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CHAPTER 39

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JURISDICTION IN INTERNET DEFAMATION CASES AND CJEU'S POLICY CHOICES

ABSTRACT

The Brussels I bis Regulation (1215/2012), sequel to the Brussels I Regulation (44/2000), contains rules on international jurisdiction of the EU Member States' courts in cross-border cases. Although the EU provision on jurisdiction for non-contractual cases follows the same principle as the respective Croatian national provision, its interpretation goes much beyond its actual wording. There is a growing number of cases related to violation of rights over the Internet, and in particular with the manner in which the jurisdictional provision based on a traditional territorial connection might be adjusted to the online environment. In its rulings, the CJEU regularly applies the purposive interpretation rather than strictly literal one, thus allowing flexibility in reading the existing provisions. In doing so, the CJEU necessarily takes account of the underlying economic and social as well as private interests. The purpose of this paper is to scrutinize the operation of the special jurisdictional provision for torts in Internet defamation cases and assess its socio-economic implications over the stakeholders. Application of those provisions poses challenges not only to legal practitioners, but also to media industry and individuals in Croatia.

Keywords: European law, personality rights, international jurisdiction, Internet, underlying principles, media

JEL classification: K13, K40

1. INTRODUCTION

One of the tasks of the private international law is to determine the courts, which will have jurisdiction to decide the case connected to more than one country. In many situations, such a connection is established based on territorial principle, such as the domicile of the defendant, the place of the fulfilment of the contract, the place where the immoveable is situated and the place where a party has acted. The concretisation of territorial principle in the form of special jurisdiction provisions is justified by the close connection between the dispute and a country of a court seised with the dispute. A sharp turn occurred with the expansion of the Internet since the mid-nineties, because of the omnipresent nature of the Internet. Naturally, these developments instantly captured the focus of international legal scholars (see for example Boele-Woelki & Kessedjian, 1998). Developments that are more recent include the Web 2.0. Its interactivity and dynamism created a favourable environment for popularizing social networks and the World Wide Web in general. Under such circumstances, the personality rights violations on the Internet became a growing social and legal issue, presenting concerns in the area of private international law as well. Recent cases referred to the Court of Justice of the European Union (hereinafter: the CJEU) have placed a difficult task on that Court – to adapt traditional territory-based jurisdiction provisions to Internet disputes defying geographic limitations.

The paper provides an analysis of the CJEU case law, which explains the scope of the applicable provision, its interpretation, and finally the approach the CJEU adopted to resolve Internet disputes. Due to its secondary applicability, a limited part of the paper is dedicated to the special jurisdiction provision of Croatian national law, which is brought into play in Internet defamation cases. The central part of the paper relates to the criteria upon which the CJEU based its decisions regarding jurisdictional issues in disputes originating in online personality rights violations, an in depth analysis of the underlying policy choices and stakeholders' interests.

2. LEGAL FRAMEWORK

2.1. Special jurisdiction in torts in EU law

The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (hereinafter: the Brussels Convention, Consolidated version OJ C 27, 26.1.1998, pp. 1–27) was introduced in 1968 as one of the most important instruments of European private international law. Being a so called "double convention" it incorporated two categories of rules, the ones determining international jurisdiction of the Member States' courts, and the ones prescribing conditions under which judgments rendered in one Member State could be recognized and enforced in another. In 2001, after the European legislator had gained the necessary legislative powers to unify the European judicial area in civil and commercial matters, the Brussels Convention was transformed, with minor amendments, into 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, OJ L 12, 16.1.2001, pp. 1–23). At the end of 2012, the Brussels I Regulation was replaced by the 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, OJ L 351, 20.12.2012, pp. 1–32) which preserved intact the majority of the Brussels I Regulation text, with some modifications. The Brussels I bis Regulation entered into force on 10 January 2015.

Several provision in the Brussels I bis Regulation may come into play when determining jurisdiction in Internet defamation cases, but one, which is particularly pertinent to the topic of this paper, is contained in Art. 7(2) of the Brussels I bis Regulation (formerly, Art. 5(3) of the Brussels I Regulation). This provision applies in matters relating to tort, delict or quasi-delict, and confers jurisdiction to courts of the Member State where the harmful event occurred or may occur.

