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Danijela Vrbljanac*

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A. Introduction

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 (hereinafter: the Brussels I bis Regulation)[1] represents one of the most important legal sources of European private international law. It is also a successor to one of the first sources enacted in this area, the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters,[2] which was subsequently replaced by the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: the Brussels I Regulation).[3] In 2015, when

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1 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, OJ L 351 of 20/12/2012, pp. 1-32.

2 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, consolidated version, OJ C 27 of 26/01/1998, pp. 1-27.

3 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 16/01/2001, pp. 1-23.

the Brussels I bis Regulation entered into force, it replaced the Brussels I Regulation. Being a double instrument, it contains both the rules on international jurisdiction and recognition and enforcement of foreign judgments. The expansion and rapid development of the internet represents a challenge for jurisdictional rules, which were formulated long before the internet. One such rule is the provision on non-contractual liability embodied in Art. 7(2) of the Brussels I bis Regulation (formerly Art. 5(3) of the Brussels I Regulation). This article will analyse the case law of the Court of Justice of the European Union (hereinafter: the CJEU) through which the CJEU adapted the aforementioned provision to the internet environment in cases which have arisen as a consequence of the violation of personality rights by content posted on the internet. The emphasis will be placed on the mosaic principle based on accessibility criterion and the injured party's centre of interest since these two jurisdictional grounds have been (re)interpreted by the latest CJEU's judgment on establishing jurisdiction in cases of personality rights violation of a legal person on the internet.

B. Harmful Event in Violation of Personality Rights on the Internet

In the early 90's, in the landmark *Shevill*[4] case, the CJEU was confronted with the task of clarifying how the rule on non-contractual liability from Art. 7(2) of the Brussels I bis Regulation (formerly Art. 5(3) of the Brussels I Regulation),[5] which confers jurisdiction to the courts of the Member State in which the harmful event occurred, should be applied when one's personality rights were violated in the newspapers. The CJEU held that the principle of ubiquity pursuant to which both the harmful act and the damage arising out of it previously established in *Bier*[6] for physical damage, should equally be applied in cases of non-physical damage. The CJEU held that the party whose personality rights were injured by the press may institute the proceedings in respect of the entire damage sustained before courts of the Member State where the publisher is established since this is the place where the harmful act occurred. He or she may also institute the proceedings before courts of every Member State in which the newspapers were distributed, since this is the place of occurrence of the damage.

4 CJEU, case C-68/93, *Shevill and Others v. Presse Alliance*, ECLI:EU:C:1995:61.

5 For more on this article and its interpretation see *Mankowski*, Art. 7, in: Magnus/Mankowski (eds.), Brussels Ibis Regulation, European Commentaries on Private International Law, ECPIL, Vol. 1, 2016, pp. 262-340, paras 226-398; *Lein*, Jurisdiction in Matters Relating to Tort, Delict or Quasi-Delict (Art. 7(2)), in: Dickinskon/Lein (eds.), The Brussels I Recast, 2015, pp. 155-172, paras 4.69-4.121.

6 CJEU, case C-21/76, *Handelskwekerij Bier v. Mines de Potasse d'Alsace,* ECLI:EU:C:1976:166.

In the latter case, the jurisdiction of the court is limited only to damage sustained in the Member State of the court seized.[7]

Almost a decade later, a time period which was marked with expansion and rapid development of internet, the CJEU got a chance to revisit the *Shevill* doctrine in joined cases *eDate Advertising* and *Olivier Martinez*[8] in which the localisation of the harmful event for the violation of personality rights was again the issue, however, this time on the internet. The CJEU established the rule according to which in cases of personality right violations on the internet the injured party has the option of suing the publisher of the violating content in respect of all the damage sustained either before the courts of publisher's establishment or before the courts where the injured party's centre of interest is located. The courts of every Member State in which the infringing content is accessible are also competent, but solely with regards to the damage sustained in that particular Member State.[9]

The respective line of development of jurisdictional rules in cases of personality rights violations on the internet left injured parties with four possible jurisdictional grounds, the first of which is the publisher's establishment as the place of the harmful

7 Appearing on the side of the plaintiff was Ms. Shevill, an English citizen residing in England who was working in the exchange office in Paris, and three companies incorporated under the laws of different Member States, engaged in managing the exchange office. The defendant was the French company Presse Alliance SA, the publisher of the France Soir newspapers. An article was published in the respective newspapers stating that Ms. Shevill and the mentioned companies were laundering money for drug traffickers. The newspapers were distributed in France, United Kingdom and other European countries. The plaintiffs instituted the proceedings for defamation before the English court. CJEU, *Shevill*, (fn. 4).

