INSIGHT

JURISDICTION CONCERNING ACTIONS BY A LEGAL PERSON FOR DISPARAGING STATEMENTS ON THE INTERNET: THE PERSISTENCE OF THE MOSAIC APPROACH

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ABSTRACT: The author comments on a recent judgment by the Court of Justice of the European Union in *Gtflix TV v DR* (C-251/20 ECLI:EU:C:2021:1036), concerning jurisdiction on an action by a legal person seeking at the same time rectification and removal of disparaging statements published by a competitor on the Internet, and compensation for damages resulting therefrom. The Court followed the line set in its previous judgments concerning the interpretation of art. 7.2 of Regulation (EU) 1215/2012 (Brussels I-*bis* Regulation) in relation to cases of online defamation. Accordingly, whereas claims for rectification and removal may be brought only before either the courts of the Member State where the publisher is established or of the Member State where the centre of interests of the person concerned is located, actions for compensation may still be brought also before other Member States' courts, based on the pure accessibility of such information, with effect limited to damage suffered within the jurisdiction of the court seized. The author discusses the appropriateness of maintaining the said solution, known as the "Mosaic approach", originally conceived by the Court in respect of defamation by means of printed publications, considering the limited relevance of the criterion based on pure accessibility as concerns online materials and the undue incentive it offers to manoeuvres of *forum shopping* and *law shopping*.

KEYWORDS: jurisdiction – Regulation (EU) 1215/2012 (Brussels I-*bis*) – online defamation – mosaic approach – *forum shopping* – *law shopping*.

I. THE CASE FORMING THE SUBJECT OF THE CJEU'S JUDGMENT IN *GTFLIX TV V DR*

The Court of Justice of the European Union (CJEU) in its recent judgment in *Gtflix TV v DR*[1] added a further bit to the long string of cases concerning jurisdiction in relation to actions for defamation based on information published online. In the circumstances of the case, the claimant, Gtflix TV, a company established in the Czech Republic and active in the field of adult entertainment, complained of disparaging statements published on various web-

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[1] Case C-251/20 *Gtflix TV v DR* ECLI:EU:C:2021:1036.

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sites by DR, a competitor established in Hungary, seeking, on the one side, rectification and removal of such statements, and, on the other side, compensation for damages.

Oddly enough, the claimant did not revert to the Czech courts, as the courts of the country where most of the negative effects of those statements could have been suffered, being the claimant established there, nor to the Hungarian courts, as the courts of the country where the defendant was established, and where, accordingly, the allegedly disparaging statements would have been published on the Internet. The claimant decided instead to sue the defendant before the French courts, despite their not presenting a particularly relevant connection with the legal sphere of the claimant himself, nor to that of the defendant. The claimant sued in France on account of the fact that the information in question was accessible there, something which appears unsurprising in consideration of the ubiquitous nature of information published on the Internet, while not being decisively relevant in terms of providing a genuine foundation to the courts' jurisdiction.

Allegedly, the choice by the claimant to sue in France rather than in the Czech Republic, in Hungary or in any other country where the information complained of would have equally been accessible, might have been dictated by considerations of convenience, related to the effectiveness of the procedure for summary judgment available under French civil procedure, or to the option, opened by French law, to frame such a claim in terms of an action for unfair competition, rather than strictly as an action for defamation.[2] It shall be noted, in fact, that before the first instance court in Lyon the claimant sought primarily a remedy presenting the distinctive features of an *astrainte*, that is, an order to the defendant to cease, on pain of a fine, from the publishing of disparaging information concerning the claimant and to publish a rectification, whereas they appeared less concerned with compensation of the damages actually suffered as a consequence of the statements complained of. The claimant in fact applied at first instance for the payment of just a symbolic sum of euro 1 for economic damage plus euro 1 for material damage, the amount of damages provisionally sought being then raised on appeal before the Court of appeal of Lyon to euros 10 thousand.[3]

The jurisdiction of the French courts was denied by both the first instance and appellate courts in Lyon on account of the fact that pure accessibility of the information complained of could not suffice to found jurisdiction, unless it is proved that the said information is of interest to Internet users located within the jurisdiction of the court, so that damage could be likely to have been caused there. The claimant appealed to the

[2] This distinctive feature of the case was pointed out in case *Gtflix TV v DR* ECLI:EU:C:2021:745, opinion of AG Hogan, para. 95 ff. However, as anticipated in the opinion, *ibid.* para. 97, such a difference in the legal basis of the action pursuant to French law could not be held as likely to have an impact on the autonomous interpretation of art. 7(2) Brussels I-*bis*. Accordingly, the Court omitted altogether to discuss the point in its judgment, something which is criticised by M Buzzoni, 'CJEU Adds a New Piece to the "Mosaic" in Gtflix TV' (13 January 2022) EAPIL Blog eapil.org 4.