The CJEU developed an extensive interpretation of the provision of Art. 7(2) of the Brussels I bis Regulation (and its predecessors in the Brussels I Regulation and Brussels Convention). Regarding the scope of the said provision, the CJEU held that the term "matters relating to tort, delict or

quasi-delict" entails the relationship between parties that cannot be qualified as a contract. Therefore, the first step by the national courts in determining whether a relationship between the parties may be characterised as a matter relating to tort, delict or quasi-delict, must be to exclude the existence of a contractual link. The contractual nature of the relationship in the sense of Art. 7(1) of the Brussels I bis Regulation is to be understood as covering a situation in which there is an obligation freely assumed by one party towards another (Judgment in *Handte v TMCS*, C-26/91, EU:C:1992:268, paragraph 15). More recently, the CJEU restated that the contractual relation "presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based" (Judgment in *Engler v Janus Versand*, C-27/02, EU:C:2005:33, paragraph 51). On the other hand, the dispute is to be classified as non-contractual if it seeks to establish the liability of a defendant that is not related to a contract (Judgment in *Kalfelis v Schröder and Others*, C-189/87, EU:C:1988:459, paragraph 18).

Turning to the jurisdiction criterion, it has to be pointed out that the entire CJEU case law on the issue concerns the cases of distant torts, i.e. torts in which an event giving rise to damage takes place in one country (*locus actus*) while the consequences of such event are produced in another country (*locus damni*). In one of its early judgments, the CJEU adopted the principle of ubiquity when holding that the term "harmful event" means both the place where the damage occurred and the place of the event giving rise to it. This issue was decided in *Handelskwekerij Bier v Mines de Potasse d'Alsace* (C-21/76, EU:C:1976:166). The CJEU replied in the affirmative to the preliminary question whether a Dutch plaintiff may institute the proceedings against the French company managing a French mine before the Dutch courts, in which he claims compensation of damages to the crops in the Netherlands as the result of the saline waste which floated through Rhine from a French mine. The principle of ubiquity underlying the provision of Art. 7(2) is justified by the fact that both the court of the place where the damage occurred and the court of the place where the wrongdoer acted present appropriate fora for collecting the evidence and conducting the proceedings, and thus satisfy good administration of justice.

It is important to bear in mind that the place where the damage occurred refers only to the place where the direct damage occurred. Indirect

consequences of a harmful act are not an acceptable criterion for establishing jurisdiction. The CJEU decided so in *Dumez France and Others v Hessische Landesbank and Others* (C-220/88, EU:C:1990:8). The French companies filed a lawsuit against German banks before French courts based on Art. 7(2) of the Brussels I bis Regulation. According to the plaintiffs, the damage occurred in France to the companies' assets as a result of the damage their German subsidiaries initially sustained following the cancellation of the loans to the contractor by the German banks. Because only the damage arising to the German subsidiaries may be qualified as direct damage, French courts do not have jurisdiction over the claim in question. The rationale for limiting the *forum damni* to the court of the direct damage only is to avoid multiplication of competent courts because it might increase the risk of irreconcilable judgments rendered in different Member States. What is more, the Brussels I bis Regulation is in principle averse to conferring jurisdiction to the court of Member State of the plaintiff, unless it is appropriate due to the close connection with the dispute. While the apparent proximity exists between the place of the direct damage and the action for establishing the perpetrator's liability, the connection does not exist with the place of the financial repercussions deriving from direct damage. The latter is not warranted in the interest of efficient judiciary and is highly unpredictable to potential defendants.

