies at the "origin" of the causal chain and directly causes harm is often difficult, as personality torts are notoriously characterised by complex causal chains.[93] Moreover, selecting the original causal act requires an assessment of the specific causal chain in question, making the determination of the competent court highly case-dependent. By contrast, focusing on the tortfeasor's physical location, irrespective of the characteristics of the specific causal chain, provides a durable interpretation of the causal event applicable across a wide range of personality rights disputes.

33. Still, interpreting the *locus actus* by reference to the tortfeasor's physical location risks promoting convergence between the *forum actus* and the *forum rei*. Indeed, the "publisher's place of establishment" has been criticised on the ground that this place often coincides with the defendant's domicile.[94] Yet the two grounds of jurisdiction are not identical, and important differences remain. First, having regard to the ECJ's neutral construction of the *forum delicti*, the jurisdictional ground of the "publisher's place of establishment" can be invoked by the tortfeasor for negative declaratory actions. This allows the tortfeasor to bring proceedings before the courts of their establishment, which will often

[86] *ibidem*, para 24.

[87] O. Feraci, "Diffamazione internazionale a mezzo internet: quale foro competente? Alcune considerazioni sulla sentenza eDate", *Rivista di diritto internazionale*, vol. 95, no. 2, 2012, p. 466.

[88] This is the «low threshold information distribution capacity» of the Internet; see D. J. B. Svantesson, *Private International Law and the Internet*, Alphen aan den Rijn, Wolters Kluwer, 2021, pp. 109-110.

[89] Indeed, suing intermediaries is often easier and more convenient for victims of illegal online activities than pursuing primary infringers. See, e.g., J. Hörnle, *Internet Jurisdiction Law and Practice*, Oxford, Oxford University Press, 2021, pp. 34-35.

[90] cfr. S. Brachotte and A. Nuyts, "Jurisdiction over Cyber Torts under the Brussels I Regulation", in A. Savin and J. Trzaskowski (eds.), *Research Handbook on EU Internet Law*, Cheltenham, Edward Elgar, 2014, p. 238; T. Lutzi, *Private International Law Online: Internet Regulation and Civil Liability in the EU*, Oxford, Oxford University Press, 2020, p. 79.

[91] Brachotte and Nuyts, cit., p. 79.

[92] de Miguel Asensio, cit., p. 1021.

[93] Monico, cit., p. 197.

[94] See, e.g., J. von Hein, "Protecting Victims of Cross-Border Torts", *Yearbook of Private International Law*, vol. XVI, 2014/2015, pp. 271-272; Hartley, "Jurisdiction", cit., p. 999; de Miguel Asensio, cit., p. 1021.

coincide with their home State, whereas a comparable option is normally unavailable under the *forum rei*.[95] Moreover, for systematic reasons and in order to preserve the *effet utile* of the *forum delicti*, the notion of "establishment" in *Shevill* and *eDate* should be interpreted more broadly than "domicile". The most obvious point of reference is the ECJ's case law on freedom of establishment under the Treaty on the Functioning of the European Union (TFEU).[96] A natural person may thus be deemed "established" in a Member State if they participate, on a stable and continuous basis, in the economic and social life of that State.[97] A legal person is "established" where it conducts an economic activity on a stable basis through a fixed place of business, either as a primary establishment (domicile) or as a secondary one (agency, branch, or other establishment).[98]

34. Should it, in any event, be accepted that the tortfeasor's conduct is entirely irrelevant under the jurisdictional ground of the publisher's place of establishment? The case law is admittedly ambiguous on the role of the tortfeasor's conduct in the jurisdictional analysis. The operative parts of the judgments on *Shevill* and *eDate* strictly localise the *locus actus* at the publisher's place of establishment. However, in the motivation of *Shevill*, the ECJ justified the jurisdiction at the publisher's place of establishment on the ground that this was where the original act of the causal chain occurred – namely, where «the libel was issued and put into circulation».[99] A similar approach is adopted by the ECJ in cases concerning online infringement of intellectual property rights.[100]

35. The ambiguity of the case law leaves room for five alternative constructions regarding the role of the tortfeasor's conduct in the jurisdictional analysis based on the *locus actus* in personality rights disputes.

36. According to a first possible construction, the causal event is to be localised exclusively on the basis of the tortfeasor's physical location (i.e., their place of establishment), with no regard for the tortfeasor's conduct.[101] As anticipated above, this construction promotes predictability. It also facilitates access to justice for victims, as the place of action usually falls within the tortfeasor's organisational sphere and may be unknown to the victim.[102] However, it may lead to a multiplication of competent courts whenever the tortfeasor has multiple establishments in several Member States. Furthermore, as regards proximity, this construction is based on the assumption that the tortfeasor will typically have committed the causal act where they are established. While this assumption may hold true in most cases, it will not in all. If the *locus actus* is determined solely by reference to the tortfeasor's place of establishment, a court situated at that place may be deemed competent even when the wrongful act was committed elsewhere. This would contradict the settled ECJ case law, according to which, for the sake of proximity, jurisdiction based on the *locus actus* may be established only when the tortfeasor has acted within the jurisdiction of the court seised.[103]

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[95] S. Marino, "Nuovi sviluppi in materia di illecito extracontrattuale online", *Rivista di diritto internazionale privato e processuale*, vol. 48, no. 4, 2012, p. 889.

[96] Consolidated version of the Treaty on the Functioning of the European Union (2016) OJ C202/1, arts 49-55. See, e.g., E. Márton, *Violations of Personality Rights Through the Internet: Jurisdictional Issues Under European Law*, Baden-Baden, Nomos, 2016, pp. 159-161; T. Lutzi, "Internet Cases in EU Private International Law – Developing a Coherent Approach", *International and Comparative Law Quarterly*, vol. 66, 2017, p. 687, pp. 709-710; L. Lundstedt, "International Jurisdiction over Cross-Border Private Enforcement Actions under the GDPR", *Stockholm Faculty of Law Research Paper Series*, no. 57, 2018, pp. 235-236.

[97] cfr. ECJ 21 June 1974, *Jean Reyners v Belgian State*, Case 2/74, ECLI:EU:C:1974:68, para 21.

[98] cfr. ECJ 25 July 1991, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others*, Case C-221/89, ECLI:EU:C:1991:320, para 20.

[99] ECJ 7 March 1995, *Shevill*, cit., para 24.

[100] ECJ 19 April 2012, *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, Case C-523/10, ECLI:EU:C:2012:220, paras 34-39 and the operative part; ECJ 22 January 2015, *Pez Hejduk v EnergieAgentur.NRW GmbH*, Case C-441/13, ECLI:EU:C:2015:28, paras 24-25.

[101] See, to this effect, Brachotte and Nuyts, cit., p. 235.

[102] Carrascosa González, "The Internet", cit., p. 330; Márton, cit., pp. 241-242.

[103] cfr. ECJ 16 May 2013, *Melzer v MF Global UK Ltd*, Case C-228/11, ECLI:EU:C:2013:305, paras 27-30; ECJ 3 April 2014, *Hi Hotel HCF SARL v Uwe Spoering*, Case C-387/12, ECLI:EU:C:2014:215, para 32; ECJ 5 June 2014, *Coty Germany*

37. According to the second (opposite) construction, the causal event should be localised solely by reference to the tortfeasor's conduct. In turn, the jurisdiction of the courts of the tortfeasor's establishment would be a mere incidental consequence of the fact that the tortious conduct was actually performed there. This construction strives to emancipate the *forum actus* from the *forum rei* on grounds of proximity. If the causal act is properly defined, the court located where the causal act occurred will have a strong basis to ascertain liability. Yet this approach leaves the interpreter with the difficult task of identifying the relevant causal act for jurisdictional purposes.

38. In addition of being a case-dependent exercise, the search for the proper causal act in personality rights disputes is complicated by the difficulties in balancing proximity and predictability. In the context of defamation, this is well illustrated by the ambiguity maintained by the ECJ in *Shevill*, where it referred to the fact that the «libel was issued and put into circulation» at the publisher's establishment. This expression may encompass at least four acts: (i) the creation of the defamatory content (e.g., writing); (ii) the adoption of the final decision to publish it (e.g., by the competent editorial office); (iii) printing; (iv) the initiation of the distribution process (e.g., dispatching).[104] The decision to publish – possibly in combination with printing and dispatching – may be regarded the "original" act of the causal chain, since only through such actions does the defamatory article come into existence for the public.[105] It also ensures a reasonable degree of proximity, as the place where the decision to publish is adopted is where the defamatory article was subject to editorial evaluation.[106] Moreover, this location is often easily ascertainable, as it typically coincides with the location of the competent editorial office.[107] By contrast, the creation of the content may be considered a preparatory act and, as such, irrelevant for jurisdiction. Moreover, the process of creating the content may have lasted for a long time, occurred in multiple locations, and be known only by the author. Still, where this process is concentrated in a specific territory, the courts of that place may have a close connection to the dispute, as all the evidence concerning the sources used to prepare the content is likely to be found there.[108]

39. The uncertainties in selecting the proper causal act are even more pronounced in cases of online defamation. To determine the *locus actus* for cyber torts, the ECJ has appropriately refused, for the sake of predictability, to give significance to the location of the web server hosting the content.[109] The case law suggests that two acts should be cumulatively considered when determining the *locus actus* for cyber torts: the decision to upload the content online and the act of uploading itself.[110] The former should arguably carry greater weight for jurisdictional purposes. Uploading merely executes a prior decision to that effect. In any event, the act of uploading is not, in itself, a particularly reliable connecting factor. Indeed, uploading may occur, at the tortfeasor's discretion, wherever an Internet connection is available, even in wholly fortuitous locations (e.g., while travelling).[111] By contrast, the decision to upload may be a reliable factor when the defamatory content is disseminated by a professional media outlet. In such cases, as with the press, the place where the decision to upload is taken corresponds to the place where the defamatory article was subject to editorial evaluation. In turn, this will normally coincide with the media outlet's headquarters, which is generally easy to identify. However, when the decision to upload is taken by an "ordinary" individual acting in a private capacity, for example on social media, this connecting factor loses much of its reliability. In such cases, the decision no longer reflects an external editorial evaluation but only the author's subjective conviction that the content deserves to be published online. Moreover, the place of the decision to upload may be entirely fortuitous and known only to the author. Overall, both

GmbH v First Note Perfumes NV, Case C-360/12, ECLI:EU:C:2014:1318, paras 49-51.

[104] cfr. Márton, cit., pp. 156-157; Hartley, "Jurisdiction", cit., pp. 999-1000.

[105] Márton, cit., p. 241; Carrascosa González, "The Internet", cit., p. 339.

[106] Márton, cit., p. 241.

[107] *ibidem*.

[108] *ibidem*, p. 242.

[109] ECJ 19 April 2012, *Wintersteiger*, cit., para 36.

[110] cfr. *ibidem*, paras 34-37; ECJ 22 January 2015, *Hejduk*, cit., paras 24-25; de Miguel Asensio, cit., p. 1021.

[111] Márton, cit., pp. 244-245; Lutzi, *Private International Law*, cit., p. 157.

the decision to upload and the act of uploading should therefore be treated with caution for jurisdictional purposes. Their relevance as the *locus actus* should be evaluated in light of the circumstances of the dispute, particularly in cases of online publications by private individuals. Where the reliability of these two factors diminishes, greater weight may be accorded to others, such as the creation of the content.

40. A third possible reconstruction of the case law is to treat the tortfeasor's establishment and the causal act as cumulative connecting factors, both of which must be satisfied to establish jurisdiction.[112] Conversely, an alternative reconstruction is to treat the tortfeasor's establishment and the causal act as independent jurisdictional grounds, thereby enabling the plaintiff to bring proceedings in either forum.[113] Both approaches are, however, difficult to reconcile with procedural proximity, particularly where the causal act occurred outside the tortfeasor's establishment. In such cases, the first reconstruction would exclude the jurisdiction of the courts where the causal act occurred, while the second would confer jurisdiction on the courts of the tortfeasor's establishment even if no act was committed there.

41. The last possible reconstruction – and, arguably, the most balanced one – is to read the ECJ's case law as establishing a rebuttable presumption that the causal act took place at the tortfeasor's establishment, unless proof to the contrary is provided.[114] This reading aligns with the case law's primary emphasis on the tortfeasor's establishment, while recognising that the ECJ justified jurisdiction there on the ground that it was the place of the causal act. The proposed approach thus seeks to reconcile predictability with proximity. On the one hand, for the sake of predictability, jurisdiction based on the *locus actus* is, as a rule, concentrated in the tortfeasor's place of establishment. On the other hand, to safeguard proximity, the court of the tortfeasor's establishment shall decline jurisdiction if the evidence available at the jurisdictional stage indicates that the causal act did not occur there. In the same vein, proximity also justifies giving the plaintiff the option to bring proceedings before a court other than that of the tortfeasor's establishment. In such cases, the plaintiff must provide reasonably convincing evidence to rebut the presumption in favour of the tortfeasor's establishment and to show that the causal act occurred within the jurisdiction of the chosen court.