[3] *Gtflix TV v DR* cit. paras 13 and 15.

French Court of Cassation. The French Supreme Court considered that the case demanded a further clarification by the CJEU concerning the application of the special rule of jurisdiction for actions in matters relating to tort, delict or quasi-delict under art. 7(2) of Regulation (EU) 1215/2012 (Brussels I-*bis*)[4] in relation to actions for damage caused by information published on the Internet.[5]

II. The evolution of the CJEU's case-law concerning jurisdiction in respect of online defamation

The judgment delivered by the CJEU in *Gtflix TV* must be read against the background of the previous cases decided by the Court concerning the application of the special rule of jurisdiction under art. 7(2) of the Brussels I-*bis* Regulation, or, rather, of the corresponding rule under art. 5(3) of the pre-existing Brussels I Regulation,[6] in respect of actions for damages arising from defamation occasioned by information published online.

In this respect, the Court referred essentially to its two earlier, well-known judgments, in *eDate Advertising and Others*[7] and in *Bolagsupplysningen and Ilsjan*[8] respectively.

In its judgment in *eDate*, concerning the application of the rule then under art. 5(3) Brussels I Regulation to actions by natural persons seeking purely compensation for damages caused by the publication of allegedly defamatory information on the web, the Court had found as vested with jurisdiction pursuant to the said rule on the one side the courts of the Member State where the publisher of the information in question is established, amounting as the Member State where the purportedly unlawful conduct had taken place. That Member State, in an action brought by the person claiming to have been damaged, normally coincides with the Member State of the defendant's domicile, pursuant to the general rule under then art. 2 Brussels I. As an alternative, in consideration of the severity and large-scale nature of damages likely to be caused by information published online, the Court pointed to the courts of the Member State where the person affected by the publication of the information concerned possesses the centre of his or her interests, to be identified as the Member State where damage caused by the publication in question materialized.[9]

Alongside the said two alternative *fora*, where the claimant could seek the compensation of the entire damage suffered as a consequence of the publication, the Court rather controversially considered as applicable also in the peculiar context of online pub-

[4] Regulation (EU) 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.

[5] *Ibid*. paras 18-19.

[6] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[7] Joined cases C-509/09 and C-161/10 *eDate Advertising GmbH and Others* ECLI:EU:C:2011:685.

[8] Case C-194/16 *Bolagsupplysningen and Ilsjan* ECLI:EU:C:2017:766.

[9] *eDate Advertising GmbH and Others* cit. paras 44-50.

lication the solution devised as concerns defamation caused by printed materials in its earlier *Shevill* judgment, concerning the interpretation of the pre-existing and materially corresponding, insofar as relevant, rule embodied in art. 5(3) of the 1968 Brussels Convention.[10] Notoriously, in that earlier judgment the Court had considered it appropriate to concede to the claimant the option to sue under the said rule either before the courts of the Member State where the publisher was established, where compensation of the entire damage caused by the allegedly defamatory publication could be sought,[11] or before the courts of any other Member State where the publication in question was distributed and where the plaintiff claimed to have suffered damage to his or her reputation. Before these other courts, to the contrary, compensation could be claimed only as concerns damages suffered in the Member State of the court seized.[12] The said solution, known in the relevant legal literature as the *mosaic* approach,[13] while being instrumental to the pursuit of proximity in the allocation of jurisdiction, paved nonetheless the way, as the expression used to identify it indeed suggests, to an undesirable fragmentation of litigation arising out of a single publication. Furthermore, as we shall note in discussing the appropriateness of the solution reached by the Court in the judgment under review, a rule based on the distribution of published materials in a Member State other than that of their originating publication may prove at the same time less relevant and more difficult to apply in respect of online publications as compared to traditional ones.[14]

In its more recent judgment in *Bolagsupplysningen*, the Court had faced a case where both a legal and a natural person were seeking, alongside compensation for damage caused by allegedly offensive information published on the web, rectification and removal of such information. The option for the claimants to seek partial compensation of the damage caused by such information before the courts of Member States other than that where the publisher of the information was established did not come for consideration based on the questions submitted by the referring court. Accordingly, the Court limited itself to confirm that compensation of the entire damage caused by the information in question could be sought by the legal person concerned, pursuant to art. 7(2) Brussels I-*bis*, either before the courts of the Member State where the publisher was established, or before the courts of the Member State where the claimant had the

[10] Case C-68/93 *Shevill and Others v Presse Alliance* ECLI:EU:C:1995:61.