8 CJEU, joined cases C-509/09 and C-161/10, *eDate Advertising,* and *Olivier Martinez*, ECLI:EU:C:2011:685.

9 In *eDate Advertising*, the plaintiff was a German domiciliary, X, known as Manfred Lauber to the German public. He, along with his brother Wolfgang Werlé, was sentenced by a German court to a life imprisonment for the murder of the famous Austrian actor Walter Sedlmayr. However, X was released on parole. The defendant was the Austrian company eDate Advertising operating the internet portal where the article reporting on the details of the murder and mentioning X by his name was published. X requested that *eDate Advertising* refrain from such publications in the future. eDate Advertising did not reply to that letter but removed the disputed content from its website. Nevertheless, X instituted the proceedings against eDate Advertising before the German court asking the court to order eDate Advertising to refrain from using his full name when reporting about him in connection with the crime committed throughout the territory of the Federal Republic of Germany.
For more on proceedings instituted by Lauber and Werlé against German media see *Siry/Schmitz*, A Right to Be Forgotten? – How Recent Developments in Germany May Affect the Internet Publishers in the US, European Journal of Law and Technology, Vol. 3, No. 1, 2012, available at European Journal of Law and Technology, http://ejlt.org/article/view/141/221, (08/11/2017), pp. 3-5; *Wagner-Von Papp/Fedtke*, Germany, BGH 9 February 2010, NJW 2010, p. 2432: Crime Reporting: Names and Pictures (Spiegel Dossier – Sedlmayr murder), in: Koziol/Steininger (eds.), European Tort Law 2010, 2011, pp. 209-211.
In *Olivier Martinez*, the plaintiffs were a French actor, Olivier Martinez, and his father who argued that the publication revealing the details of Olivier Martinez's encounter with Kylie Minogue interfered with their private life and violated Olivier Martinez's right to his image. The disputed article titled 'Kylie Minogue is back with Olivier Martinez' was published by MNG, an English company on its website. It contained some remarks on Olivier Martinez's father.

act. The second possible jurisdictional ground is the defendant's domicile which coincides in this particular case with the first jurisdictional ground of the publisher's establishment according to Art. 4 of the Brussels I bis Regulation (formerly Art. 2 of the Brussels I Regulation), which is a jurisdictional rule complementary to the special jurisdiction rule from Art. 7(2) of the Brussels I bis Regulation.[10] The two other possible jurisdictional grounds are the injured party's centre of interest and Member States in which the violating content is accessible as places where the damage arose. One of the jurisdictional grounds, namely accessibility of content confers jurisdiction limited to the amount of damage sustained in the forum, thus creating the mosaic approach. The remaining three confer jurisdiction for the entire damage sustained.

However, the list of available forums has been re-examined with the most recent judgment on violations of personality rights on the internet, *Bolagsupplysningen*,[11] which, unlike *eDate Advertising* and *Olivier Martinez*, deals with the violation of personality rights of a legal person. *Svensk Handel*, a Swedish trade association company blacklisted an Estonian company which does most of its business in Sweden on its website *Bolagsupplysningen*, stating that the company carries out acts of fraud and deceit. The discussion forum on that website contained approximately 1.000 comments, including comments inciting violence against *Bolagsupplysningen* and its employees, among which was *Ms Ilsjan*. *Svensk Handel* refused to remove *Bolagsupplysningen* from the blacklist and to delete the comments, which resulted in the material damage sustained by *Bolagsupplysningen*. *Bolagsupplysningen* and *Ms Ilsjan* commenced the proceedings before the Harju Maakohus (Harju Court of First Instance, Estonia) against *Svensk Handel*. The plaintiffs sought an order from the court for *Svensk Handel* to rectify incorrect information, delete the comments and pay material and non-material damage. The Supreme Court of Estonia (Riigikohus) decided to refer questions for preliminary ruling, specifically to ascertain whether a victim of a personality rights violation may bring the suit seeking rectification of the incorrect information and removal of the harmful comments before the courts of any Member State in which the information is accessible, with respect to the harm sustained in that

10 Understanding publisher's establishment as the publisher's domicile in the sense of Art. 63 of the Brussels I bis Regulation is supported by the fact that Advocate General *Léger* referred to the publisher's domicile several times in his opinion delivered in *Shevill.* See Opinion of Advocate General *Léger*, CJEU, *Shevill*, (fn. 4), ECLI:EU:C:1994:303, paras 13 and 46-48. There are also different opinions. Advocate General *Bobek* indicated that in most cases establishment will coincide with the domicile, without elaborating in which instances this will not be the case. See Opinion of Advocate General *Bobek*, CJEU, case C-194/16, *Bolagsupplysningen and Ilsjan*, ECLI:EU:C:2017:554, para. 32. *Oster* is of similar opinion, *Oster*, European and International Media Law, 2017, p. 133. See also *Márton* and *Stone* who argue that the term establishment should entail secondary establishment, besides domicile. *Márton*, Violations of Personality Rights through the Internet: Jurisdictional Issues under European Law, 2016, pp. 159-162; *Stone*, EU Private International Law, 2nd ed., 2010, p. 104. However, it seems that understanding establishment in line with Arts 49-55 of the TFEU would lead to the proliferation of competent courts since secondary establishment covers agencies, branches or subsidiaries whereas Art. 63 of the Brussels I bis Regulation covers only statutory seat, central administration and principal place of business.