2. The "Mosaic" Jurisdiction in Personality Rights Disputes

A) Connecting Factors: Distribution, Injury to Reputation, and Accessibility

42. In *Shevill*, the ECJ established that, in case of press defamation, a damage occurs in each Member State «in which the publication was distributed and where the victim claims to have suffered injury to his reputation».[115] Hence, the *locus damni* has been apparently defined by reference to two cumulative connecting factors: "distribution" and "injury to reputation".

43. As regards "distribution", there is no *de minimis* rule. The distribution of even a few copies of the defamatory content in the forum State suffices to establish jurisdiction.[116] It is not required that the content has been read in the forum.[117] At the same time, "distribution" occurs only where the publisher intentionally distributes the defamatory material in the forum. The mere circulation of the defamatory content in the forum, beyond the publisher's own will, is not sufficient.[118]

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[112] Márton, cit., p. 245.

[113] J. Oster, "Rethinking Shevill. Conceptualising the EU Private International Law of Internet Torts against Personality Rights", *International Review of Law, Computers & Technology*, vol. 26, nos. 2-3, 2012, p. 115.

[114] cfr. J. Kramberger Škerl, "Jurisdiction in On-line Defamation and Violations of Privacy: In Search of a Right Balance", *LeXonomica*, vol. 9, no. 2, 2017, p. 95.

[115] ECJ 7 March 1995, *Shevill*, cit., operative part (1).

[116] Carrascosa González, "The Internet", cit., p. 345; Márton, cit., p. 213.

[117] Márton, cit., p. 165.

[118] J.-J. Kuipers, "Joined Cases C-509/09 and C-161/10, eDate Advertising v X and Olivier Martinez and Robert Martinez

44. As regards "injury to reputation", *Shevill* remained ambiguous on whether the plaintiff's enjoyment of reputation in the country of distribution should be subject to proof at the jurisdictional stage. At paragraph 29 of the judgment it is stated that «the injury … occurs in the places where the publication is distributed, *when the victim is known in those places*» (emphasis added). However, subsequent paragraphs (30-31 and 33) and the operative part only require that «the victim *claims* to have suffered injury to his reputation» (emphasis added). While some authors consider the criterion of "injury to reputation" a constitutive element of the jurisdictional test outlined in *Shevill*[119], others argue that distribution suffices to establish jurisdiction[120]. Admittedly, the criterion of "injury to reputation" raises problems in different respects. It fails to address the specific features of personality rights other than the right to reputation, most notably the right to privacy.[121] Moreover, it may lead to unjust results also for defamation, as a person who was not previously known in a given country could acquire a negative reputation precisely because the defamatory content was distributed there.[122]

45. Since *eDate*, in case of online infringements of personality rights, the ECJ revised the "mosaic" jurisdiction twice. It has not required the victim to "be known" in the forum State and has translated the "distribution" of printed materials into the "accessibility" of online content. This latter solution has attracted severe criticism. First, compared to the uploading of online content, the distribution of printed materials offers a much clearer indicator that the defendant is actively directing their tortious activity towards the forum State.[123] More generally, the "accessibility" criterion reflects an outdated conception that sits uneasily with today's socio-economic and technological reality. In the early years of the Internet, "accessibility" was defended on the premise that those who publish online do so knowing the medium's global reach, and must therefore accept the risk of worldwide jurisdiction.[124] This conception underestimates that today's online environment – particularly with the rise of social networks – is largely populated by small publishers and individual users who disseminate content typically directed at specific audiences, such as local communities or circles of friends.[125] Moreover, as the Internet has become a mass medium, going online is no longer a deliberate attempt to reach the wide world, but the routine way to communicate with others.[126] In any case, by giving full effect to the Internet's ubiquity, "accessibility" subjects online actors to excessively broad and conflicting jurisdictional claims, undermining international comity, socio-economic and technological development, and free speech.[127]

46. From the perspective of the principles underlying the *forum delicti*, the "distribution" criterion upheld in *Shevill* was already criticised for conferring overly broad forum shopping opportunities and hence for promoting "libel tourism".[128] This critique has intensified exponentially in relation to "accessibility" criterion. In light of the Internet's ubiquity, online content is considered universally accessible, so that victims may bring proceedings in all 27 EU Member States.[129] It is true that geolocation technologies

v MGN Limited, Judgment of the Court of Justice (Grand Chamber) of 25 October 2011", *Common Market Law Review*, vol. 49, no. 3, 2012, p. 1220.

[119] e.g., *ibidem*, p. 1220; Mankowski, cit., p. 304.

[120] C. I. Nagy, "The Word is a Dangerous Weapon: Jurisdiction, Applicable Law and Personality Rights in EU Law – Missed and New Opportunities", *Journal of Private International Law*, vol. 8, no. 2, 2012, p. 251, pp. 258-259; D. Vrbljanac, "Jurisdiction for Online Personality Rights Violations after the Judgment Bolagsupplysningen", *Zeitschrift für Europarechtliche Studien* - ZEuS, vol. 21, no. 2, 2018, p. 168.

[121] Márton, cit., p. 260.

[122] Carrascosa González, "The Internet", cit., pp. 352-353; Svantesson, *Private International Law*, cit., p. 459.

[123] Kuipers, "Joined Cases", cit., p. 1222; Oster, cit., p. 116; Carrascosa González, "The Internet", cit., p. 345.

[124] cfr., most notably, High Court of Australia, 10 December 2002, *Dow Jones & Company Inc v Gutnick*, [2002] HCA 56.

[125] M. Reymond, "The ECJ *eDate* Decision: A Case Comment", *Yearbook of Private International Law*, vol. XIII, 2011/2012, p. 497.

[126] Lutzi, *Private International Law*, cit., p. 141.

[127] M. Trimble, "Targeting Factors and Conflict of Laws on the Internet", *Review of Litigation*, vol. 40, no. 1, 2020, p. 4.

[128] e.g., C. Forsyth, "Defamation under the Brussels Convention: A Forum Shopper's Charter?", *The Cambridge Law Journal*, vol. 54, no. 3, 1995, p. 516.

[129] e.g., Nagy, cit., p. 296; Kuipers, "Joined Cases", cit., p. 1222; Oster, cit., p. 116; Lutzi, *Private International Law*, cit., p. 79.

can restrict access to online content from specific locations.[130] However, even the most advanced geolocation technologies do not fully eliminate the possibility of accessing online content.[131] For its part, the ECJ has progressively construed "accessibility" as a connecting factor that must be promptly available in each individual case. Indeed, according to the Court, the number of access from the forum, few or many, is irrelevant.[132] Moreover, the Court has made clear that the victim «must always» be entitled to rely on "mosaic" jurisdiction, and that national courts cannot impose «additional conditions» beyond the mere accessibility of the harmful content in the forum.[133] In this way, the case law has arguably eroded any scope for a more contextual assessment of "accessibility" in light of geolocation technologies.

47. Overall, the ECJ's reliance on "accessibility" appears informed by the concern to enable national courts to readily decide on jurisdiction, ensure effective access to justice for victims, and preserve the *effet utile* of the *forum delicti*.[134] Yet this criterion is ill-suited to promoting procedural proximity, since the "accessibility" of online content is a very tenuous indicator that such content may cause damage in the forum.[135] It rests on an overly broad interpretation of the *forum damni*, under which all Member State courts are deemed to have a close connection to the harm arising from the same content.[136] Predictability for defendants is disregarded, as they may be sued in up to 27 Member States, at the plaintiff's discretion, including in the latter's home State.[137] This can hardly be seen as achieving parity of arms between the litigants. Rather than justifying jurisdictional solutions that favour one party, the Internet underscores the need for a balanced jurisdictional approach in personality rights disputes.[138] While the Internet undoubtedly poses a high risk to personality rights, it has also played an unprecedented role in enhancing public access to information and freedom of expression. Moreover, it has democratised communication by enabling virtually anyone to disseminate information to the broader public, with the result that, in personality rights disputes, victims and perpetrators may often have comparable strength and resources.[139]

B) The "Mosaic" Approach in Personality Rights Disputes

48. Starting with *Shevill* and *eDate*, the ECJ ruled that jurisdiction based on the "distribution" or "accessibility" of harmful content extends only to the damage suffered within the forum State. Since *Shevill*, the "mosaic" approach has been justified by reference to two arguments.

49. First, it was argued that the courts at the place of the damage are procedurally best placed to assess only the existence and extent of damage occurring within their own Member State.[140] This

[130] See further Svantesson, *Private International Law*, cit., pp. 515-566.

[131] *ibidem*, p. 530.

[132] ECJ 25 October 2011, *eDate Advertising and Martinez*, cit., para 46; cfr. Carrascosa González, "The Internet", cit., pp. 345-346.

[133] ECJ 21 December 2021, *Gtflix*, cit., para 42.

[134] cfr. de Miguel Asensio, cit., p. 1030; D. J. B. Svantesson and I. Revolidis, "From eDate to Gtflix: Reflections on CJEU Case Law on Digital Torts under Art. 7(2) of the Brussels Ia Regulation, and How to Move Forward", in P. Arvanitakis (ed.), *National and International Legal Space – The Contribution of Prof. Konstantinos Kerameus in International Civil Procedure*, Athens, Sakkoulas Publications, 2022, p. 334.

[135] M. Bogdan, "Website Accessibility as Basis for Jurisdiction under the Brussels I Regulation", *Masaryk University Journal of Law and Technology*, vol. 5, no. 1, 2011, p. 4.

[136] Nagy, cit., pp. 269-270; Lutzi, "Internet cases", cit., p. 693.

[137] Reymond, "The ECJ eDate decision", cit., p. 502; Carrascosa González, "The Internet", cit., p. 351; Vrbljanac, cit., pp. 176-177.

[138] J. J. Fawcett, M. Ní Shúilleabháin and S. Shah, *Human Rights and Private International Law*, Oxford, Oxford University Press, 2016, p. 507; Symeonides, cit., pp. 147-148; D. J. B. Svantesson and S. C. Symeonides, "Cross-Border Internet Defamation Conflicts and What to Do about Them: Two Proposals", *Journal of Private International Law*, vol. 19, no. 2, 2023, p. 141.

[139] J. von Hein, "Determining Jurisdiction for Violations of Personality Rights and Data Protection Rules", in *Beni e valori comuni nelle dimensioni internazionale e sovranazionale*, Napoli, Editoriale Scientifica, 2022, pp. 336-337.

[140] ECJ 7 March 1995, *Shevill*, cit., paras 30-31; cfr. Opinion of AG Darmon on *Shevill*, cit., para 62; Opinion of AG Léger on *Shevill*, cit., para 55.

restrictive reading of procedural proximity disregards another objective of the Brussels I regime: the harmonious administration of justice.[141] In practice, different "mosaic" proceedings are all concerned with the harm caused by a single tortious conduct, that is the dissemination of the same harmful content across different Member States. Therefore, the "mosaic" approach fictitiously fragments liability along national borders and allocates jurisdiction accordingly.[142]

50. The multiplication of competent courts and the fragmentation of litigation resulting from the "mosaic" approach cannot be effectively contained by the mechanisms of the Brussels Ibis Regulation designed to prevent irreconcilable judgments.[143] Where the plaintiff brings parallel "mosaic" proceedings in different Member States, courts subsequently seised are not obliged to stay proceedings under Article 29 on lis pendens, since such proceedings concern different portions of the overall harm and therefore do not share the «same cause of action».[144] These proceedings would normally qualify as «related» pursuant to Article 30(3). Accordingly, a court subsequently seised may, at its discretion, stay proceedings under Article 30(1). It cannot, however, decline jurisdiction in favour of the court first seised under Article 30(2), because the latter has no jurisdiction over the harm occurring in the Member State of the court subsequently seised.[145] Moreover, when parallel "mosaic" proceedings reach different outcomes on the local parts of the damage, the respective judgments cannot be deemed «incompatible» and recognition or enforcement cannot therefore be refused under Article 45(1)(c)-(d).[146]

51. The second argument invoked in *Shevill* to justify the "mosaic" approach was the need to discourage the risk of forum shopping arising under the "distribution" criterion.[147] The logic is that this approach compels the plaintiff to bring proceedings in each Member State where a damage occurred in order to recover the different national portions of the entire damage suffered, thereby preventing him from obtaining compensation for the entire damage through a single action in the most convenient forum.[148]

52. This idea assumes that harm to personality can be apportioned and quantified on a territorial basis with ease and mathematical precision. In practice, however, territorial apportionment of such harm has proved ineffective and difficult for national courts to apply.[149] The infringement of personality rights typically causes non-pecuniary harm and determining monetary compensation for non-pecuniary harm is inherently complex.[150] Additionally requiring national courts to apportion harm to personality along national borders in cross-border cases further aggravates this difficulty and makes the quantification of damages highly volatile. In addition, since the laws of Member States provide different rules for damage quantification in civil matters, the amount of damage corresponding to each national portion of the entire

[141] Recital 21 of the Brussels Ibis Regulation.

[142] Márton, cit., p. 192.