The next step in the interpretation of the respective provision was owed to *Shevill and Others v Presse Alliance* (C-68/93, EU:C:1995:61). In this case, the CJEU was faced with the circumstances in which damage occurred in several Member States. On the plaintiff's side appeared Ms. Shevill, an English citizen residing in England who worked in the exchange office in Paris, as well as three companies incorporated under the laws of different Member States, managing an exchange office in Paris. The defendant was the company Presse Alliance SA, the publisher of the France Soir newspapers, in which an article was published, suggesting that companies managing the exchange office and Ms. Fiona Shevill were involved in money laundering as part of a drug trafficking network. The plaintiffs instituted the proceedings before the English court claiming compensation for defamation. The case raised issues concerning constitutive elements of "harmful event" and their localisation. The CJEU clarified that in the event of personality rights violations the rules developed in previously mentioned cases involving a physical damage or damage to assets, still apply. The plaintiff may

initiate proceedings in respect of all damage caused before the court of the publisher's establishment, as the place where the event giving rise to damage occurred. Additionally, the jurisdiction is conferred to the court of each Member State in which plaintiff claims to have suffered the damage as a result of copies of the newspapers distributed there, but only regarding the amount of damage sustained in that particular Member State. Such partitioning of *locusdamni* jurisdiction by portions of damage is often called the mosaic principle. In this paper it is referred to as the distributive jurisdiction, as opposed to the jurisdiction in the *locus actus* which is called aggregate jurisdiction.

2.2. Special jurisdiction in torts in Croatian law

In the Republic of Croatia, the majority of rules on establishing international jurisdiction are contained in Croatian Private International Law Act (hereinafter: the Croatian PIL Act, Official Gazette No. 53/1991, 88/2001). Subsequent to the accession of the Republic of Croatia to the European Union, the Brussels I Regulation, and its later amendments introduced by the Brussels I Regulation bis Regulation, became directly applicable. Accordingly, the Croatian PIL Act applies only in cases, which fall out of the scope of application of the Brussels I bis Regulation, such as where the defendant's domicile is outside the EU. There are several provisions in the Croatian PIL Act, which might be pertinent to Internet defamation cases, such as on general jurisdiction and on tacit prorogation of jurisdiction. Since they do not pose particular issues in Internet disputes, they are not dealt with in this paper. The provision specifically relevant to the Internet defamation cases is contained in Art. 53. According to it, the Croatian courts have jurisdiction if the damage occurred in the territory of the Republic of Croatia.

The term "damage" from Art. 53 of the Croatian PIL Act refers only to direct damage. The Supreme Court of the Republic of Croatia laid down this principle in its landmark judgment in *Katić* (VSRH, Revt 51/2003-2 of 27 February 2007). The plaintiff was a seaman who suffered severe bodily injuries during the inspection of the safety equipment in the lifeboat while the ship was anchored in Piraeus, Greece. The plaintiff whose domicile was in Croatia sued the Dutch shipowner in Croatia for pecuniary and non-pecuniary damages relying on Art. 53 of the Croatian PIL Act. The Commercial Court in Rijeka awarded him damages and the

High Commercial Court affirmed. However, upon the defendant's appeal on points of law, the Croatian Supreme Court quashed both judgments holding that Croatian courts do not have jurisdiction to hear this case. Seeing that the harmful event in which the plaintiff has suffered bodily injuries and health damage occurred abroad, the Supreme Court concluded that the damage occurred there and not on the territory of the Republic of Croatia. As the Croatian High Commercial Court reasoned in one of the later judgments (Pž-462/04 of 22 November 2007) relying on *Katić*, Art. 53 should be interpreted restrictively as it represents an exception to the general rule of jurisdiction, and therefore a close connection must exist between the subject matter and the competent court other than the court of the defendant's domicile. The Croatian Supreme Court thus chose to follow the same line of reasoning as developed by the CJEU's case law concerning the provision of the Brussels Convention and later regulations on international jurisdiction in non-contractual disputes, discussed in the former chapter (supra Ch. 2.1.). By doing so, the Supreme Court changed the direction of the long-standing Croatian court practice which failed to differentiate indirect from direct consequences of the harmful event for the purposes of international jurisdiction in torts (see, for example the High Commercial Court judgment Pž-6000/04 of 3 February 2006).