11 CJEU, case C-194/16, *Bolagsupplysningen and Ilsjan*, ECLI:EU:C:2017:766.

Member State. Furthermore, the Court wanted to clarify if a legal person may institute the proceedings for rectification of the information, injunction for removal of the comments and damages for the pecuniary loss with respect to the entire harm sustained, before the courts of the Member State in which its centre of interest is located. If the answer to this question is in the affirmative, the Court asked whether the centre of the interest is located in the Member State of the seat, or whether the centre of interest should be determined in accordance with all the circumstances, such as its seat and fixed place of business, the location of its customers and the way and means in which its transactions are concluded. The CJEU responded that the legal person may institute the proceedings for removal and rectification of violating content and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interest is located. It cannot however bring an action for rectification and removal of violating content before the courts of each Member State in which the information is accessible.

C. Injured Party's Centre of Interest

In the joined cases *eDate Advertising* and *Olivier Martinez*, the CJEU remained consistent with *Shevill,* but introduced a new jurisdictional criterion, i.e. centre of interest of the injured party. The factual background in the joined cases *eDate Advertising* and *Olivier Martinez* and *Shevill* differ with respect to the means by which the violating content was disseminated to the public. In *Shevill*, the defamatory article was published in the newspapers meaning distribution and accessibility was limited to one or more countries. On the other hand, in *eDate Advertising* and *Olivier Martinez*, the information was posted on the internet and the violating content could have been read from anywhere in the world. Internet, unlike traditional means of communication, does not have a limited territorial scope. The content available on the internet is generally universally accessible and stays on the internet forever. As the CJEU explained, the consequence of this distinction makes personality rights violations occurring on the internet more severe.[12] For that reason, the centre of interest was introduced in *eDate Advertising* and *Olivier Martinez* as a jurisdictional criterion based

12 CJEU, *eDate Advertising* and *Olivier Martinez*, (fn. 8), para. 47.
The devastating effect that personality rights violation over the internet has on the injured party, compared to the violation through traditional media was recognised by the English court. In *Cairns v Modi and KC v MGN Limited*, this is referred to as the percolation phenomenon and represents the ground for awarding a higher amount of damages. '… we recognise that as a consequence of modern technology and communication systems any such stories will have the capacity to "go viral" more widely and more quickly than ever before. Indeed it is obvious that today, with the ready availability of the world wide web and of social networking sites, the scale of this problem has been immeasurably enhanced, especially for libel claimants who are already for whatever reason in the public eye. In our judgement, in agreement with the judge, this percolation phenomenon is a legitimate factor to be taken into account in the assessment of damage.' Court of Appeal, [2012] EWCA Civ 1382, *Cairns v Modi and KC v MGN Limited*, para. 27.

on the place where the injured party suffers the consequences of a harmful act most intensely and is accordingly allowed to sue for all the damage sustained.

I. Natural Person's Centre of Interest

In *eDate Advertising* and *Olivier Martinez*, the CJEU explained that the centre of interest of the natural person usually coincides with his or her habitual residence. European private international law instruments and accompanying CJEU case law, with a few exceptions with respect to a child's habitual residence,[13] do not define habitual residence. Therefore, for the purposes of establishing habitual residence, national courts should rely on CJEU case law in other areas. According to that case law, habitual residence is located in the country in which the person has his or her habitual centre of their interest.[14] Intention and permanence of stay are the main elements relevant for determining habitual residence.[15] Account should also be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his or her absence, the nature of the occupation found in the other Member State, the person's family situation, reasons for moving and stability of employment.[16] The CJEU left some room for the possibility that the centre of interest does not coincide with the habitual residence, but is, instead located in the Member State in which the injured party pursues his or her professional activity.[17]

The rationale of the centre of interest criterion is to locate the place in which the person enjoys his or her reputation the most because he or she is known by the greatest number of people. In such a place, where his or her reputation is diminished in the eyes of the largest number of people, the person suffers the most severe consequences from personality rights violations. This is 'the main place of person's self-fulfilment'.[18] Keeping this in mind, the centre of interest should be located in a Member State that is different from the one in which the person has his or her habitual residence in the event that the person's reputation in that other Member State is greater than in the Member State of habitual residence, which might be the case with certain people enjoying a cross-border reputation.