[11] *Ibid*. paras 24-25.

[12] *Ibid*. paras 29-30. Cf. *eDate Advertising GmbH and Others* cit. paras 51-52.

[13] See, among others, E Lein, 'Art. 7(2)' in A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (Oxford University Press 2015) 169 ff.; P Mankowski, 'Article 7' in U Magnus and P Mankowski (eds), *European Commentaries on Private International Law (ECPIL)* (O Schmidt 2016) 278 ff.; T Lutzi, 'Gerichtsstand am Schadensort und Mosaikbetrachtung bei Wettbewerbsverletzungen im Internet' (2017) IPRax – Praxis des internationalen Privat- und Verfahrensrechts 552, 553 ff.

[14] See especially E Lein, 'Art. 7(2)' 169; T Lutzi, 'Gerichtsstand am Schadensort und Mosaikbetrachtung' cit. 553 ff.

centre of their interests.[15] The Court thus extended to actions by legal persons the solution adopted already in its previous judgment in *eDate*.[16] The Court at the same time reflected the frequent trend by companies to locate, out of economic considerations of convenience, their registered office in a Member State other than that where the main part of their activities is carried out, as allowed when not encouraged by the Court's case law concerning freedom of establishment by companies as well as freedom to provide services,[17] by adding that in such cases a legal person may sue before the courts of that other Member State, as the Member State where damage caused by the offensive information materialized.[18]

The Court, instead, expressly denied that an action for rectification or removal of the allegedly offensive information complained of could be brought before the courts of any Member State, other than that where the publisher is established or that where the person concerned has the centre of his or her interests, based on the pure accessibility of the information in question.[19] In this respect, it is certainly true that pure accessibility as concerns information available online does not stand out as a particularly significant criterion of localization, considering that, as a matter of principle, information published on the web is virtually accessible worldwide. At the same time, the assumption relied upon by the Court, whereby from the ubiquitous nature of information available on the Internet would follow the impossibility to seek an order for rectification or removal with effect limited to one or more Member States, may be questionable in view of the current state of development of the relevant technology. In fact, as it is well known, the current state of technical development allows forms of territorial fragmentation of the web, such as geo-blocking, based on the location of the IP address from where Internet users access the web.[20] At the same time, it shall not be neglected that the recourse to

[15] *Bolagsupplysningen and Ilsjan* cit. paras 32-35.

[16] *Ibid*. paras 40-41. Cf. *eDate Advertising GmbH and Others* cit. para. 49.

[17] Cf., notoriously, case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* ECLI:EU:C:2007:772; case C-341/05 *Laval un Partneri* ECLI:EU:C:2007:809.

[18] *Bolagsupplysningen and Ilsjan* cit. paras 41-43. See, among others, A Bizer, 'International Jurisdiction for Violations of Personality Rights on the Internet: *Bolagsupplysningen*' (2018) CMLRev 1941, 1953 ff.; S Corneloup and H Muir Watt, 'Le for du droit à l'oubli' (2018) Revue critique de droit international privé 290, 300 ff.; TC Hartley, 'Jurisdiction in Tort Claims for Non-Physical Harm Under Brussels 2012, Article 7(2)' (2018) ICLQ 987 and 1001; R Monico, 'Il foro in materia di diffamazione online alla luce della sentenza Ilsjan' (2018) Rivista di diritto internazionale privato e processuale 359, 371 ff.; lastly, C Kohler, 'Rückbau der Mosaiklösung: Zur internationalen Zuständigkeit bei Verletzung des Personlichkeitsrechts von Unternehmen im Internet' (2021) IPRax – Praxis des internationalen Privat- und Verfahrensrechts 428, 430 ff.

[19] *Bolagsupplysningen and Ilsjan* cit. paras 45-49.

[20] The solution consisting of having recourse to geo-blocking techniques has notably been admitted by the CJEU in case C-507/17 *Google (Territorial scope of deferencing)* ECLI:EU:C:2019:772, but only for the purposes of preventing Internet users located in the Member States from accessing information retrievable from third-country versions of a search engine, in order to preserve the effectiveness of a measure of de-referencing of the information concerned adopted in respect of the EU versions of that search engine.