There seems to be no consensus in Croatian legal scholarship as to whether Art. 53 of the Croatian PIL Act incorporates the principle of ubiquity or not. Older theories suggest that Art. 53 refers only to the consequences of the damage (Dika, 1991: 197). However, more recent viewpoints lean towards an extensive interpretation according to which Art. 53 covers both the place of the event giving rise to damage and the place of the damage (Sajko, 1994: 239). Despite the fact the literary interpretation speaks in favour of the *locus damni*, Croatian scholarship tends to justify a broader interpretation by several points: Both jurisdiction criteria have equal importance, place of the event giving rise to damage is often more closely related to the harmful event, court in the place of the event giving rise to damage is competent to rule on the entire damage and not just the segment related to that specific country (Tomljenović 1998: 908), and this is the type of jurisdiction which is of elective nature so the plaintiff should have a choice between the two equally relevant jurisdiction criteria (Kunda 2008: 475).

3. OPERATION OF PROVISIONS ON SPECIAL JURISDICTION IN TORTS IN INTERNET DEFAMATION CASES

In the vein of its predecessors, the Brussels I bis Regulation does not contain a specific jurisdictional rule that applies in cases concerned with personality right violations on the Internet, including Internet defamation cases. Instead, the provision of Art. 7(2) is brought into play. The CJEU had a chance to clarify in which manner the provision of Art. 7(2) is applied to Internet defamation disputes. The issue appeared in *eDate Advertising* and *Olivier Martinez* (C-509/09 and C-161/10, EU:C:2011:685). In this case, X whose domicile is in Germany was convicted before the German court to a prison sentence, along with his brother, for the murder of a famous Austrian actor. In 2008, he was released on parole. eDate Advertising, a company domiciled in Austria, published an article on the website it manages mentioning X by his full name. The article alleged that X and his brother intend to prove that the witnesses gave false information during the trial. X sent a cease and desist letter to eDate Advertising concerning information on his conviction. The disputed content was subsequently removed from the website. In the proceedings instituted before the German courts, X sought that court orders eDate Advertising to stop using his full name in articles reporting on the murder. The company objected to international jurisdiction of German courts. The German Supreme Court was in doubt whether the jurisdiction of German courts could be established relying upon Art. 7(2) of the Brussels I bis Regulation. By the request for the preliminary ruling, the Court wished to resolve the dilemma as to interpretation of the place where the harmful event occurred: May the injured party sue the defendant before the courts of any Member State in which the disputed online content is accessible, regardless of the Member State in which the defendant's domicile is? Alternatively, is the existence of a close connection between the website and the content, on one hand and the Member State of the seised court, on the other, required? A further question intended to establish the circumstances which could indicate the presence of such a connection, mentioning: the intent of directing the website to a certain Member State, the number of times the website has been accessed from the territory of the Member State of the court seised, and the objective connection between the disputed information and the Member State of the court seised reflecting itself in the fact that the conflict of interest between the injured party and

the wrongdoer occurred or could have occurred in the Member State of the court seised.
In a joined case, the famous actor Olivier Martinez and his father instituted the proceedings before the French courts alleging the violation of Olivier Martinez's privacy rights. The suit was filed against MNG, the company incorporated under English law that manages the website of the British newspaper Sunday Mirror. The company published an article headed "Kylie Minogue is back with Olivier Martinez" on its website carrying out the details of their encounter. MNG objected to the jurisdiction of the French courts claiming the absence of an adequate connection between the disputed content and the damage allegedly sustained in France. Since the French court was not certain how to interpret the provision on jurisdiction in non-contractual disputes in an online environment, it referred to the CJEU several questions for preliminary ruling. The court wished to clarify whether a mere fact that the website is accessible from a Member State suffices for establishing the jurisdiction of the court in that Member State or should the existence of a significant connection be established between the harmful act and the territory of the Member State. In the case of a latter, the French court further inquired as to whether such a connection may be based on a number of visits to the webpage from the Member State of the court seised in total or compared to the number of visits in other Member States, or nationality or residence of the injured party or persons concerned, or the language in which the disputed content was communicated or other circumstance that could demonstrate the publisher's intention of directing information to Internet users in a certain Member State, or the place where the reported event took place or where the photographs were taken, or perhaps some other criteria.