13 CJEU, case C-523/07, *A*, ECLI:EU:C:2009:225; CJEU, case C-497/10 PPU, *Mercredi*, ECLI:EU:C:2010:829; CJEU, case C-111/17, *PPU – OL*, ECLI:EU:C:2017:436.

14 CJEU, case C-102/91, *Knoch v. Bundesanstalt für Arbeit*, ECLI:EU:C:1992:303, para. 21; CJEU, case C-90/97, *Swaddling*, ECLI:EU:C:1999:96, para. 29; CJEU, case C-372/02, *Adanez-Vega*, ECLI:EU:C:2004:705, para. 37.

15 See CJEU, *Swaddling*, (fn. 14), para. 30.

16 CJEU, *Knoch v. Bundesanstalt für Arbeit*, (fn. 14), para. 23; CJEU, *Swaddling*, (fn. 14), para. 29; CJEU, *Adanez-Vega*, (fn. 14), para. 37; CJEU, case C-452/93 P, *Magdalena Fernández v. Commission*, ECLI:EU:C:1994:332, para. 22.

17 CJEU, *eDate Advertising* and *Olivier Martinez*, (fn. 8), para. 18; Opinion of the Advocate General *Cruz Villalón*, CJEU, *eDate Advertising* and *Olivier Martinez*, (fn. 8), para. 48.

18 *Oster*, (fn. 10), p. 133.

II. Legal Person's Centre of Interest

As for legal persons, the CJEU in *Bolagsupplysningen* clarified that in the event that a legal person's personality rights are violated, the legal person, just like a natural person, has the option of suing before courts of the Member State in which its centre of interest is located. The Advocate General Bobek rightly observed that in so far as the centre of interest jurisdictional ground is concerned, there should be no distinction between natural and legal persons.[19] The centre of interest as the jurisdictional ground represents a special jurisdictional rule, which means that its aim is not the protection of the plaintiff as the weaker party but rather the sound administration of justice and therefore there is no reason why a legal person should not rely on it.[20]

The CJEU explained that the legal person's centre of interest is located in the place where its commercial reputation is most firmly established and should be localised in the place where it carries out the main part of its economic activities. If the legal person carries out the main part of its economic activities in the Member State of its registered office, then its centre of interest coincides with the registered office. If the court, based on the evidence, cannot establish if the legal person carries out the main part of the economic activity in a certain Member State, the centre of interest as the jurisdictional ground becomes unusable.

Even prior to the *Bolagsupplysningen* judgment, the injured party's centre of interest was compared to COMI (centre of main interest) from the Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings[21] (formerly Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings).[22] According to Art. 3(1) of the Insolvency Regulation the centre of main interest is located in the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a legal person, the COMI is presumed to coincide with the registered office. In the case of an individual exercising an independent business or professional activity, it is his or her principal place of business or in the case of other individuals, his or her habitual residence. However, as it was indicated, the COMI is focused on economic interests, while the centre of the injured party's interest relies also on non-economic factors such as habitual residence of the injured party's relatives and close friends.[23]

19 Opinion of Advocate General *Bobek*, CJEU, *Bolagsupplysningen and Ilsjan*, (fn. 10), paras 36-69.

20 CJEU, *Bolagsupplysningen and Ilsjan*, (fn. 11), paras 38 f.

21 Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141 of 05/06/2015, pp. 19-72.

22 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160 of 30/06/2000, pp. 1-18.

23 *Bogdan*, Defamation on the Internet, Forum Delicti and the E-Commerce Directive: Some Comments on the ECJ Judgment in the eDate Case, in: Bonomi/Romano (eds.), Yearbook of Private International Law, Vol. 13, 2011, Swiss Institute of Comparative Law Lausanne, p. 486.

Advocate General Bobek, in his opinion in *Bolagsupplysningen,* referred to COMI in determining the legal person's centre of interest. According to Advocate General Bobek, the fact that the registered office represents the starting point when determining the COMI of a legal person is in line with general jurisdiction rule in Art. 4 of the Brussels I bis Regulation. However, as he pointed out, for the purposes of establishing jurisdiction pursuant to the Insolvency Regulation, the COMI of the debtor should be determined. In cases of personality rights violations on the internet, the situation is reversed: the centre of interest of the injured party, who is usually the plaintiff, is to be determined. Therefore, as he concludes, the elements which should be taken into account when establishing the legal person's centre of interest should be the main commercial or other professional activities, which should be determined based on turnover or number of customers or other professional contacts. The seat of the legal person may be taken into account, as merely one of the elements since legal persons often establish registered offices in countries with which they have no real contact.[24]