[143] T. Lutzi, "Shevill Is Dead, Long Live Shevill!", *Law Quarterly Review*, vol. 134, 2018, p. 212.

[144] Nagy, cit., pp. 272-273; Lutzi, *Private International Law*, cit., p. 105; F. Marongiu Buonaiuti, "Jurisdiction Concerning Actions by a Legal Person for Disparaging Statements on the Internet: The Persistence of the Mosaic Approach", *European Papers*, vol. 7, no. 1, 2022, p. 355.

[145] Lutzi, *Private International Law*, cit., p. 106; Marongiu Buonaiuti, cit., p. 306.

[146] Nagy, cit., pp. 272-273; Monico, cit., p. 219.

[147] cfr. Opinion of AG Darmon on *Shevill*, cit., para 79; Opinion of AG Léger on *Shevill*, cit., para 56-57.

[148] cfr. Nagy, cit., p. 271; Lutzi, "Internet cases", cit., p. 691; Mankowski, cit., pp. 279-280.

[149] B. Hess, T. Pfeiffer and P. Schlosser, *Report on the Application of the Regulation Brussels I in the Member States*, Study JLS/C4/2005/03 ("Heidelberg Report"), Heidelberg, 2007, pp. 99-100; Milieu Consulting, *Study to Support the Preparation of a Report on the Application of Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels Ia Regulation)*, Brussels, 2023, p. 120; See in literature, e.g., B. Hess, "The Protection of Privacy in the Case Law of the CJEU", in B. Hess and C. M. Mariottini (eds.), *Protecting Privacy in Private International and Procedural Law and by Data Protection*, Baden-Baden, Nomos, 2015, p. 106; Márton, cit., p. 177; Lutzi, "Internet cases", cit., p. 693; Kramberger Škerl, cit., p. 97.

[150] F. S. Giaoui, "Damage to Reputation: A Comparative Analysis of Pecuniary Compensation for Non-Pecuniary Harm", *Loyola of Los Angeles International and Comparative Law Review*, vol. 46, 2023, p. 6.

harm varies significantly depending on the applicable law.[151] Moreover, apportioning the harm along national borders clashes with the fundamental ubiquity of the Internet.[152]

53. With regard to online violations, the ECJ sought to address the difficulties of apportioning harm along national borders by restricting the jurisdiction of mosaic courts only to territorially "divisible" remedies, such as compensation, while excluding their competence to grant "indivisible" remedies, such as injunctions. Yet the distinction between "divisible" and "indivisible" remedies remains to some extent unclear, as it rests on relatively weak assumptions.[153] For divisible remedies, the ECJ in *Gtflix* argued that national courts are «perfectly capable» of measuring the harm occurring within the forum State.[154] In this way, the ECJ suggests that, in order to quantify such harm, national courts must rely on data about the location of Internet users and the number of times the harmful content has been accessed in the forum.[155] However, this contradicts the Court's own indication in the same judgment that "mosaic" jurisdiction cannot depend on «additional conditions» than mere accessibility.[156] For indivisible remedies, the assumption that rectification and removal of online content is necessarily "single and indivisible" overlooks the widespread availability and use of geolocation technologies. In principle, geolocation technologies make it technically feasible to restrict access and to rectify or remove online content for users from specific locations.[157]

54. Above all, the "mosaic" jurisdiction has been criticised for enabling alleged victims to harass defendants through multiple proceedings, each with a different object, in numerous fora, thereby undermining free speech within the EU.[158] In this connection, it has been observed that it creates fertile ground for abusive litigation, including "strategic lawsuits against public participation" (so-called "SLAPP").[159] The preamble of the so-called "Anti-SLAPP Directive" accordingly highlights that any future review of the Brussels Ibis Regulation should assess the implications of jurisdictional rules for SLAPP.[160] Against this background, it is submitted that any future reform of the *forum delicti* should not result in a double-track jurisdictional system that differentiates between "ordinary" personality rights claims and those covered by the Anti-SLAPP Directive. On one hand, establishing such a system would compel the national courts to assess, as a precondition for asserting jurisdiction, whether the claims fall within the scope of the Anti-SLAPP Directive, adding complexity and uncertainty at the jurisdictional stage.[161] On the other hand, the exceptional gravity of SLAPP should be addressed through tailored

[151] T. C. Hartley, "'Libel Tourism' and Conflict of Laws", *International and Comparative Law Quarterly*, vol. 59, 2010, pp. 31-32; Carrascosa González, "The Internet", cit., pp. 289-290; Lutzi, "Internet cases", cit., p. 693.

[152] e.g., Hess, "The Protection of Privacy", cit., p. 106; Márton, cit., pp. 177-78; Lutzi, "Internet cases", cit., p. 693.

[153] Lutzi, "Shevill is dead", cit., pp. 211-212; de Miguel Asensio, cit., p. 1028; L. Lundstedt, "*Gtflix Tv v DR*: 'Same Ole Same Ole' or Has the CJEU Broken New Ground?", *Stockholm Faculty of Law Research Paper Series*, no. 103, 2022, p. 260.

[154] ECJ 21 December 2021, *Gtflix*, cit., para 38.

[155] de Miguel Asensio, cit., p. 1028. cfr. Opinion of AG Hogan on *Gtflix*, cit., footnote n 82.

[156] ECJ 21 December 2021, *Gtflix*, cit., para 42.

[157] A. Bizer, "International Jurisdiction for Violations of Personality Rights on the Internet: *Bolagsupplysningen*", *Common Market Law Review*, vol. 55, no. 6, 2018, p. 1949; M. Bogdan, "Regulation Brussels Ia and Violations of Personality Rights on the Internet", *Nordic Journal of International Law*, vol. 87, no. 2, 2018, pp. 217-218; Svantesson and Revolidis, cit., pp. 336-337.

[158] e.g., Kuipers, "Joined Cases", cit., p. 1222; Reymond, "The ECJ eDate decision", cit., pp. 502-503; von Hein, "Determining Jurisdiction", cit., p. 339.

[159] J. Borg-Barthet, "The Brussels Ia Regulation as an Instrument for the Undermining of Press Freedoms and the Rule of Law: An Urgent Call for Reform", *Centre for Private International Law Working Paper Series (University of Aberdeen)*, no. 7, 2020, p. 19; J. Borg-Barthet, B. Lobina and M. Zabrocka, "The Use of SLAPPs to Silence Journalists, NGOs and Civil Society", *Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, European Parliament*, Brussels, 2021; C. Kohler, "Private International Law Aspects of the Commission's Proposal for a Directive on SLAPPs ('Strategic Lawsuits against Public Participation')", *Rivista di diritto internazionale privato e processuale*, vol. 58, no. 4, 2022, p. 822.

[160] Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings (Strategic lawsuits against public participation), *OJ* L 2024/1069 of 16 April 2024, recital 51.

[161] Kohler, "Private international law", cit., p. 825.

procedural safeguards against abusive civil proceedings, like the early dismissal and the imposition of deterrent measures, as envisaged by the Anti-SLAPP Directive. From the perspective of the rules of jurisdiction, forum shopping provides fertile ground for SLAPP.[162] However, the broad forum shopping opportunities currently available under the *forum delicti*, especially with regard to the "mosaic" jurisdiction, sit uneasily *per se* with the Brussels I regime's objectives of promoting legal certainty and consistent adjudication. Arguably, the need to curtail the "mosaic" jurisdiction extends beyond the SLAPP context and also encompasses "ordinary" personality rights claims.

55. In light of the concerns described above, a wide range of authors, academic associations, advocates general, and national stakeholders have stressed the need to abandon the "mosaic" jurisdiction for personality rights disputes.[163] As the ECJ has been committed to defending the continuity of its case law, an appropriate response can only come from the EU legislator. The forthcoming review of the Brussels I regime offers a meaningful opportunity to this end.

3. The Victim's Centre of Interests

56. Since *eDate*, the ECJ has established that, in addition to the "mosaic" jurisdiction based on the accessibility of the harmful content in the forum, in case of personality rights infringements via the Internet, jurisdiction based on the *locus damni* shall be given, for «all the damage» caused, to the courts of the Member State where the alleged victim has their «centre of interests».[164]

57. As the case law currently stands, the ECJ's construction of the "victim's centre of interests" presents three interrelated difficulties that affect the consistency and foreseeability of this head of jurisdiction.

58. First, the ECJ has endorsed considerable flexibility in defining the personal factors that inform the notion of the "victim's centre of interests".

59. As regards natural persons, since *eDate* the ECJ has used "habitual residence" as the starting point for determining the "victim's centre of interests".[165] According to the prevailing view,

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[162] B. Hess, "Strategic Litigation: A New Phenomenon in Dispute Resolution?", *MPILux Research Paper Series*, no. 3, 2022, p. 20.

[163] Kuipers, "Joined Cases", cit., p. 1230; Marino, "Nuovi sviluppi" cit., p. 892; Oster, cit., p. 122; P. A. Nielsen, "Libel Tourism: English and EU Private International Law", *Journal of Private International Law*, vol. 9, no. 2, 2013, p. 279; Hess, "The Protection of Privacy", cit., p. 106; Márton, cit., p. 288; Lutzi, *Private International Law*, cit., p. 158; Bizer, cit., p. 1951; Kramberger Škerl, cit., pp. 100-101; E. Prévost *et al.*, "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, Directorate General of Human Rights and Rule of Law (DGI(2019)04)*, Strasbourg, 2019, pp. 14-15; Borg-Barthet, Lobina and Zabrocka, cit., p. 42; O. Feraci, "Digital Rights and Jurisdiction: The European Approach to Online Defamation and IPRs Infringements", in E. Carpanelli and N. Lazzerini (eds.), *Use and Misuse of New Technologies: Contemporary Challenges in International and European Law*, Cham, Springer, 2019, p. 300; von Hein, "Determining Jurisdiction", cit., pp. 344-345; A. S. de Sousa Gonçalves, "International Jurisdiction in Cross-Border Infringement of Personality Rights", *Masaryk University Journal of Law and Technology*, vol. 16, no. 2, 2022, pp. 139-140; B. Hess *et al*., "The Reform of the Brussels Ibis Regulation – Academic Position Paper", Vienna Research Paper 2024, p. 28; Kohler, "Private international law", cit., pp. 824-825; S. Lindroos-Hovinheimo, "Jurisdiction and Personality Rights – In Which Member State Should Harmful Online Content Be Assessed?", *Maastricht Journal of European and Comparative Law*, vol. 29, no. 2, 2022, p. 214; Marongiu Buonaiuti, cit., pp. 357-360; Monico, cit., pp. 335-336; Y. El Hage, "How to Locate a Cyber Tort?", *Yearbook of Private International Law*, vol. XXIV, 2022/2023, p. 464; Symeonides, cit., p. 149; J. von Hein and C. M. Mariottini, "The 'Lisbon Guidelines on Privacy' – A Path Forward for the Protection of Privacy in Private International and Procedural Law", *Yearbook of Private International Law*, vol. XXIII, 2021/2022, pp. 112-113; Opinion of AG Bobek on *Bolagsupplysningen*, cit., paras 70-98; Opinion of AG Bobek, 23 February 2021, *Mittelbayerischer Verlag KG v SM*, Case C-800/19, ECLI:EU:C:2021:124, paras 31-32; Heidelberg Report, pp. 99-100; Milieu Consulting, cit., pp. 120-121.

[164] ECJ 25 October 2011, *eDate Advertising and Martinez*, cit., paras 48, 51-52; ECJ 17 October 2017, *Bolagsupplysningen*, cit., para 32; ECJ 17 June 2021, *Mittelbayerischer*, cit., para 32.

[165] ECJ 25 October 2011, *eDate Advertising and Martinez*, cit., para 49.

"habitual residence" should be preferred to "domicile" in personality rights disputes for three main reasons.[166] First, reliance on habitual residence reflects a broader trend away from domicile as a connecting factor in national, international and EU private international law, particularly in matters of personal status. Second, the factual notion of habitual residence better reflects the victim's personal circumstances and thus ensures a close connection between the dispute and the forum, consistently with the *forum delicti*'s teleology. Third, habitual residence arguably offers greater legal certainty than domicile. While the Brussels Ibis Regulation does not provide a uniform EU-wide definition of domicile for natural persons, the ECJ case law offers quite extensive guidance on the habitual residence of natural persons. The Court generally defines "habitual residence" as the place where a person has their habitual centre of interests.[167] This must be determined on the basis of two elements: a sufficiently stable physical presence in the Member State concerned (objective element) and the person's intention to establish the habitual centre of their interests there (subjective element), as evidenced by objective circumstances.[168] For children, "habitual residence" corresponds to the place that reflects some degree of integration by the child in a social and family environment.[169] For adults, habitual residence is determined by considering not only family interests but also the person's professional, social, cultural, and patrimonial ties.[170]

60. In the *eDate* line of case law, the ECJ's reliance on habitual residence is based on the reasonable assumption that this is the place where the person's reputation and personality are most firmly established and, therefore, where the damage caused by an online infringement of personality rights is, in principle, felt "most significantly" for the purposes of Article 7(2) of the Brussels Ibis Regulation.[171] However, the ECJ further held that a natural person may have their centre of interests «in a Member State where he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State».[172] As shown by the reference to the «pursuit of a professional activity», the «other factors» mentioned by the ECJ may encompass the same personal elements informing the notion of "habitual residence".[173] However, the degree of connection with a given State required to establish a person's "centre of interests" may be lower than that required for habitual residence.[174]

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[166] cfr. Reymond, "The ECJ eDate decision", cit., p. 499 ; Márton, cit., pp. 109-110 and 273; Monico, cit., p. 260. See, however, Vrbljanac, cit., pp. 173-175, who argues that the formal and legal concept of "domicile" is more suitable than the factual concept of "habitual residence" for jurisdictional matters, as demonstrated by the fact that the Brussels Ibis Regulation refers to habitual residence only in exceptional cases (cfr. arts. 15(3) and 19(3)).