In its ruling, the CJEU restated that the courts of the publisher's establishment, as courts for the place where the event giving rise to the damage occurred, have aggregate jurisdiction. The CJEU's answer to referred questions is that the courts of every Member State in which the disputed content is accessible (without any further requirement) have distributive jurisdiction. A novelty introduced by the *eDate Advertising*, and limited to cases of personality violation over the Internet, is that in addition to mentioned fora, the court of the place where the injured person's centre of interest is based has the jurisdiction to decide on the entire damage suffered by the injured person. This will most commonly be in the place of the injured party's habitual residence, but under the

circumstances might also be elsewhere. The CJEU reasoned that the court in the place of the injured part's centre if interest is the most appropriate forum to decide on the impact the violation had on the victim's life and it is appropriate to confer such jurisdiction to the court for the place where the injured person's interest is based. Consequently, there are two potential fora with aggregate jurisdiction to hear the claims on total damage (the place of the event giving rise to damage and the place of the injured party's centre of interest) and a number of fora (practically in all Member States) with distributive jurisdiction to hear respective portions of damage (the places where the damage occurred).

The only cases which were decided under Art. 53 of the Croatian PIL Act were similar to *Katić*. To the authors' knowledge, it is nor reported that this provision was tested before Croatian courts in a distance tort case. Against this background, it would be highly speculative to attempt to construe any projection as to its interpretation in an Internet defamation case.

4. THE UNDERLYING POLICIES

In defamation cases occurring both online and offline, three categories of stakeholders can be identified, whose interests have to be balanced in law-making process as well as in rendering court decisions. Those are: an individual, whose interest is in protecting his or her private sphere against unlawful infringements; a publisher, whose interest is regularly of commercial nature and directed at publishing the content that will attract the audience as wide as possible; and public, whose interest is in having access to as much information as possible. The latter two interests generally coincide, whereas they are both frequently in conflict with the former interest of an individual. Balancing of these interests is indeed a difficult task, all the more since they are recognised as specific human rights: the freedom of expression on the part of media and public, and the right to human dignity and respect for private and family life on the part of individuals (Charter of Fundamental Rights of the European Union, Arts. 1, 7 and 11). While balancing of these conflicting interests is probably a more tangible process in substantive law under which the merits of a defamation case are resolved, it seems to be an inevitable point of reference for private international lawmakers in determining international jurisdiction criteria.

Previously scrutinized CJEU's case law demonstrates that the term "harmful event", as uncomplicated as it may seem at first glance, was able to generate a large corpus of interpretative case law. It is possible to tie the need for comprehensive clarification to the CJEU's effort to accomplish a satisfactory level of symmetry among the conflicting interests of the stakeholders. These interests are also represented in the principle of legal certainty and the principle precluding multiplication of the competent fora aimed at minimising the risk of irreconcilable judgments in the European area of freedom, security and justice. Along these lines, the question is raised as to the CJEU's motives to confer in Internet defamation cases such a variety of jurisdictional choices (a distributive jurisdiction on courts of virtually every Member State, an aggregate jurisdiction in the Member State of the event giving rise to damage and additional aggregate jurisdiction in the place of the injured party's centre of interest) at the account of these legal principles.

In *Shevill*, the CJEU believed to have struck the right balance between the interests of the injured party for protection of his or her personality rights, on the one hand, and the interest of the publisher to impart information and general public to receive information as components of the freedom of expression (on the freedom of expression see e.g. Barendt 2012: 899; Verpeaux 2010: 48 et seq.). For obvious reasons, the actions in cases concerned with personality right violations in media will most frequently be brought by the injured party against the publisher. The first option for the injured party is to bring the action in respect of all damage before the court of the publisher's establishment. From the publisher's point of view, besides being the most predictable forum and corresponding to its legitimate expectations, this is probably the most favourable forum as the publisher itself chooses the place of its establishment. This will often mean reference to the defendant's domicile (Art. 4(1) of the Brussels I bis Regulation), which may turn into the plaintiff's domicile if the publisher decides to commence the proceedings, for instance, asking the court to declare there was no violation. Undoubtedly, this criterion is very much in line with the publisher's interests, and with the coinciding interest of the public, and not as much with the injured party's interest. The injured party will usually have to turn to the courts of another Member State, which puts her or him in disadvantageous position. Namely, the official language of the court might be unknown to the injured party, as well as the legal system, in particular procedural rules. Besides, the cost of travel to and

stay in that Member State for the hearings or consultations, along with the cost of legal representation and translation might be significantly higher than compared to the proceedings in the Member State of her or his domicile.