Neither the CJEU, nor the Advocate General considered fixing the centre of interest of the legal person to its habitual residence as defined by Art. 19 of the Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation)[25] and Art. 23 of the Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II Regulation).[26] According to these provisions, the legal person's habitual residence is the place of their central administration. Given that there has to be consistency in interpreting scope and provisions of the Brussels I bis Regulation, Rome I and the Rome II Regulation,[27] the understanding of the legal person's habitual residence from the Rome I and the Rome II Regulation might have been borrowed for the purpose of the legal person's habitual residence. Prior to the decision in *Bolagsupplysningen*, it has been observed that this approach would perhaps be a good starting point.[28]

D. Domicile Instead of Centre of Interest?

The introduction of the new jurisdictional criterion in *eDate Advertising* and *Olivier Martinez* is a welcome response to the rapid technological development and conse-

24 Opinion of Advocate General *Bobek*, CJEU, *Bolagsupplysningen and Ilsjan*, (fn. 10), paras 106-118.

25 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177 of 04/07/2008, pp. 6-16.

26 Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ L 199 of 31/07/2007, pp. 40-49.

27 Recital 7 of the Rome I Regulation preamble and recital 7 of the Rome II Regulation preamble.

28 *Márton*, (fn. 10), p. 303.

quential personality rights violations which are becoming more frequent.[29] The consequences of internet violations have a more devastating effect on one's personality due to their ubiquity, rapid dissemination and the inability to completely take down the content. Therefore, even though it is clearly justified to introduce the new jurisdictional criterion, the choice might seem odd. Habitual residence, which in the majority of situations will coincide with the natural person's centre of interest, is a common jurisdictional ground in family matters.[30] For instance, in cases of divorce and parental responsibility, habitual residence is justified by reasons of proximity.[31] According to those rules, the court competent to discuss the divorce or parental responsibility is the one where the spouses and/or the child live and that court is indeed in the best position to ascertain the family and social relationships and render the decision. It must be admitted that personality rights are closer to family matters than other issues falling within the ambit of the Brussels I bis Regulation, so from that point of view, habitual residence may indeed be an appropriate approach. Questions related to personal status are often raised in the country in which people have their habitual residence.[32] Nevertheless, with *eDate Advertising* and *Olivier Martinez* the CJEU indirectly introduced habitual residence as one of the jurisdictional criteria into the Brussels I bis regime, which is a strict system of jurisdictional rules, founded on the principle of legal certainty and the requirement that a normal, well-informed defendant should be able to reasonably foresee the courts, other than those of the State in which he or she is domiciled, before which he or she may be sued.[33] Even though habitual residence might be considered as a jurisdictional ground, which entails flexibility and demonstrates a close connection with a particular country compared to domicile which is more rigid, it is a circumstantial concept and does not provide as

29 *Bogdan* referred to adapting a provision on non-contractual liability which was formulated long before internet to internet environment as 'pragmatic flexibility' which is 'both welcome and necessary', *Bogdan*, (fn. 23), p. 485.

30 See Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ L 338 of 23/12/2003, pp. 1-29 and Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7 of 10/01/2009, pp. 1-79.

31 See Recital 12 of the Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000. *Tomljenović/Kunda*, Uredba Rim III: treba li Hrvatskoj?, in: Kunda (ed.), Obitelj i djeca: europska očekivanja i nacionalna stvarnost/Family and Children: European expectations and national reality, Pravni fakultet u Rijeci, Hrvatska udruga za poredbeno pravo, 2014, pp. 223-224; *Medić Musa*, Predmeti o roditeljskoj odgovornosti prema Uredbi Vijeća (EZ) br. 2201/2003 od 27. studenoga 2003. o nadležnosti i priznanju i ovrsi odluka u bračnim predmetima i predmetima roditeljske odgovornosti i o ukidanju Uredbe (EZ) br. 1347/2000, in: Korać Graovac/Majstorović (eds.), Europsko obiteljsko pravo, Narodne novine, 2013, p. 235.

32 *Iyer*, Domicile and Habitual Residence, Singapore Law Review, Vol. 6, 1985, p. 125.

33 CJEU, case C-281/02, *Owusu*, ECLI:EU:C:2005:120, para. 40.

sufficient a level of legal certainty as a jurisdictional criterion.[34] While habitual residence is an appropriate connecting factor in the field of the applicable law, at the point in time when the court has yet to establish whether it has jurisdiction, it is not opportune to burden it with factual questions that are a matter of proof.[35] Hess illustrated difficulties which might arise in determining the centre if interest by using his own personal circumstances of the director of the Max Planck Institute (MPI) who is currently working in Luxembourg but still enjoys reputation in Germany where his family lives.[36]