[167] See, e.g., ECJ 15 September 1994, *Pedro Magdalena Fernández v Commission of the European Communities*, Case C-452/93 P, ECLI:EU:C:1994:332, para 22; ECJ 17 February 1977, *Silvana di Paolo v Office national de l'emploi*, Case 76/76, ECLI:EU:C:1977:32, para 17; ECJ 22 December 2010, *Barbara Mercredi v Richard Chaffe*, Case C-497/10 PPU, ECLI:EU:C:2010:829, para 51; ECJ 16 July 2020, *E.E.*, Case C-80/19, ECLI:EU:C:2020:569, paras 37-39; ECJ 25 November 2021, *IB v FA*, Case C-289/20, ECLI:EU:C:2021:955, para 41; ECJ 1 August 2022, *MPA v LCDNMT*, Case C-501/20, ECLI:EU:C:2022:619, para 44. See also A. Borrás, *Explanatory Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters*, *OJ* C 221 of 16 July 1998, p. 38.

[168] ECJ 15 September 1994, *Fernández*, cit., para 22; ECJ 17 February 1977, *Silvana di Paolo*, cit., para 22; ECJ 22 December 2010, *Barbara Mercredi*, cit., para 51; ECJ 25 November 2021, *IB v FA*, cit., para 57; ECJ 1 August 2022, *MPA v LCDNMT*, cit., para 44; ECJ 20 March 2025, *DL v PQ*, Case C-61/24, ECLI:EU:C:2025:197, para 42.

[169] See, e.g., ECJ 22 December 2010, *Barbara Mercredi*, cit., para 47; ECJ 1 August 2022, *MPA v LCDNMT*, cit., para 72.

[170] ECJ 25 November 2021, *IB v FA*, cit., para 56.

[171] cfr. ECJ 25 October 2011, *eDate Advertising and Martinez*, cit., para 48; ECJ 17 October 2017, *Bolagsupplysningen*, cit., para 33.

[172] ECJ 25 October 2011, *eDate Advertising and Martinez*, cit., para 49.

[173] Márton, cit., pp. 273-274; S. Marino, "La violazione dei diritti della personalità nella cooperazione giudiziaria civile europea", *Rivista di diritto internazionale privato e processuale*, vol. 48, no. 2, 2012, p. 367. cfr. M. Bogdan, "Defamation on the Internet, Forum Delicti and the e-Commerce Directive: Some Comments on the ECJ Judgment in the eDate Case", *Yearbook of Private International Law*, vol. XIII, 2011/2012, p. 486.

[174] This is confirmed by the reference in *eDate Advertising and Martinez* to the «pursuit of a professional activity» – rather than to the "*main*" or "*principal*" professional activity – and by the indication that this factor may also demonstrate a particularly close link with a Member State where the victim «*does not habitually reside*» (emphasis added). cfr. Márton, cit., pp. 273-274.

61. In light of the foregoing, occasional or purely ancillary personal contacts with a given State – such as the victim's pursuit of minor professional activities – may suffice to establish that the victim's "centre of interests" is located in that State. This flexible understanding of the "victim's centre of interests" has the advantage of accommodating cases where it is difficult to identify a person's habitual residence, for instance where the person leads a highly cross-border life or is an international celebrity.[175] However, this flexibility inevitably comes at the expense of legal certainty. It is difficult to reconcile such flexibility with the broad assumption made by the ECJ in *eDate* that «the publisher of harmful content is, at the time at which that content is placed online, in a position to know the centres of interests of the persons who are the subject of that content».[176] Moreover, the ECJ's flexible interpretation of the "victim's centre of interests" has led some to suggest that a person might simultaneously be regarded as having several centres of interests across different Member States, thereby creating a risk of a multiplication of competent courts.[177]

62. As regards the "centre of interests" of a company, before the *Bolagsupplysningen* judgment, it was argued that a useful starting point could have been either the "place of registration" or the "place of central administration".[178] Yet the ECJ opted for the «place where [the legal person] carries out the main part of its economic activities», a criterion that essentially corresponds to the third alternative connecting factor used by art. 63(1) of the Brussels Ibis Regulation for determining the «domicile» of legal persons – namely the «principal place of business».[179]

63. While the criterion of the "main part of the economic activities" may pose practical difficulties for companies equally active in several Member States, it generally accords with the principle of procedural proximity[180]. Since damage to a company's reputation usually materialises in a loss of customers or market share, the place where such harm is most significantly felt is typically where the legal person has its largest customer base – that is, its principal place of business.[181] Any potential harm felt at the place of incorporation or at the real seat is merely an indirect consequence of the harm primarily suffered on the affected market. Moreover, the place of incorporation or the real seat does not necessarily bear any relation to a company's market reputation, as a company may register or establish its management system in one State – for example for tax or administrative reasons – without engaging in any economic activity there.[182]

64. By analogy with the approach adopted for natural persons, the ECJ has likewise left open the possibility of assigning jurisdictional relevance to other personal factors for legal persons. The Court's statement in *Bolagsupplysningen* that the place of the registered office is not, in itself, a «conclusive

[175] Marino, "La violazione", cit., p. 365; Nagy, cit., p. 271; Carrascosa González, "The Internet", cit., pp. 364-366.

[176] A. Dickinson, "By Royal Appointment: No Closer to an EU Private International Law Settlement?", *Conflict of Laws .net*, 2012, available at: https://conflictoflaws.net; Kuipers, "Joined Cases", cit., p. 1221; Márton, cit., pp. 273-274; Lutzi, "Internet cases", cit., p. 695; Monico, cit., p. 269.

[177] See, e.g., Opinion of AG Bobek on *Bolagsupplysningen*, cit., para 116; Carrascosa González, "The Internet", cit., p. 365.

[178] Márton, cit., p. 302. cfr. Vrbljanac, cit., p. 172.

[179] ECJ 17 October 2017, *Bolagsupplysningen*, cit., para 41. See S. Brachotte and A. Nuyts, "Jurisdiction over cyber torts under the Brussels I Bis Regulation", in A. Savin and J. Trzaskowski (eds), *Research Handbook on EU Internet Law*, Cheltenham, Edward Elgar, 2023, pp. 221-222. The criterion of the place where a legal person carries out the «main part of its economic activities», developed in *Bolagsupplysningen* for profit-making companies, may by analogy extend to other legal persons, including non-profit organisations. The «principal place of business» in art. 63(1) of the Brussels Ibis Regulation likewise applies broadly to «a company or other legal person or association of natural or legal persons». For non-profit entities, this place should correspond to where the organisation is primarily active. cfr. Opinion of AG Bobek in *Bolagsupplysningen*, cit., para 104. See, however, Vrbljanac, cit., p. 174, who argues that, for non-profit legal persons, it remains unclear which criterion should be used to determine the centre of interests.

[180] Carrascosa González, "The Internet", cit., p. 364; Lutzi, "Shevill is dead", cit., p. 210.

[181] Opinion of AG Bobek on *Bolagsupplysningen*, cit., paras 112-113; Bizer, cit., p. 1954; Lutzi, "Shevill is dead", cit., p. 210.

[182] Carrascosa González, "The Internet", cit., p. 364; Bizer, cit., p. 1954; Lutzi, "Shevill is dead", cit., p. 210.

criterion» implies that this factor is not entirely irrelevant to the jurisdictional analysis.[183] Moreover, the ECJ's emphasis on the "principal place of business" appears closely linked to the facts of *Bolagsupplysningen*. The judgment indicates that the jurisdictional inquiry into a legal person's "centre of interests" should focus on identifying the place where reputational harm is felt most keenly.[184] Where, as in *Bolagsupplysningen*, the plaintiff carries out most of its activities in a Member State other than that of its registered office or central management, jurisdiction should lie with the former. The outcome may differ, however, where the legal person also operates in the Member State of incorporation or at its real seat.

65. The second difficulty arising from the "victim's centre of interests" concerns the uncertain role of objective factors relating to the context and content of the harmful information in the jurisdictional inquiry.[185]

66. In *eDate* the ECJ endorsed a distinctly subjective construction of the "centre of interests" by placing the overall focus of the jurisdictional inquiry on the victim's personal circumstances.[186] It identified the victim's "habitual residence" as the primary connecting factor and mentioned only the pursuit of a professional activity among the "other factors" relevant to determining the "victim's centre of interests". Moreover, the Court remained silent on the second part of the jurisdictional test of the "centre of gravity of the dispute" proposed by AG Cruz Villalón, which focused on the objective relevance of the harmful information in the forum State.

67. In the case law following *eDate*, the Court has given some weight to objective elements in the jurisdictional inquiry based on the "victim's centre of interests". In doing so, the ECJ likely sought to respond to the criticism advanced in the literature that this ground of jurisdiction entailed the creation of a *forum actoris*, while also promoting foreseeability of jurisdiction for the defendant, consistently with the new recital 16 of the Brussels Ibis Regulation. However, the incorporation of objective factors into the jurisdictional inquiry did not occur with the clarity and consistency one might have expected.

68. In *Bolagsupplysningen*, after finding that the plaintiff's "centre of interests" was located in the Member State where it carried out the main part of its economic activity, the ECJ held that the courts of that State were best placed to adjudicate «particularly given that» the reputational injury arose from information published on «a professional site managed» in the same Member State and written in a «language» meant «to be understood by people living in that Member State».[187] Hence, objective elements relating to the website's characteristics (i.e. the location of its management system) and the information concerned (i.e. the language in which it was written) were invoked merely to corroborate the localisation of the victim's centre of interests, as established through a connecting factor linked to the victim's personal circumstances (i.e. its principal place of business).[188]

69. In *Mittelbayerischer*, the ECJ denied jurisdiction at the victim's habitual residence on the ground that the harmful content did not mention the victim, either directly or indirectly. As a matter of principle, the Court stressed that the existence of a close connection between the dispute and the forum in online personality rights cases should not rest solely on subjective factors, but also on objective elements.[189]

70. However, in addition to the fact that the harmful content did not mention the plaintiff or any other person residing in the forum State (i.e., Poland), other factors may have supported the conclusion

[183] ECJ 17 October 2017, *Bolagsupplysningen*, cit., para 41. cfr. Lutzi, "Shevill is dead", cit., p. 210.

[184] ECJ 17 October 2017, *Bolagsupplysningen*, cit., paras 41-42.

[185] Bizer, cit., pp. 1955-1957; Lindroos-Hovinheimo, cit., pp. 213-214; Svantesson and Revolidis, cit., pp. 348-349.

[186] See, e.g., Kuipers, "Joined Cases", cit., pp. 1220-1221; Reymond, "The ECJ eDate decision", cit., pp. 500-501; Fawcett, Ní Shúilleabháin and Shah, cit., p. 506; von Hein, "Determining Jurisdiction", cit., p. 342.

[187] ECJ 17 October 2017, *Bolagsupplysningen*, cit., para 42.

[188] Bizer, cit., pp. 1955-1956; Bogdan, "Regulation Brussels Ia", cit., p. 218; Lutzi, "Shevill is dead", cit., p. 210.

[189] ECJ 17 June 2021, *Mittelbayerischer*, cit., para 42.

that the Polish courts did not have a close link to the dispute. The article at issue mainly concerned events that occurred in Germany, was written in German, and was published by a local outlet whose online edition primarily covered local German news. However, the Court remained silent on the possible relevance of these latter elements in the jurisdictional analysis. Moreover, by reformulating the two questions referred into a single question, the ECJ ultimately failed to address the second question raised by the referring court, which specifically concerned whether, when assessing jurisdiction based on the "victim's centre of interests", national courts must take into account factors such as the public to whom the relevant website is principally addressed and the language of both the website and the harmful information.[190]

71. Third and finally, another difficulty with the "victim's centre of interests" concerns the uncertainty surrounding the conditions under which the jurisdictional ground is available.