The injured party's second option is to institute the proceedings before the courts of each of the Member States in which damage to one's reputation occurred. These will be the Member States in which the defamatory information is disseminated and in which the injured party is known prior to or after (as a consequence of) its dissemination (compare judgment in *Keeton v Hustler Magazine*, 465 U.S. 770 (1984) where the US court held that even if an injured party did not have a reputation in a certain place prior to publishing of the violating content, it might have one afterwards). The criterion of the place of damage is again highly predictable to publisher. The publisher that appears as defendant can easily limit the number of jurisdictions in which it may be sued under this criterion by territorially restricting the distribution or broadcasting of the information it publishes. Besides, publisher's legitimate expectations are protected by denying any relevance to hearsay in establishing jurisdiction in the place of damage (Nagy 2012: 256). The place of damage is somewhat less predictable to injured party. Although injured party is generally aware of places where she or he has reputation prior to publishing, she or he might become known in other places only because of the defamatory content distributed there. Whatever the case may be, the court of the Member State, other than the one where publisher's establishment is situated, has jurisdiction to decide the claim related to damage sustained in that Member State only. Although in such instances injured party has *de iure* wide options among available fora, these options are *de facto* very limited, as it is inconvenient, if not practically impossible, for the injured party to seek damages in multiple fora. It has been suggested that injured party faced with the choice of aggregate jurisdiction in publisher's establishment and distributive jurisdictions in other Member States where damage is sustained will usually choose the former (see Opinion of the Advocate General Villalón in joined cases *eDate Advertising* and *Olivier Martinez*, C-509/09 and C-161/10, EU:C:2011:192, paragraph 38; Oster, 2012: 115). Thus the injured party would get as much damages as possible for as little litigation costs as needed. In practical terms, thus, the distributive jurisdiction criterion favours publisher rather than injured party. Owing

to marginal chilling effect over the freedom of expression, this criterion is also favourable to the interest of the public to receive information.

In responding to the national court's preliminary questions in *eDate Advertising*, the CJEU attempted to remain consistent with its ruling in *Shevill* (see Gillies, 2012: 1014 et seq.). While two abovementioned criteria remain intact, their effect on the parties' interests is intensified due to the differentiating element in *eDate Advertising* and *Shevill*, i.e. the nature of the media by which the disputed information was communicated to the public. In *Shevill*, the defamatory statement was published in the traditional form of newspapers, the medium whose distribution and accessibility is *per se* limited to a definite number of countries. On the other hand, in *eDate Advertising*, the information was published on the webpage and became instantly accessible in virtually every country in the world (see Judgment in *eDate Advertising*, EU:C:2011:685, paragraph 45; see also Nagy, 2012: 260-261). The CJEU based its ruling on the premise that accessibility of the defamatory content in a certain Member State is sufficient to result in distributive jurisdiction there (discussion on accessibility vs. targeting see in Kunda 2013: 477-482). Unlike some who object that the mere accessibility results in exorbitant jurisdiction (Winkler, 2012: 816), authors of this paper believe that it is warranted by the need to compel everyone, including publishers, to act more responsibly on the Internet. In particular, in cases concerned with online personality rights violation, the harm caused to a person is much more intense and much less reparable than in the case of offline personality rights violation.

Because in situations of online defamation the defamatory content is virtually accessible in all countries in the world, including all Member States, the application of the criterion of distributive jurisdiction to these situations results in the exponentially larger number of potential fora. In a regular case subject to the Brussels I bis Regulation, the courts in 28 Member States would be competent to decide on the respective portions of damages suffered as a consequence of online defamation. For the abovementioned disadvantages in suing in more than one forum, publisher's interest in not being sued before the courts of distributive jurisdiction are probably even safer with online than traditional media. Most likely, the plaintiff would prefer to seek the award of the total amount of damages before one court; hence, the alternative to the distributive jurisdiction under *Shevill* would be aggregate jurisdiction of

the court of the publisher's establishment. This is again unfavourable to the injured party.