Similar to a natural person's centre of interest, the legal person's centre of interest might not be the best option from the perspective of legal certainty and predictability. First of all, it might not always be apparent where the legal person performs the majority of its economic activities. This is especially true with respect to companies which are doing business in more than one country in which case it might be cumbersome to determine in which one the economic activity is stronger and which factors should be taken into consideration in assessing this in the first place. Again, confronting the court with the task of investigating facts connected to the legal person's business just in order to establish whether it is competent or not does not seem efficacious. Moreover, in case of non-profit legal persons, it is not clear which criterion should be taken into consideration in determining their centre of interest. The most problematic aspect of the legal person's centre of interest might be the fact that in the event that the court is not able to identify in which country the legal person carries out the main part of its economic activity, the centre of interest cannot be used as the jurisdictional ground. This jurisdictional ground is hence unpredictable for the defendant. Even the plaintiff who must submit the information on its economic activity cannot be certain if the court seized based on the centre of interest criterion will declare itself competent.

Another downside of the centre of interest as the jurisdictional criterion is the fact that both in respect of natural and legal persons it is not clear whether there can be

34 On habitual residence and legal uncertainty, see *Bouček*, Uobičajeno boravište u hrvatskom međunarodnom privatnom pravu, Zbornik Pravnog Fakulteta u Zagrebu, Vol. 65, No. 6, 2015, pp. 898 and 913.
On the difference between domicile and habitual residence, see *Márton*, (fn. 10), pp. 109-110. For a different opinion on legal certainty being predictable, see *Lein*, (fn. 5), pp. 171-172, paras 4.118-4.121.

35 *Jenard* explained why habitual residence was not accepted as a jurisdictional basis in the Brussels Convention in the first place. He pointed out that the habitual residence is open to different interpretation in Member States. Moreover, the introduction of habitual residence as the jurisdictional criterion would significantly deviate from Member States' legal orders, majority of which uses domicile as a jurisdictional basis. Determining the habitual residence would present a problem with respect to persons whose domicile is dependent on another person's domicile. Therefore, the domicile is 'more fixed and stable place'. Coexistence of both criteria was also rejected for it would increase the risk of parallel proceedings. See *Jenard*, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Jenard Report), OJ C 59 of 05/03/1979, pp. 15-16.

36 *Hess*, The Protection of Privacy in the Case Law of the CJEU, in: Hess/Mariottini (eds.), Protecting Privacy in Private International and Procedural Law and by Data Protection, European and American Developments, Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, Vol. 3, 2015, p. 94.

more than one centre of interest. Prior to the judgment in *Bolagsupplysningen*, it has been argued that a person has only one centre of interest, since the judgment in *eDate Advertising and Olivier Martinez* mentions 'the' and not 'a' centre of interest.[37] The Italian, French and German versions of the judgment use definite articles, 'il', 'le' and 'den' respectively, to refer to the centre of interest. However, the Advocate General in his opinion in *Bolagsupplysningen* expressed a different opinion by saying that there might be more than one centre of interest in respect to a specific claim.[38]

For the stated reasons, the domicile as the jurisdictional criterion instead of the injured party's centre of interest would be more in line with legal certainty as the Brussel I bis cornerstone and would fit into the existing jurisdictional system which does not use habitual residence as the jurisdictional criterion.[39]

E. The Mosaic Principle Based on Accessibility Criterion

The mosaic principle for jurisdiction in personality rights violation cases was first introduced by *Shevill* in which the CJEU held that the person whose personality rights were injured in newspapers may institute the proceedings before the courts of every Member State in which the newspapers are distributed for the damage sustained in that Member State. Thus the mosaic approach was based on accessibility of the violating content in the jurisdiction. Even though the CJEU explained in paragraph 29 of the judgment that damage to personality rights occurs in places where the newspapers were distributed under the condition that the injured party is known in those places, this condition was omitted from the operative part of the judgment.[40] It follows that, for the purposes of jurisdiction, the courts do not have to ascertain if the injured party was known in the forum, rather it is sufficient if the newspapers were distributed in the forum.

In *eDate Advertising* and *Olivier Martinez*, the CJEU decided to remain consistent with mosaic approach based on accessibility criterion regardless of the difference of the internet and press as means of communication. It held that the party injured by violation of the personality rights on the internet may sue before the courts of each Member State in which the content is accessible for the damage sustained in that country. Due to the internet's universality and ubiquity, this generally means that the injured party will be able to sue before the courts of each Member State.

37 *Bogdan*, (fn. 23), p. 486. See CJEU, *eDate Advertising* and *Olivier Martinez*, (fn. 8), paras 49 and 50.

38 Opinion of Advocate General *Bobek*, CJEU, *Bolagsupplysningen and Ilsjan*, (fn. 10), paras 36-69.

39 Habitual residence is used in only one instance. In order for the prorogation clause to be valid in insurance contracts and consumer contracts, one of the alternative conditions is that the parties choose the court of the Member State in which they are both habitually resident. See Art. 15(3) and Art. 19(3) of the Brussels I bis Regulation.