72. Since *Bolagsupplysningen*, the ECJ has held that this ground cannot be relied upon when it is «not clear» from the evidence available at the jurisdictional stage where the victim's centre of interests is located.[191] In this way, the Court tries to reconcile its flexible construction of the "victim's centre of interests", grounded on the principle of proximity, with the need to safeguard foreseeability of jurisdiction. In the Court's view, this balance is achieved by imposing a high threshold of foreseeability, whereby reliance on the "victim's centre of interests" is permitted only when that centre can be readily identified by the court seised. There is, however, an evident tension in the Court's approach: while the court seised, in order to rely on the "victim's centre of interests", must consider virtually all elements to determine whether a particularly close link exists with the dispute, it may assert jurisdiction only where the victim's centre of interests is immediately apparent. No guidance is provided by the ECJ on how these conflicting axioms should be reconciled in practice. In any event, the Court has not yet faced a case in which the victim's centre of interests could not be identified in practice. Anticipating this hypothetical scenario creates uncertainty about the conditions under which this jurisdictional ground is available.[192] It also encourages victims to resort to the problematic "mosaic" jurisdiction, especially after the Court's clarification in *Gtflix* that alleged victims must «always» be able to bring proceedings at the *forum damni* under the "mosaic" approach[193].

4. Reassessing the Media-Specific Construction of the *Locus Damni* in the ECJ Case Law

73. Since *eDate*, the ECJ distinguished the interpretation of the *locus damni* in personality rights disputes depending on whether the infringement has been committed through the press and other "conventional" media or through the Internet. Most notably, "full" jurisdiction at the victim's centre of interests is available only for online infringements. The bifurcation of the applicable jurisdictional rules has been justified by the ECJ on the ground that, unlike conventional media, the uploading of online content, due to the ubiquity of the Internet, entails the instantaneous and worldwide dissemination of the information, beyond any intention on the part of the uploader and outside that person's control.[194]

74. The ECJ's insistence on the ubiquity of the Internet reflects a long-standing school of thought rooted in the 1990s' early cyberspace literature.[195] Indeed, in the early years of the Internet, several authors argued that, because of its exceptional capacity to establish virtual contacts on a global scale, the Internet should have been subject to alternative methods of governance rather than to those based on state sove-

[190] *ibidem*, paras 23-24.

[191] ECJ 17 October 2017, *Bolagsupplysningen*, cit., para 43; ECJ 21 December 2021, *Gtflix*, cit., para 39.

[192] cfr. Vrbljanac, cit., p. 174.

[193] ECJ 21 December 2021, *Gtflix*, cit., para 42.

[194] ECJ 25 October 2011, *eDate Advertising and Martinez*, cit., para 45; ECJ 17 October 2017, *Bolagsupplysningen*, cit., para 48; ECJ 21 December 2021, *Gtflix*, cit., para 32.

[195] M. Reymond, "Jurisdiction in Case of Personality Torts Committed over the Internet: A Proposal for a Targeting Test", *Yearbook of Private International Law*, vol. XIV, 2012/2013, pp. 227-228.

reignty and territoriality.[196] Especially among the so-called "cyber-libertarians", there was a pronounced tendency to conceive the Internet as a "virtual" space distinct from the "real" world.[197] This conception was invoked to support the argument that the Internet should have been immune from governmental control and left to self-regulation. As a reaction, the so-called "non-exceptionalists" rejected the medium's specificity and argued that the Internet should have been subject to the same regulation as other means of communication.[198] Meanwhile, at the turn of the millennium, as the Internet emerged as a mass medium, States increasingly asserted their authority over the Internet, while online actors explored the benefits of localised online experiences.[199] Overall, over the past two decades, the Internet has undergone two major changes. On the one hand, to comply with local laws and pursue profit, online actors have increasingly relied on geolocation technologies to diversify content and services on a territorial basis, which has in turn significantly contributed to the territorialisation of the Internet.[200] On the other hand, the Internet's progressive penetration into virtually every aspect of private and social life, through smartphones, social media, and Internet of Things (IoT) devices, has led to an increasing convergence between online and offline activities.[201] The intermingling between online and offline environments has become apparent in the production and distribution of media content, as shown by the well-documented trend towards the blending of technologies, products, and personnel between conventional and digital media industries (so-called "media convergence").[202] Accordingly, it has been observed that not only «the dream of a truly borderless location-independent Internet is over»[203], but also that – contrary to the cyberlibertarian discourse of the 1990s – it is no longer sustainable to draw a clear boundary between online and offline communications.[204]

75. Against this background, it is hardly surprising that the normative approach underlying the case law from *eDate* to *Gtflix* has been described as «obsolete» or even based on a «misunderstanding of the technological reality».[205] On the one hand, the assumption that the dissemination of online content is necessarily global disregards the fact that geolocation technologies make it possible to restrict the geographical reach of such content and that the use of geolocation technologies has become a widespread phenomenon in the contemporary Internet.[206] On the other hand, the idea that a clear dividing line can be drawn between the Internet and conventional media clashes with the growing convergence of online and offline environments.[207]

76. In light of the gap between the normative approach underlying the case law and technological reality, the distinction between online and offline infringements of personality rights drawn in

[196] See further D. J. B. Svantesson, *Solving the Internet Jurisdiction Puzzle*, Oxford, Oxford University Press, 2017, pp. 92-96.

[197] See, especially, D. R. Johnson and D. Post, "Law and Borders – The Rise of Law in Cyberspace", *Stanford Law Review*, vol. 48, 1996, p. 1379.

[198] J. L. Goldsmith, "Against Cyberanarchy", *University of Chicago Law Review*, vol. 65, no. 4, 1998, p. 1199; T. S. WU, "Cyberspace Sovereignty? – The Internet and the International System", *Harvard Journal of Law & Technology*, vol. 10, no. 3, 1997, p. 647; A. R. Stein, "The Unexceptional Problem of Jurisdiction in Cyberspace", *The International Lawyer*, vol. 32, no. 4, 1998, p. 1167.

[199] M. Trimble, "The Future of Cybertravel: Legal Implications of the Evasion of Geolocation", *Fordham Intellectual Property, Media & Entertainment Law Journal*, vol. 22, no. 2, 2012, pp. 580-581; Svantesson, *Solving*, cit., pp. 96-112.

[200] D. Lambach, "The Territorialization of Cyberspace", *International Studies Review*, vol. 22, 2020, p. 482; Svantesson, *Private International Law*, cit., p. 515; Trimble, "Targeting Factors", cit., pp. 41-42.

[201] Lambach, cit., p. 489; Svantesson, *Solving*, cit., p. 93.

[202] See further G. Meikle and S. Young, *Media Convergence: Networked Digital Media in Everyday Life*, London, Bloomsbury, 2017; K. Bruhn Jensen, *Media Convergence: The Three Degrees of Network, Mass, and Interpersonal Communication*, New York, Routledge, 2022.

[203] Svantesson, *Private International Law*, cit., p. 515; cfr. Trimble, "Targeting Factors", cit., pp. 41-42.

[204] Svantesson, Solving, cit., p. 93; cfr. Lambach, cit., p. 490.

[205] Svantesson and Revolidis, cit., pp. 336-337. In less provocative yet equally critical terms, cfr. Kuipers, "Joined Cases", cit., p. 1223; Nagy, cit., pp. 264-267; von Hein, "Determining Jurisdiction", cit., pp. 340-341; Brachotte and Nuyts, cit., p. 221.

[206] Svantesson and Revolidis, cit., pp. 336-337; Bizer, cit., p. 1949; Bogdan, "Regulation Brussels Ia", cit., pp. 217-218; von Hein, "Determining Jurisdiction", cit., pp. 340-341; Lundstedt, cit., p. 260; Marongiu Buonaiuti, cit., pp. 352-353.

[207] cfr. Kuipers, "Joined Cases", cit., p. 1223; Nagy, cit., p. 266; Márton, cit., pp. 295-296; von Hein, "Determining Jurisdiction", cit., p. 344.

eDate raises practical uncertainties regarding the boundaries between the jurisdictional rules of *Shevill* and *eDate*. First, since the adaptation of the *forum damni* in *eDate* was designed to offset the territorial dispersion of harm caused by universally accessible online content, it remains uncertain whether the *eDate*'s solutions also apply to online content with limited accessibility, such as emails, content available upon subscription, or social media content.[208] It is likewise uncertain whether the *eDate*'s solutions should, by analogy, be extended beyond the Internet to other media whose geographical reach is equally difficult to control, such as satellite broadcasting or short-wave radio.[209] Furthermore, it remains unclear how the *Shevill – eDate* line of case law should operate where an infringement of personality rights results from content published simultaneously online and through conventional media (so-called "parallel" publications). To avoid the difficulties of applying two different jurisdictional standards in parallel, it has been argued that, in such cases, the solutions elaborated in *eDate* should apply uniformly to all versions of the same content, including offline publications.[210] Nevertheless, this necessarily implies extending the jurisdictional rules established in *eDate* beyond the medium for which they were originally formulated. If one adheres to the rigid demarcation between online and offline infringements of personality rights established in *eDate*, the logical consequence is that the online and offline versions of the same content must be subjected to different jurisdictional standards. Needless to say, applying the *Shevill* and *eDate* jurisdictional standards in parallel to the online and offline versions of the same content does not promote legal certainty and the sound administration of justice.[211]

77. Against this background, in light of the growing convergence between different media, it is submitted that a sustainable reform of the *forum delicti* in personality rights disputes should establish a technologically neutral jurisdictional framework – that is, one applying uniformly to all personality rights infringements, regardless of the medium used.[212] This aligns with the technologically neutral approach characterising the general instruments of EU private international law, which do not contain Internet-specific provisions.[213]

78. At the same time, any reform of the *forum delicti* to better accommodate personality rights disputes should take into account the fact that, in light of the pervasive use of the Internet in today's European information society, such infringements of personality rights are predominantly committed online. As such, a proper jurisdictional framework for personality rights disputes should not only promote technological neutrality but should also strive to address, as far as possible, the specific localisation problems posed by the Internet.

79. To this latter effect, it is increasingly recognised that the localisation problems posed by the Internet do not require abandoning the most paradigmatic method of private international law – that is, localising the relevant legal relationship through geographical connecting factors (so-called "Savignyan"

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[208] A positive solution is given by Márton, cit., pp. 295-296. See, however, Vrbljanac, cit., pp. 177-178.

[209] See, in support of this view, M. Bogdan, "Defamation on the Internet, Forum Delicti and the e-Commerce Directive: Some Comments on the ECJ Judgment in the eDate Case", *Yearbook of Private International Law*, vol. XIII, 2011/2012, p. 485.

[210] Márton, cit., pp. 297-298.

[211] Nagy, cit., p. 266; *ibidem*, pp. 296-297; von Hein, "Determining Jurisdiction", cit., p. 344.

[212] A technologically neutral approach in the formulation of jurisdictional rules for personality rights disputes has been advocated by Opinion of AG Cruz Villalón on *eDate Advertising and Martinez*, cit., paras 53-54; Hartley, "'Libel Tourism'", cit., pp. 36-37; Kuipers, "Joined Cases", cit., pp. 1223-1224; Nagy, cit., pp. 275-278; Nielsen, cit., pp. 278-279; Vrbljanac, cit., pp. 177-178; von Hein, "Determining Jurisdiction", cit., p. 344; Svantesson, *Private International Law*, cit., pp. 650-679; B. Hess et al., "ILA Guidelines on the Protection of Privacy in Private International and Procedural Law ('Lisbon Guidelines on Privacy') and Commentary Thereto", MPILux Research Paper Series, no. 4, 2022, p. 10; Monico, cit., pp. 332-333. Other authors have supported the introduction of specific jurisdictional rules for online infringements of personality rights. cfr. Opinion of AG Bobek on *Bolagsupplysningen*, cit., para 71; Lutzi, *Private International Law*, cit., pp. 155-159; Institut de Droit International, "Injuries to Rights of Personality Through the Use of the Internet: Jurisdiction, Applicable Law and Recognition of Foreign Judgments", 8th Commission, 31 August 2019 ("2019 IDI Resolution"); Feraci, "Digital Rights", cit., pp. 299-301; Hess *et al.*, "The Reform", cit., pp. 28-29. Again, other authors have argued that, while the legal framework should be technologically neutral, the specificities of the Internet should be addressed at the level of interpretation. See Marino, "Nuovi sviluppi", cit., p. 883.

[213] Lutzi, "Internet cases", cit., p. 688; Feraci, "Digital Rights", cit., p. 279; Monico, cit., p. 169.

method).[214] However, rules of private international law based on strictly territorial connecting factors, such as those focused on conduct or effects (e.g., the place of the harmful event, the place of performance of the obligation, etc.) are generally recognised as problematic when applied to the Internet, as they often lead to a multiplicity of competent courts or applicable laws.[215] Against this background, it has been argued that adopting connecting factors that focused on the location of the parties involved in online transactions may prove a coherent solution to address the localisation problems posed by the Internet.[216] This builds on the early "non-exceptionalist" argument that every act of communication, whether online or offline, necessarily involves natural or legal persons situated in geographical spaces.[217] Accordingly, the adoption of private international law rules based on connecting factors that focus on the parties to a personality rights dispute may help reconcile, at the regulatory stage, the need for technologically neutral solutions with the need to address the specific localisation challenges posed by the Internet.