The uselessness of the distributive jurisdiction in Internet defamation cases, coupled with the seriousness of the harm suffered as a result of defamation in an online publication (Judgment in *eDate Advertising*, EU:C:2011:685, paragraphs 46 and 47), is counterbalanced by adding a new jurisdiction criterion – the centre of injured party's interests. This CJEU's choice of criterion has been both criticised (e.g. Winkler, 2012: 814-816) and praised (e.g. Muir Watt, 2012: 404) in the legal literature. In the opinion of the authors of this paper, the introduction of such a criterion is an important contribution to efficiency in legal protection of personality rights on the private international law level. This criterion enables injured party's recovery of total amount of damages before one court, which is proximate to injured party, but also proximate to the harmful event as a whole, since this is where the injured party suffers the consequences of a harmful act most intensely. This criterion is also very predictable to both injured party and publisher. As a rule, publisher will be able to establish, prior to publishing, where the respective person's centre of interest is located. In majority of cases, as the CJEU explains, the injured party's centre of interest should correspond to her or his habitual residence, but it might also be another place, such as the place where she or he pursues her or his commercial activity (Judgment in *eDate Advertising*, EU:C:2011:685, paragraph 49).

Mindful of the advantages of this additional aggregate jurisdiction criterion, it is hard to disregard its weaknesses, the main one being in its concretisation as the habitual residence. Not known in the Brussels I bis Regulation or its predecessors, the criterion of habitual residence thus entered the area of jurisdiction in civil and commercial matters through the back door. The Brussels I bis Regulation is a strict system of jurisdictional rules, founded on the principle that a normally well-informed defendant should be able to reasonably foresee before which courts, other than those of the Member State of her or his domicile, she or he may be sued (Judgment in *Owusu*, C-281/02, EU:C:2005:120, paragraph 40). Regardless of the fact that habitual residence as a jurisdictional criterion spread into the matters such as divorce or succession, the civil and commercial matters have been resistant to these developments. The revised Brussels I bis Regulation, which entered into force in January 2015, did not involve any such amendments. Perhaps

the reason is not only in preserving well-established traditional approach (the Brussels Convention dates back to 1968), but also in the fact that habitual residence is a flexible notion based on particular circumstances of each case, and thus prone to reduce the level of the judicial efficiency at the stage of establishing jurisdiction.

In its intention to protect the injured party as the weaker party, the CJEU possibly overstepped the boundaries set by the European legislator. In other instances where the weaker parties merit special protection the Brussels I bis Regulation provides for the jurisdiction in the place of the weaker party's domicile (see rules on jurisdiction protecting the weaker party in consumer and insurance contracts, Sections 3 and 4 of the Brussels I bis Regulation). The same principle could have been followed concerning online violations of personality rights (in the same vein also Lazić, 2014: 102 et seq.; Rühl, 2014: 340 et seq.). Opting for domicile instead of habitual residence, the CJEU would have achieved the same goals: a suitable level of protection of the injured party and satisfactory degree of predictability, but not at the account of the judicial efficiency and good administration of justice. Perhaps the CJEU regarded the overt adoption of the criterion of the injured party's domicile as too radical a choice, given that this would in fact equal to introducing the *forum actoris*, a taboo in the EU law on jurisdiction in civil and commercial matters.

5. CONCLUSION

With this paper, the authors sought to analyse the provisions of European and Croatian private international law, which are applicable in disputes arising out of non-contractual liability. Special attention is devoted to the manner in which these provisions operate in cases of violation of personality rights over the Internet. Following the analysis of the judgment in *eDate Advertising*, the authors came to the conclusion that the CJEU was correct in providing a new criterion for aggregate jurisdiction. This criterion serves to strike fairer balance between publisher's and injured party's interests. Otherwise, the injured party would be *de facto* deprived of access to full justice (i.e. full damages). However, the attempt to create the criterion named as the centre of the injured party's interest is not particularly helpful for either the involved parties or the judicial system. It is a new concept relying on the notion of habitual residence. Being hard to define with certainty and reliant on the

facts of a particular case, the concept of habitual residence operates at the account of legal certainty and judicial efficiency. The injured party's domicile would have been a safer choice: less ambiguous and more in line with the principles underlying the Brussels regime in civil and commercial matters.

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