40 *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, August 2012, p. 258.

In *Bolagsupplysningen*, the CJEU limited the applicability of the mosaic approach based on the category of the claim. In this judgment, the claim was for the rectification of disputed information and the removal of information. The CJEU found that such a claim is a single and indivisible application and can therefore only be made before a court which is competent with respect to the entire damage sustained. While the CJEU's standing on this matter is sound and justified, it is not clear why the CJEU did not establish this rule earlier. In *eDate Advertising,* X sought to prevent eDate Advertising from using his full name when reporting about him in connection with the crime committed; an injunction which concerned the territory of the Federal Republic of Germany.[41] There does not seem to be any difference between the injunction against the German based operator of the website which was aimed at prohibiting future publications in Germany and the claim for correction and removal of the violating content against the Swedish company responsible for posting violating content online. Courts of the Member State in which the violating content is merely accessible should not have jurisdiction for discussing either one of those claims. It is not entirely clear from the operative part of the judgment whether after *Bolagsupplysningen* a natural person will be able to institute proceedings for removal and correction before courts of each Member State in which the content is accessible or whether this part of the judgment refers to natural persons as well. It seems as though the appropriate approach would be making no distinction in this respect between natural and legal persons.

F. Appropriateness of the Mosaic Principle

The accessibility criterion which underlies the mosaic principle may be justified by an argument used by the High Court of Australia in the landmark decision of *Dow Jones and Company Inc v Gutnick*: 'those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction'.[42] However, the accessibility criterion has been heavily criticised.[43] A number of practical and conceptual flaws have been associated with it such as libel tourism[44] and forum shopping.[45] Furthermore, accessibility is

41 CJEU, *eDate Advertising* and *Olivier Martinez*, (fn. 8), para. 18; Opinion of the Advocate General *Cruz Villalón*, CJEU, *eDate Advertising* and *Olivier Martinez*, (fn. 8), ECLI:EU:C:2011:192, para. 13.

42 High Court of Australia, [2002] HCA 56, *Dow Jones and Company Inc v Gutnick*, para. 39.

43 Even before the judgment in *eDate Advertising* and *Olivier Martinez* was rendered, *Bogdan* stated that accessibility of the content is not an appropriate jurisdictional ground, unless combined with real or potential damage in the jurisdiction. *Bogdan*, Website Accessibility as Basis for Jurisdiction under the Brussels I Regulation, Masaryk Journal of Law and Technology, Vol. 5, No. 1, 2011, p. 4.

44 *Reymond*, Jurisdiction in Case of Personality Torts Committed over the Internet, in: Bonomi/Romano (eds.), (fn. 23), p. 209.

45 *Kunda*, Competencia judicial internacional sobre violaciones de derechos de autor y derechos conexos en Internet, Anuario Español de Derecho Internacional Privado, Vol. 13, 2013, p. 478; *Reymond*, (fn. 44), p. 209.

contrary to recital 16 of the Brussels I bis Regulation pursuant to which the existence of the close connection between the court and the action is particularly important in 'disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation', as well as the principle of avoidance of proliferation of competent courts.[46] It does not seem that the mosaic principle based on website accessibility meets the requirement that the defendant can reasonably foresee the courts before which he or she may be sued. When the violating content is distributed through traditional means of communication, this criterion may be justified, since it means that jurisdiction will be conferred to Member States in which the violator itself decided to distribute the content, save for maybe a few copies which made their way to a Member State outside of the distribution net. However, even after *Shevill* was rendered, the mosaic principle was criticised for allowing the plaintiff to harass the defendant by suing him in a different Member State.[47]

The CJEU admitted that 'it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State'.[48] It is not completely clear why it decided to accept this jurisdictional criterion. It is true that the CJEU tried to discourage injured parties from suing before courts of the Member State in which the content is accessible by limiting the jurisdiction of the courts in that Member State to the damage sustained there. Still, the fact is that the plaintiff has the option of suing before courts of every Member State in which the violating content is accessible which does not put the defendant in the position of being able to reasonably predict the courts before which he or she may be sued.

Furthermore, the mosaic principle based on accessibility criterion is problematic from the perspective of content which is of limited accessibility on the internet, i.e. is not universally accessible. For instance, this was the case in *Finkel v Dauber*[49] in which the defamatory content was posted within a closed Facebook group. It is not clear how the accessibility criterion should operate in cases such as this, for example whether the court seized should investigate the location of group members or whether the relevant criterion should be domicile or perhaps the habitual residence or the location of the group member. The mosaic principle based on accessibility criterion thus fails to be technologically neutral; the requirement which Advocate General Villalón indicated should be fulfilled with the choice of jurisdictional criterion in *eDate Ad-*

46 On avoidance of multiplication of competent court see CJEU, case C-125/92, *Mulox IBC v. Geels*, ECLI:EU:C:1993:306, para. 21; CJEU, case C-220/88, *Dumez France and Others v. Hessische Landesbank and Others*, ECLI:EU:C:1990:8, para. 18; CJEU, case C-37/00, *Weber*, ECLI:EU:C:2014:212, para. 42; CJEU, case C-383/95, *Rutten v. Cross Medical*, ECLI:EU:C:1997:7, para. 18.