V. Alternative Jurisdictional Models in the Literature

80. As the foregoing analysis illustrates, the solutions developed by the ECJ in interpreting the *forum delicti* in personality rights disputes – particularly with respect to the "place of the damage" head of jurisdiction – have proven somewhat unsatisfactory. They have proven insufficient to ensure consistency with the underlying principles of the *forum delicti*, equal treatment between litigants, and responsiveness to technological reality. While the "mosaic" jurisdiction is almost unanimously rejected in the literature, the ECJ's solution adopted since *eDate* to recognise a forum centred on the victim has proved more divisive. Against this background, the section reviews the principal proposals for reform discussed in the literature, which may be grouped into four jurisdictional approaches: (i) "country of origin", (ii) "actual access", (iii) "targeting", and (iv) "forum of the victim". The subsequent section then advances an alternative proposal for the reform of the *forum delicti* in personality rights cases.

1. The Country of Origin Approach

81. According to the so-called "country of origin" approach, jurisdiction should lie with the courts of the country where the harmful conduct originated.[218] On this basis, some authors have argued that, in personality rights disputes, exclusive jurisdiction should be conferred upon the courts of the Member State in which the defendant is domiciled or established, thereby excluding altogether the plaintiff's option to sue at the *forum damni*.[219] This view is typically justified on two grounds. First, concentrating jurisdiction at the defendant's domicile or establishment aligns with the principle *actor sequitur forum rei*, as reflected in the Brussels I regime's general forum of the defendant's domicile. Secondly, by requiring alleged victims to bring proceedings in the alleged tortfeasor's home State, it reduces the risk of abusive litigation, including SLAPP.

82. The principle *actor sequitur forum rei undoubtedly* reflects a legitimate concern for fairness towards defendants. As the decision about whether and when to bring proceedings rests entirely with the plaintiff, it is generally for the latter to bear the costs of international litigation.[220] This principle ensures

[214] Marino, "Nuovi sviluppi", cit., p. 883; Carrascosa González, "The Internet", pp. 302-307; Lutzi, *Private International Law*, pp. 127-139.

[215] e.g. Oster, cit., p. 122; Carrascosa González, "The Internet", pp. 304-305; Svantesson, *Solving*, cit., pp. 37-39; Lutzi, *Private International Law*, cit., p. 27.

[216] See especially Lutzi, *Private International Law*, cit., pp. 148-149.

[217] Goldsmith, cit., p. 1250.

[218] See Lutzi, *Private International Law*, cit., pp. 142-145.

[219] See especially Dickinson, "By Royal Appointment", cit.; Borg-Barthet, Lobina and Zabrocka, cit., p. 42.

[220] A. T. von Mehren, "Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems", in *Collected Courses of the Hague Academy of International Law*, vol. 295, The Hague, Brill Nijhoff, 1996, p. 181.

that defendants may defend themselves before the courts of the State most familiar to them rather than being compelled to litigate abroad. Nevertheless, the principle *actor sequitur forum rei* is not exempt from criticism. By placing the entire cost of litigation on the injured party, it risks creating jurisdictional safe havens for potential tortfeasors and may even encourage the commission of wrongful acts.[221] In any event, virtually all contemporary jurisdictional systems depart from a strict adherence to this principle and instead provide a range of alternative fora grounded in other rationales, such as proximity, party autonomy, and the protection of the weaker party.[222] Concentrating jurisdiction exclusively in the defendant's home State would simply disregard the fact that the *forum delicti* has been firmly rooted in EU law since 1968 and that abandoning it today would be both unrealistic and undesirable.[223] By the same token, while there is undoubtedly a need to combat abusive litigation, requiring alleged victims to bring proceedings in the alleged tortfeasor's home State in all circumstances can hardly be regarded as a balanced solution.[224] Such an approach would be excessively tilted in favour of defendants and would ultimately hinder effective judicial protection for victims.[225]

2. The Actual Access Approach

83. The "actual access" approach is an Internet-specific methodology that seeks to determine jurisdiction on the basis of the number of page views or accesses that the harmful online content has received in the forum. This approach has left traces in some important judgments delivered by national courts, especially in the early years of the Internet.[226] In the literature, the number of page views is still occasionally defended as a standalone criterion or, at least, as a central factor for determining jurisdiction in cases involving online infringements of personality rights.[227]

84. As a matter of fact, it is undeniable that the majority of contemporary websites collect information on page views and on the geographical location of Internet users.[228] This is ordinarily achieved through web-analytics tools, such as Google Analytics or Matomo, which rely on tracking scripts and cookies to collect data on page views and use IP-based geolocation techniques to determine users' location. Moreover, many web-analytics services are also freely available and relatively easy to implement.

85. As most scholars observe, figures about page views may help in measuring the impact of online content in the forum and hence may be taken into account for assessing jurisdiction.[229] These

[221] See further J. Carrascosa González, "Foro del domicilio del demandado y Reglamento Bruselas 'I-bis 1215/2012'. Análisis crítico de la regla *actor sequitur forum rei*", *Cuadernos de Derecho Transnacional*, vol. 11, no. 1, 2019, pp. 112-138.

[222] von Mehren, cit., p. 193.

[223] Carrascosa González, "Distance Torts", cit., pp. 37-38; Monico, cit., p. 181.

[224] B. Hess, "Reforming the Brussels Ibis Regulation: Perspectives and Prospects", *MPILux Research Paper Series*, no. 4, 2021, p. 10. cfr. Lutzi, *Private International Law*, cit., p. 152.

[225] Hess, "Reforming", cit., p. 10.

[226] See, e.g., *Dow Jones & Co. Inc v Jameel* [2005] EWCA Civ 75, where the Court of Appeal (England and Wales) found a defamation claim to constitute an abuse of process on the ground that the allegedly defamatory online article had been accessed by only five subscribers in the forum.

[227] Nagy, cit., pp. 277-278, argues that jurisdiction over online infringements of personality rights should be determined by combining the extent of the victim's reputation with the number of accesses in the forum. Where the victim is hardly known in the forum, jurisdiction is proper only if the content has achieved a high level of circulation there. Conversely, if the victim enjoys a strong reputation in the forum, jurisdiction may be appropriate even when the level of circulation is relatively low. El Hage, cit., pp. 463-466, argues that, for all cyber torts, including personality rights torts, jurisdiction should lie where the cyber tort has had its «most significant impact», which will typically correspond to the country where «the illegal content has circulated most intensively», depending on the «numbers of viewers».

[228] S. Englehardt and A. Narayanan, *Online Tracking: A 1-Million-Site Measurement and Analysis, Proceedings of the 2016 ACM Conference on Computer and Communications Security*, Vienna, ACM, 2016, p. 1397; A. McDonald et al., *403 Forbidden: A Global View of CDN Geoblocking*, *Proceedings of the Internet Measurement Conference*, Boston, ACM, 2018, p. 218.

[229] D. J. B. Svantesson, "Time for the Law to Take Internet Geo-Location Technologies Seriously", *Journal of Private International Law*, vol. 8, no. 3, 2012, p. 473; Oster, cit., p. 117; Reymond, "Jurisdiction", cit., pp. 222-223.

figures, however, should not be treated as a standalone criterion for establishing jurisdiction.[230] First, such data may not always be available.[231] When they are available, their capacity to offer a realistic picture of the actual impact of the content within the forum is limited by both technical and legal constraints. From a technical standpoint, the reliability of page-view statistics depends on the accuracy and resilience to manipulation of the web-analytics tools used to generate them.[232] From a legal perspective, since these technologies often involve the processing of users' IP addresses or other identifying data, their use is subject to data protection law, which may limit the scope or granularity of the information that can be lawfully collected.[233] Taken together, these considerations explain why, with few exceptions, the number of page views is typically treated as a factor within broader "targeting" assessments rather than as a standalone basis for jurisdiction.[234]

3. The Targeting Approach

86. "Targeting" – also known as "focalisation" or "*critére de destination*" – is a jurisdictional methodology that seeks to determine whether the defendant has directed its activities toward the forum State.[235] Under the Brussels I regime, this methodology is adopted by the protective rules of jurisdiction on consumer contracts.[236] Though applicable beyond the Internet, "targeting" primarily emerged in legal literature and practice as a reaction to dissatisfaction with the "accessibility" criterion. While "accessibility" exposes online actors to virtually worldwide jurisdiction, "targeting" reflects the more balanced view that online actors should be sued only in countries they have actively targeted. The literature often distinguishes between "subjective" and "objective" targeting, based on the focus of the jurisdictional inquiry. "Subjective" targeting assesses the defendant's intent to reach the audience in a given State, as manifested through objective indicators relating to: (i) the characteristics of the disputed information (e.g., its content and language); (ii) its impact in the forum (e.g., the number of distributed copies, accesses, or whether users in the forum have been geo-blocked); and (iii) the general features of the medium (e.g., the local profile of the publisher, the domain name used by the relevant website, and the availability of local advertisements and content). "Objective" targeting rests essentially on the same criteria but focuses on the actual links between the defendant's conduct and the forum, regardless of intent.

87. The "targeting" methodology has emerged as the main point of reference for those scholars who have criticised the approach adopted by the ECJ since *eDate* to introduce a victim-centred head of jurisdiction in personality rights infringement cases.

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[230] Oster, cit., p. 117; Reymond, "Jurisdiction", cit., pp. 222-223.

[231] *ibidem*.

[232] Reymond, "Jurisdiction", cit., pp. 222-223; Márton, cit., pp. 253-254.

[233] Oster, cit., p. 117; Márton, cit., pp. 253-254. See also G. Zheng and S. Peltsverger, "Web Analytics Overview", in *Encyclopedia of Information Science and Technology*, 3rd ed., Hershey (PA), IGI Global, 2015, pp. 7-8.

[234] Opinion of AG Cruz Villalón on *eDate Advertising and Martinez*, cit., para 65; Oster, cit., p. 117; Reymond, "Jurisdiction", cit., pp. 222-223.

[235] See further, e.g., M. A. Geist, "Is There a There There? Towards Greater Certainty for Internet Jurisdiction", *Berkeley Technology Law Journal*, vol. 16, 2001, pp. 1380-1381; O. Cachard, *La régulation internationale du marché électronique*, Paris, LGDJ, 2002, pp. 193-217; Lutzi, *Private International Law*, cit., p. 145-147; Trimble, "Targeting Factors", cit., pp. 7-44.

[236] Under the Brussels I regime, consumers may bring proceedings against traders in matters relating to contracts either in the Member State of the consumer's domicile or in Member State of the trader's domicile. This favourable rule of jurisdiction is subject to the condition, set out in now art 17(1)(c) of the Brussels Ibis Regulation, that the trader «directs» its commercial activities to the Member State of the consumer's domicile. Since *Pammer and Alpenhof*, the ECJ has held that, in the case of electronic consumer contracts, the accessibility of the trader's website in the Member State of the consumer's domicile is insufficient to conclude that the trader has "directed" its activity there. Rather, it must be determined whether the trader has «manifested its intention to establish commercial relations with consumers» in the Member State of the consumer's domicile on the basis of a non-exhaustive list of factors. See ECJ 7 December 2010, *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG and Hotel Alpenhof GesmbH v Oliver Heller*, Joined Cases C-585/08 and C-144/09, ECLI:EU:C:2010:740.

88. Indeed, after *eDate*, several authors criticised the "victim's centre of interests" for having *de facto* introduced a *forum actoris* within the Brussels I regime.[237] This has been claimed to cause an undue interference with the principle *actor sequitur forum rei*.[238] In turn, it has been argued that a *forum actoris* in personality rights disputes may not be convincingly justified by the need to protect alleged victims, as this would sit uneasily with the nature of the Internet as a medium that is today used by a vast and diverse range of users.[239] Nor does the "victim's centre of interests" necessarily align with the principle of proximity. By relying on a "subjective" and "one-sided" reading of the *locus damni* focused on the victim's habitual residence, it leaves little room for other elements that may demonstrate the existence, or lack thereof, of a particularly close connection between the dispute and the forum.[240] Depending on the circumstances, the harmful information may not be capable of causing foreseeable harm in the victim's forum. This may depend on the characteristics of the information (e.g. when it is of little public interest in the forum or is written in a language understood by few), its actual impact within the forum (e.g. the publisher has geo-blocked users or has not actively disseminated it in the forum, or the information has been accessed or read by only a few people), and the general features of the medium (e.g. where the publisher or website has a purely local profile). Moreover, the more the alleged victim has personal links or a reputation across several Member States, the more fortuitous the identification of the "centre of interests" becomes, and the rationale underlying this jurisdictional ground – namely, that it reflects the place where the most significant harm to personality occurs – appears increasingly artificial. Because it is for the alleged victim to prove the location of their "centre of interests", a person with a highly cross-border lifestyle may claim that this centre lies in a forum with only limited connections to the dispute.[241] This could result in jurisdiction being conferred on a court that is only tenuously linked to the case and therefore unforeseeable for the defendant. In this connection, it has been argued that applying the "victim's centre of interests" without due regard for the defendant's ability to foresee jurisdiction may unduly interfere with their rights of defence and freedom of expression.[242] Moreover, a *forum actoris* might be perceived as "exorbitant" in certain jurisdictions and thus create obstacles to the recognition and enforcement of judgments.[243]

89. On this basis, several authors have variously proposed to reform the "victim's centre of interests" through the "targeting" methodology. Some authors have proposed extending to personality rights disputes the "subjective" targeting test applied by the ECJ since *Pammer and Alpenhof* in consumer-contract cases, which was itself inspired by the US doctrine of "purposeful availment".[244] The predominant view, however, has endorsed the "objective" targeting methodology proposed by AG Cruz Villalón in *eDate*, based on the criterion of the "centre of gravity of the dispute".[245] Some authors have

[237] Kuipers, "Joined Cases", cit., pp. 1220-1221; Nagy, cit., p. 270; Reymond, "Jurisdiction", cit., p. 244; Bizer, cit., p. 1952; Lutzi, "Internet cases", cit., p. 696; Hartley, "Jurisdiction", cit., p. 1001; El Hage, cit., p. 462; Mankowski, cit., pp. 312-313.