47 *Briggs*, The Brussels Convention, Yearbook of European Law, Vol. 15, No. 1, 1995, pp. 490-491.

48 CJEU, *eDate Advertising* and *Olivier Martinez*, (fn. 8), para. 46.

49 Supreme Court, Nassau County, 29 Misc. 3d 325 (2010), 906 N.Y.S. 2d 697, *Finkel v. Dauber*.

vertising and *Olivier Martinez.*[50] Accessibility does not seem to be an appropriate choice of jurisdictional basis if the defendant is not the content creator but rather the provider of information society services or an individual. Conferring jurisdiction to the courts of every Member State from which the content is accessible does not seem reasonable if the provider of information society services does not provide its services in the Member State of the court seized.

With these considerations in mind, the jurisdictional rule for violations of personality rights on the internet would be more in line with principles of legal certainty and avoidance of multiplication of competent courts, as well as technological neutrality if the part of the *eDate Advertising* and *Olivier Martinez* judgments, according to which the injured party may commence proceedings before the courts of every Member State in which the content is accessible for the damage sustained there, was omitted. *Bolagsupplysningen* is not explicit on whether it intends to overturn the *eDate Advertising* and *Olivier Martinez* judgments whenever the injured party sues for an injunction which is territorially limited, or only if the injured party seeks removal and correction.

G. Conclusion

Through its judgment in joined cases *eDate Advertising* and *Olivier Martinez* the CJEU clarified how the Brussels I rule on jurisdiction for non-contractual liability should operate in cases of personality rights violations on the internet. It established a principle according to which the injured party may institute the proceedings before courts of the Member State of the publisher's establishment and the Member State in which the centre of interest of the injured party is located for the entire damage sustained as well before courts of each Member State in which the violating content is accessible, but in the latter case solely in respect of the damage sustained in that particular country. Thus the CJEU remained consistent with *Shevill*, the case which concerned violations of personality rights by traditional means of communication. In both judgments the publisher's establishment is the jurisdictional criterion, which corresponds to the place where the harmful act was committed and confers jurisdiction for the entire damage sustained. The jurisdictional criterion of distribution of violating content from *Shevill* was adapted to the online environment in *eDate Advertising* and *Olivier Martinez* by conferring jurisdiction to courts of Member States in which the violating content is accessible.

The most recent judgment *Bolagsupplysningen,* unlike *eDate Advertising* and *Olivier Martinez,* concerned the violation of personality rights of a legal person on the internet. In this case, the CJEU held that legal persons whose personality rights have been violated on the internet, just like natural persons, may institute proceedings before the courts of the Member State in which the legal person's centre of interest is

50 Opinion of the Advocate General *Cruz Villalón*, CJEU, *eDate Advertising* and *Olivier Martinez*, (fn. 8), para. 53.

located. The legal person's centre of interest is located in the place where it carries out the main part of its economic activities.

Even though it is justified to introduce a new criterion due to the serious impact violations of personality right may have on the injured party, its choice does not seem appropriate. The Brussels I bis system of rules is founded on domicile as the jurisdictional rule. Instead of habitual residence, which in the majority of cases will coincide with the centre of interest of the natural person and is a question of fact, the injured party's domicile would be more in line with the existing system. The same goes for the legal person's centre of interest, which also depends on facts connected with the economic activity of the legal person. In this manner, situations whereby the court cannot establish the legal person's centre of interest with the consequence of having to deny this jurisdictional option for legal persons would be mitigated.

In *Bolagsupplysningen*, the CJEU also held that the claim for correction and removal of the violating content cannot be raised before courts of the Member State in which the content is accessible, since it is a single and indivisible action. Given that in *eDate Advertising*, the claim at issue was also a single and indivisible one, i.e. an injunction by which the injured party sought to prevent the violator from posting violating content in the future, it remains unclear, whether the *Bolagsupplysningen* case partly changed the *eDate* doctrine, or if it only refers to claims for correction and removal. The first solution seems to be a more justified one. Nevertheless, conferring jurisdiction to the courts of every Member State where the violating content is accessible, which in the majority of cases is every Member State, is in direct collision with legal certainty, avoidance of multiplication of competent courts and sound administration of justice. Abolishing this criterion for all categories of claims, not only single and indivisible ones, would be more in line with Brussels I cornerstones.