[238] Dickinson, "By Royal Appointment", cit.; Nagy, cit., p. 270.

[239] von Hein, "Determining Jurisdiction", cit., pp. 345-346.

[240] cfr. Kuipers, "Joined Cases", cit., pp. 1221-1222; Dickinson, "By Royal Appointment", cit; Reymond, "Jurisdiction", cit., p. 243; Marino, "La violazione", cit., p. 369.

[241] G. Zarra, "Conflitti di giurisdizione e bilanciamento dei diritti nei casi di diffamazione internazionale a mezzo internet", *Rivista di diritto internazionale*, vol. 98, no. 4, 2015, pp. 1245-1246.

[242] Fawcett, Ní Shúilleabháin and Shah, cit., p. 506; von Hein, "Determining Jurisdiction", cit., p. 342.

[243] El Hage, cit., p. 462.

[244] cfr. Zarra, cit., pp. 1256-1262; Marino, "La violazione", cit., pp. 368-369. On the US courts' approach to jurisdiction in personality rights disputes, see, e.g., L. E. Little, "Internet Defamation, Freedom of Expression, and the Lessons of Private International Law for the United States", *Yearbook of Private International Law*, vol. XIV, 2012/2013, pp. 181-190; L. J. Silberman, "Judicial Jurisdiction and Forum Access: The Search for Predictable Rules", in F. Ferrari and D. P. Fernández Arroyo (eds.), *Private International Law: Contemporary Challenges and Continuing Relevance*, Cheltenham, Edward Elgar, 2019, pp. 332-358; Symeonides, cit., pp. 87-94.

[245] Kuipers, "Joined Cases", cit., pp. 1221-1222; Oster, cit., p. 122; Bizer, cit., pp. 1956-1957; Lutzi, *Private International Law*, cit., p. 158; Feraci, "Digital Rights", cit., p. 288; von Hein, "Determining Jurisdiction", cit., pp. 342-344; Lindroos-Hovinheimo, cit., p. 215. The jurisdictional test proposed by AG Cruz Villalón was to some extent inspired by the "collision of interests" test developed by German courts to assess jurisdiction over online personality rights disputes involving third-country defendants. See further S. Schmitz, "From Where Are They Casting Stones? – Determining Jurisdiction in Online Defamation", *Masaryk University Journal of Law and Technology*, vol. 6, no. 1, 2012, pp. 170-173.

developed alternative *sui generis* jurisdictional models grounded in "targeting", three of which merit special mention.[246]

90. First, Michel Reymond has proposed that the court seised should assert jurisdiction over online personality torts only if the offending website is objectively capable of causing foreseeable harm in the forum.[247] This must be determined through a non-exhaustive list of eleven criteria, grouped into three categories: (i) «general» criteria, applicable to all websites; (ii) «commercial» criteria, relevant only to websites designed to generate revenue from the forum; and (iii) «criteria specific to defamation and personality torts».[248] The burden of proof for the first two categories lies with the defendant.[249] The «general» criteria comprise: (i) the number of page views of the harmful content in the forum; (ii) the language of the website and of the content; (iii) the ranking position of the website on major search engines; (iv) the website's top-level domain; (v) the geolocation technologies used or reasonably available to the defendant; and (vi) the nature of the website, such as whether it addresses a local or international audience. The «commercial» criteria include: (vii) whether the website allows conclusion of contracts with customers in the forum; (viii) the availability of localised advertising; and (ix) the defendant's offline commercial activity in the forum. The «criteria specific to defamation and personality torts» include: (x) the extent of the claimant's reputation in the forum; and (xi) the degree of public interest in the allegedly harmful content.

91. Secondly, according to the Resolution of the *Institut de Droit International* (IDI) «Injuries to Rights of Personality Through the Use of the Internet: Jurisdiction, Applicable Law and Recognition of Foreign Judgments» (31 August 2019), the alleged victim of online personality rights infringements may file a single action in one of the following States: (i) the State where the «critical conduct» of the liable person occurred; (ii) the liable person's «home State»; (iii) the State in which the «most extensive injurious effects occurred or may occur»; and (iv) the victim's «home State».[250] The latter two fora draw inspiration from the ECJ's case law on the "victim's centre of interests".[251] Under the Resolution, the defendant may "escape" jurisdiction at these two fora if they cumulatively prove that: (i) they «did not derive any pecuniary or other significant benefits from the accessibility of the content in the forum state»; and (ii) «a reasonable person could not have foreseen that the material would be accessible in the forum State» or that their conduct «would cause any injury in that State».[252] As co-rapporteur Prof Symeonides explains, this "escape clause" is intended to mediate between the EU and US approaches to special jurisdiction over online personality rights infringements.[253]

92. Third and finally, the «ILA Guidelines on the Protection of Privacy in Private International and Procedural Law» (23 June 2022) provide four alternative grounds of jurisdiction. In line with the principle *actor sequitur forum rei*, the plaintiff may initiate proceedings in the State of the defendant's habitual residence.[254] The remaining three grounds focus on the defendant's conduct and require the

[246] For other proposals grounded in "targeting", see: (i) I. Roth, *Die internationale Zuständigkeit deutscher Gerichte bei Persönlichkeitsrechtsverletzungen im Internet*, Frankfurt am Main, Peter Lang, 2007, pp. 273-287, proposing jurisdiction where, beyond accessibility, a «qualified domestic connection» exists; (ii) Hartley, "'Libel Tourism'", cit., pp. 36-37, proposing jurisdiction for the State of the claimant's domicile as well as for the State that has been targeted more than any other and where the defendant has taken significant steps to make the offending material available; (iii) Svantesson, *Private International Law*, cit., pp. 650-679, proposing jurisdiction for the State where «the defendant performed the injuring act», as well as for State where the defamatory material «enters the mind» of persons present in the forum, unless the defendant shows that they took reasonable steps to avoid contact with the forum (so-called "dis-targeting" approach).

[247] M. Reymond, "Jurisdiction", cit., p. 221.

[248] *ibidem*.

[249] *ibidem*.

[250] 2019 IDI Resolution, cit., arts. 3(1) and 5(1).

[251] Institut de Droit International, "8th Commission's Final Report", 21 November 2018, pp. 269-270.

[252] 2019 IDI Resolution, cit., art. 5(2).

[253] Symeonides, cit., pp. 153-158.

[254] Hess et al., "ILA Guidelines", cit., art. 4.

existence of a «significant relationship of the claim with the forum».[255] First, the plaintiff may bring proceedings in the State where «the act or omission directly causing the harm occurred». Secondly, proceedings may be brought in the State where the plaintiff has their «centre of main interest, unless the defendant could not have reasonably foreseen substantial consequences of their act occurring in that State». According to the Guidelines' commentary, this foreseeability condition is intended «to capture, in particular, the foreseeability requirement that is at the core of the due process analysis in the United States».[256] Third and finally, the plaintiff may bring proceedings «in the State to which the publication in question is principally directed, taking into account, in particular, (a) the language of the publication; (b) the content of the publication; and (c) the physical location of the intended audience».[257]

93. Overall, from the perspective of the underlying principles of the *forum delicti*, "targeting" has the advantage of promoting procedural proximity, since it may generally be assumed that a court situated in the place where the liable person has targeted their conduct is well positioned to hear the dispute and to assess the constitutive elements of liability.[258] "Targeting" is also intended to enhance foreseeability for the defendant, as it is reasonable to assume that an allegedly liable person may expect to be sued in the State they have actively targeted.[259] However, "targeting" also has important drawbacks. It fails to promote the concentration of jurisdiction where the defendant's conduct is not directed at any particular country, as may frequently occur in the context of online communications.[260] It encourages geo-blocking and, in turn, contributes to the fragmentation of the EU internal market.[261] If the court seised finds that the defendant's conduct was not targeted at any specific State, the plaintiff may be deprived of the possibility to sue at the *forum damni*, thereby undermining the *effet utile* of the *forum delicti*.[262] Furthermore, as it requires the court seised to assess all elements of the dispute in light of a non-exhaustive list of guiding criteria, "targeting" constitutes a fact-dependent and open-textured jurisdictional methodology that sits uneasily with the objective of ensuring legal certainty in the allocation of jurisdiction.[263] Any attempt to enhance legal certainty by introducing rigid pre-defined criteria for "targeting" may undermine the very nature of this methodology and prove counterproductive, as it risks encouraging manipulative tactics whereby defendants structure their websites so as not to appear to have targeted the forum.[264]

4. The Forum of the Victim

94. The trend in legal literature described above, which variously proposes reforming the jurisdictional ground of the "victim's centre of interests" through a "targeting" methodology, has been opposed by other authors. These authors have endorsed the premise of the ECJ's approach in *eDate* to establish a jurisdictional ground focused on the victim in personality rights disputes.[265]

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[255] *ibidem*, p. 37.

[256] *ibidem*, pp. 41-42.

[257] *ibidem*, pp. 42-44.

[258] Carrascosa González, "The Internet", p. 371; Lutzi, "Internet cases", cit., p. 705.

[259] *ibidem*.

[260] Lutzi, "Internet cases", cit., p. 705; cfr. Svantesson, *Solving*, cit., p. 103.

[261] Bogdan, "Website Accessibility", cit., p. 8; Márton, cit., pp. 250-251; Lutzi, "Internet cases", cit., p. 705.

[262] Monico, cit., p. 299.

[263] cfr. Oster, cit., p. 121; Carrascosa González, "The Internet", p. 371; Márton, cit., pp. 251-253; Svantesson, *Solving*, cit., p. 103; Monico, cit., pp. 299-300. The Report on the application of the Brussels Ibis Regulation also recognises the difficulties faced by national courts in determining whether a trader has "directed" its commercial activity towards the consumer's domicile in cases involving the online offering of goods or services. See European Commission, *Report on the application of Regulation (EU) No 1215/2012*, cit., p. 12.

[264] cfr. Márton, cit., p. 251; Lutzi, "Internet cases", cit., p. 705.

[265] Hess, "The Protection of Privacy", cit., pp. 105-106; Carrascosa González, "The Internet", pp. 354-375; Márton, cit., pp. 261-274; Kramberger Škerl, cit., p. 101; Vrbljanac, cit., pp. 177-178; de Sousa Gonçalves, cit., pp. 138-140. Nielsen, cit., p. 279, proposes introducing a new paragraph (3) in what is now art. 7, conferring jurisdiction for all personality rights violations, regardless of the medium used, on the courts of the State where the alleged victim has the centre of his interests or where

95. First of all, it has been argued that, because of the nature of the protected interests, a forum centred on the victim in personality rights disputes is fully justifiable in light of the principle of proximity. Since personality rights aim to protect the moral integrity of the individual, the assumption that harm to personality should be deemed to occur, for jurisdictional purposes, at the place where the victim's personality is most firmly established – that is, at their domicile or habitual residence – constitutes a reasonable solution, which had already been advanced in the literature before the *Shevill* judgment.[266]

96. Moreover, it has also been argued that attributing jurisdiction to the forum of the victim promotes the concentration of litigation and reduces the proliferation of competent courts resulting from the immaterial nature of personality rights and the ubiquity of the Internet, thereby better reflecting the realities of an increasingly globalised and interconnected world.[267]

97. Given the inherent link between personality rights and the person of the right holder, it may be argued that an infringement causes damage not only at the victim's habitual residence but also in any other place where the victim has some personal contacts or a reputation to defend.[268] However, allowing jurisdiction in all places with which the victim has minor personal contacts – and, hence, where minor harm to personality may occur – inevitably increases the risk of positive conflicts of jurisdiction, particularly in light of the growing international mobility of persons. Concentrating jurisdiction exclusively at the victim's habitual residence ensures a close connection between the dispute and the court seised and prevents the multiplication of competent fora.[269]

98. Moreover, a shift from "territorial" or "effects-based" connecting factors (such as "distribution", "accessibility" or "targeting") to a connecting factor focused on the location of the victim may contribute to resolving the difficulties of localising, in physical spaces, the harmful consequences of online communications. It may also promote technological neutrality, as any act of communication, regardless of the medium used, involves natural or legal persons located in geographical spaces.

99. Furthermore, it has been submitted that attributing jurisdiction to the forum of the victim aligns with the modern functions of tort law: ensuring redress for victims (reparation function) and deterring potential tortfeasors from committing violations (normative function).[270] Allowing the alleged victim to sue in their home State has been defended as a means of ensuring effective judicial protection and redress, while also discouraging violations of personality rights.[271] Foreseeability of jurisdiction for the defendant is generally preserved, since in most cases the publisher can reasonably identify the habitual residence of the individuals who are the subject of the relevant content.[272]

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the publisher is established. Monico, cit., pp. 406-407, proposes integrating art. 7(2) of the Brussels Ibis Regulation with legal definitions specifying the location of «the place where the harmful event occurred or may occur» for different categories of torts. In the case of personality rights infringements, the author suggests that the place of the causal event should coincide with the place where the alleged tortfeasor is established, and the place of the damage with that where the victim has their centre of interests. Hess et al., "The Reform", cit., pp. 28-29, argue that the "mosaic" jurisdiction should be limited to personality rights torts committed through the press, whereas, in the case of online infringements, a new paragraph in what is now art. 7 should confer jurisdiction on the courts of the State where the victim's centre of interests is located.

[266] H. Gaudemet-Tallon, "Note", *Revue critique de droit international privé*, 1983, p. 674; P. Bourel, "Du rattachement de quelques délits spéciaux en droit international privé (Volume 215)", in *Collected Courses of the Hague Academy of International Law*, The Hague, Brill Nijhoff, 1989, p. 357; Carrascosa González, "The Internet", p. 367; Márton, cit., pp. 270-272; Kramberger Škerl, cit., p. 101; E. Farnoux, "Delendum est Forum Delicti? Towards the Jurisdictional Protection of the Alleged Victim in Cross-Border Torts", in B. Hess and K. Lenaerts (eds.), *The 50th Anniversary of the European Law of Civil Procedure*, Baden-Baden, Nomos, 2020, p. 273; de Sousa Gonçalves, cit., pp. 138-140; Hess et al., "ILA Guidelines", cit., pp. 39-40; Monico, cit., pp. 267-268.

[267] Bogdan, "Defamation", cit., p. 485; Carrascosa González, "The Internet", pp. 367-368; Feraci, "Digital Rights", cit., p. 289.

[268] See, e.g., Nagy, cit., p. 271; Reymond, "Jurisdiction", p. 243; Mankowski, cit., p. 311.

[269] Carrascosa González, "The Internet", pp. 354-355.

[270] Farnoux, cit., pp. 277-278.

[271] Carrascosa González, "The Internet", pp. 368-369; Márton, cit., pp. 267-268; Monico, cit., p. 271.

[272] Carrascosa González, "The Internet", p. 368; Márton, cit., p. 269.

100. Lastly, provided that the "mosaic" jurisdiction based on accessibility is eradicated, the solution adopted by the ECJ in the *eDate* line of case law has been defended on the ground that it achieves a jurisdictional equilibrium between the parties and, hence, procedural justice.[273] The alleged victim and the alleged tortfeasor are both allowed to bring proceedings at their "home" jurisdiction, the former on the basis of the jurisdictional ground of the "victim's centre of interests" and the latter on the basis of the jurisdictional ground of the "publisher's place of establishment".[274]

VI. A Possible Way Forward *De Lege Ferenda*

101. The foregoing analysis has shown that, although the interpretative solutions thus far developed by the ECJ concerning the *forum delicti* in personality rights disputes remain somewhat unsatisfactory, the literature suggests a range of different approaches to how EU private international law might be reformed to achieve more coherent and balanced outcomes in this area. In such a delicate domain, there are no unequivocally "correct" or "wrong" approaches: the solution ultimately adopted in the forthcoming recast of the Brussels Ibis Regulation will depend on the policy objectives that the EU legislator chooses to prioritise and on what proves politically feasible in the course of negotiations under the ordinary legislative procedure.

102. Against this background, it is suggested that a politically sustainable solution, which seeks to reconcile proximity and predictability while promoting technological neutrality and parity of arms between the parties, could consist in adopting a jurisdictional model based on rebuttable presumptions. Such a model could build on the reasonable assumption underlying the ECJ case law that, on the one hand, the event giving rise to the harm ordinarily occurs where the allegedly liable person is established, and, on the other hand, the most significant harm resulting from an infringement of personality rights is typically suffered where the victim has the closest personal or professional connections, namely at their habitual residence in the case of natural persons or at their principal place of business in the case of companies or other legal persons.

103. The proposed provision, which could either be inserted as a separate paragraph within the current Article 7 or introduced as a standalone article in the forthcoming recast of the Brussels Ibis Regulation, could be formulated as follows:

> «1. In case of violations of privacy and rights relating to personality, including defamation, a person domiciled in a Member State may be sued in another Member State either in the courts of the place where the event giving rise to the damage occurred or may occur or, alternatively, in the courts of the place where the most significant damage occurred or may occur.
>
> 2. For the purpose of paragraph 1, in the absence of proof to the contrary:
>
> a) the place where the event giving rise to the damage occurred or may occur shall be presumed to be the place where the person claimed to be liable is established;
>
> b) the place where the most significant damage occurred or may occur shall be presumed to be the place where the person sustaining damage has their habitual residence, in the case of a natural person, or its principal place of business, in the case of a company or other legal person.»

104. The solution proposed here presents a twofold advantage.

105. First, it is politically sustainable. The Report on the application of the Brussels Ibis Regulation shows that the European Commission does not intend to introduce radical amendments to the Regulation, but rather favours targeted adjustments aimed at addressing concrete practical difficulties

[273] Hess, "The Protection of Privacy", cit., p. 93. cfr. Nielsen, cit., pp. 278-279; Carrascosa González, "The Internet", p. 368; Márton, cit., p. 266; Monico, cit., p. 271.

[274] See especially Hess, "The Protection of Privacy", cit., p. 93.

while preserving the overall functioning of the existing system.[275] The proposed approach would be consistent with this approach on two counts. On the one hand, a model for allocating jurisdiction on the basis of rebuttable presumptions would not be unfamiliar to EU private international law.[276] On the other hand, insofar as it partially builds on the solutions developed in the existing case law, it would to some extent favour continuity with the current framework.

106. Secondly, it has the advantage of seeking to reconcile proximity and predictability while promoting technological neutrality and parity of arms between the litigants.

107. Regarding proximity, the proposed solution builds on the reasonable assumption that, in personality rights disputes, the event giving rise to the damage and the most significant harm typically occur where the alleged tortfeasor and the alleged victim enjoy stable physical presence, respectively. However, it duly recognises that, depending on the circumstances, the act of infringement and the most significant damage may take place elsewhere. For reasons of proximity, courts situated at the tortfeasor's establishment or at the victim's habitual residence may exceptionally be required to dismiss the claim where the evidence available at the jurisdictional stage demonstrates that the event or the most significant harm did not materialise within their jurisdiction. Conversely, courts situated outside the tortfeasor's establishment or the victim's habitual residence may exceptionally assume jurisdiction if the plaintiff demonstrates, subject to the defendant's allegations to the contrary, that the act of infringement or the most significant harm occurred or may occur within the jurisdiction of the chosen court.

108. Predictability is reasonably safeguarded through the presumption in favour of the jurisdiction of the courts situated at the tortfeasor's establishment or the victim's habitual residence. This presumption ensures that the courts located where the parties are established will ordinarily constitute the most natural forum in which to bring proceedings. To validly assert jurisdiction, these courts would simply need to verify whether the alleged tortfeasor or the alleged victim is established within their jurisdiction. In turn, both parties would be reasonably able to identify the competent court, since the tortfeasor will normally be able to determine where the victim is established, and vice versa. The possibility for these courts to decline jurisdiction would be strictly limited to situations in which the assumption upon which jurisdiction rests – namely, that the act of infringement or the most significant harm occurred within their jurisdiction – is clearly not fulfilled in the individual case. Only such circumstances could justify the jurisdiction of another court. Indeed, courts situated outside the tortfeasor's establishment or the victim's habitual residence may validly assume jurisdiction only where the evidence available at the jurisdictional stage is sufficiently strong as to demonstrate that the factual assumptions underlying these presumptions are not met in the individual case.

109. Technological neutrality is ensured in so far as jurisdiction is, as a rule, determined on the basis of connecting factors that focus on the location of the parties. At the same time, the moderate margin of flexibility left by the proposed provision also allows national courts, at the interpretative stage, to take into account the distinctive characteristics of specific media. For instance, a court situated at the

[275] European Commission, *Report on the application of Regulation (EU) No 1215/2012*, cit., p. 2.

[276] A similar model is adopted by Regulation (EU) 2015/848 of the European Parliament and of the Council, of 20 May 2015, on insolvency proceedings (recast), *OJ* L 141 of 5 June 2015, p. 19 ("EU Insolvency Regulation"). Indeed, jurisdiction to open main insolvency proceedings is given to the courts of the Member State where the «centre of the debtor's main interests» (COMI) is located. Art. 3(1) of the EU Insolvency Regulation generally defines COMI as «the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties». It then establishes that the COMI of the debtor «shall be presumed to be … in the absence of proof to the contrary» the place of the registered office, in case of a company or legal person, the individual's principal place of business, in case of individual exercising an independent business or professional activity, as well as the place of the individual's habitual residence, in case of any other individual. See further G. van Calster, "COMIng, and Here to Stay: The Review of the European Insolvency Regulation", *European Business Law Review*, vol. 27, no. 6, 2016, p. 735-753; N. Magallon Elosegui, "El centro de intereses del deudor persona fisica en el Reglamento Europeo 848/2015 sobre procedimientos de insolvencia", *Cuadernos de Derecho Transnacional*, vol. 13, 2021, pp. 974-985.

alleged victim's habitual residence may conclude that the most significant harm did not occur within its jurisdiction if the defendant demonstrates that only a small number of printed copies of the defamatory material circulated in the forum, or that online access to the harmful content from the forum was effectively restricted through reasonably accurate geolocation technologies.

110. Finally, parity of arms between the litigants is also safeguarded. The two alternative fora envisaged by the proposed solution – the courts of the place where the event giving rise to the damage or the most significant harm occurred, together with the respective rebuttable presumptions – are, in principle, available to both parties, including alleged tortfeasors in the context of negative declaratory actions. By concentrating jurisdiction in two fora that are both closely connected to the dispute, the proposal avoids the proliferation of competent courts with only tenuous links to the case, thereby reducing the risk of forum shopping and abusive litigation. The position of the alleged victim is duly protected through the possibility of bringing proceedings before the courts of their habitual residence. At the same time, the defendant may still escape jurisdiction if they provide reasonably convincing evidence that, in light of the circumstances of the case, the most significant harm did not occur, or is not likely to occur, in the victim's forum. Conversely, proceedings may be brought before courts other than those situated where the litigants are established, provided that the act of infringement or the most significant harm occurred or may occur within the jurisdiction of these courts. In such cases, however, the plaintiff bears the burden of proving, subject to the defendant's allegations to the contrary, that the act of infringement or the most significant harm occurred or may occur within the jurisdiction of the chosen court.

VII. Conclusion

111. For the time being, conflicts of jurisdiction over personality rights disputes are still far from being satisfactorily regulated at EU level.

112. The central ground of jurisdiction applicable in this context – namely, the *forum delicti* – has proven problematic when applied to torts against personality.

113. On a foundational level, a tension exists between the territorial approach underlying the *forum delicti* and the non-territorial nature of personality rights infringements. The strictly territorial connecting factor on which this ground of jurisdiction is based, namely the "harmful event", is difficult to reconcile with both the immaterial nature of personality interests and the geographical independence of the medium through which such rights are typically infringed in today's information society, namely the Internet. In addition, personality rights disputes involve a conflict between two fundamental rights under constitutional and international human rights law: the right to reputation or privacy, on one side, and the right to freedom of expression, on the other. Lastly, the two principles or objectives underlying the *forum delicti*, proximity and predictability, may themselves come into conflict and push its interpretation along diverging directions.

114. Notwithstanding these difficulties, the EU legislator has so far refrained from introducing specific jurisdictional rules for personality rights infringement cases within the Brussels I regime and has instead left to the ECJ the challenging task of adapting the general ground of jurisdiction for tort matters to the particular nature of infringements of personality rights. As discussed in this paper, while attempting to reconcile the conflicting axioms and objectives at stake, the solutions developed by the ECJ in the interpretation of the *forum delicti* in personality rights disputes have proven somewhat unsatisfactory.

115. Against this background, legislative action is needed to achieve more coherent and balanced outcomes in the field of jurisdiction over personality rights disputes. The forthcoming review of the Brussels Ibis Regulation offers a meaningful opportunity to this end. Within this context, the present paper has sought to contribute to the search for a balanced and coherent regulatory response by:

(i) identifying the main difficulties arising from the interpretative solutions developed by the ECJ over nearly thirty years, from *Shevill* to *Gtflix*; (ii) reviewing the principal reform proposals advanced in the legal literature; and (iii) advancing an additional proposal on how the *forum delicti* might be reformed in personality rights infringements cases.