such techniques does not meet with favour from the perspective of the EU policy concerning the Single Digital Market, whereby encouraging recourse to such techniques as between different Member States would run counter to the objectives of promoting freedom of competition and to provide services across a single market not split by virtual internal borders.[21] Accordingly, as noted by some commentators, it would have sounded odd of the CJEU to endorse a solution in point of jurisdiction based on a recourse to techniques implying a territorial fragmentation of the European digital market, which would be inconsistent with the said policy objectives.[22] Nonetheless, the fact of the Court not having even discussed such a possibility stands as a shortcoming of its judgment, revealing an excessively hard-and-fast approach towards an issue which would have been worth of a more thorough consideration.[23]

III. The adaptation by the Court of the solutions set out in its previous case-law to the questions referred to it in *Gtflix TV*

In its judgment in *GTflix TV* the Court was substantially faced with a question of gap-filling between the *dicta* contained in its two previous judgments in *eDate* and *Bolagsupplysningen*. In fact, it was requested to rule on whether the fact that the claim for compensation for damages caused by the publication on the web of allegedly disparaging comments had been introduced jointly with an application for rectification and removal of such comments necessarily implied a joint allocation of jurisdiction concerning the two claims. This would have implied an extension of the purportedly exclusive jurisdiction, of either the courts of the Member State where the publisher of the information is established or those of the Member State where the centre of interests of the person concerned is located, in order to decide non only in respect of rectification and removal of the information being complained of, but also as concerns damages.[24]

The Court on the one side confirmed without further discussion its ruling in *Bolagsupplysningen* in the sense that, considering the purported ubiquitous and indivisible nature of the Internet, an application for rectification and removal of information published online was to be intended as a single application with universal effects, and, as such, it could not be introduced other than before the courts of the Member State where the publisher of the information concerned is established or before those of the Member State where the person affected has the centre of his interests.[25] On the other

[21] See namely Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC.

[22] See especially S Corneloup and H Muir Watt, 'Le for du droit à l'oubli' cit. 303 ff.

[23] See also M Buzzoni, 'CJEU Adds a New Piece to the "Mosaic" in Gtflix TV' cit. 4.

[24] *Gtflix TV v DR* cit. para. 34.

[25] *Ibid*. paras 32-33. Cf. *Bolagsupplysningen and Ilsjan* cit. para. 48.

side, it stuck to its earlier ruling in *eDate* in upholding the possibility for the person concerned to file separate actions before the courts of every Member State in which the information in question would have been accessible – thereby potentially meaning all Member States – for the purposes of seeking compensation of just those damages which the information in question could be demonstrated to have caused in the Member State of the court seized.[26]

The Court of Justice supported the conclusions it reached in this respect by arguing that the necessary link of dependence found by the referring court between the action for rectification and removal of the information posted on the web and the claim for damages could not be considered as demonstrated, since the two actions, however based on the same facts, possessed different purposes, causes and, purportedly, a different regime in terms of divisibility, so that no need allegedly existed for them to be decided jointly.[27]

While we shall return later to these rather simplistic and unsubstantiated assumptions on which the Court based its reasoning, it appears worth noting that the Court added some further considerations in support of its line of argument, which appear of limited relevance in respect of the circumstances of the case at hand. The Court argued, in fact, that the solution consisting of allowing separate actions for damages before the courts of every Member State where the information published on the web would have been accessible, with effects limited to damages suffered in the Member State of the court seized, could be of avail for the purposes of restoring fairness to the claimant as concerns the allocation of jurisdiction in those cases where the centre of interests of the claimant himself could not be identified.[28] Such an occurrence was not material in the case at hand, where it appeared undisputed that the centre of interest of the claimant, as a legal person, was located in the Czech Republic, where it was established as a company.[29]

Furthermore, the Court seemed to neglect that the possibility of uncertainty concerning the location of the claimant's centre of interests had already been catered for, at least as concerns actions by a legal person, in its earlier judgment in *Bolagsupplysningen*. As noted, in that judgment the Court had admitted that in those cases where the centre of the main activities of a company could not be identified with the place, or, at least, with the Member State where that company's registered office is located, reference could be made straight to the Member State where the centre of the main activities of the company is located, as the Member State where the *eventus damni* materialized.[30]

[26] *Gtflix TV v DR* cit. paras 35-40. Cf. *eDate Advertising GmbH and Others* cit. paras 42-44 and 51-52.
[27] *Gtflix TV v DR* cit. para. 36.
[28] *Ibid*. para. 39.
[29] *Ibid*. para. 11.
[30] *Bolagsupplysningen and Ilsjan* cit. paras 41-44.

IV. The strenuous and rather unpersuasive defence of the mosaic approach by the Court in *Gtflix TV*: critical remarks

Ultimately, the Court in *GtflixTV* appeared relentlessly committed to defend the continuity of its interpretation of the rule under art. 7(2) Brussels I-*bis* in respect of online defamation, demonstrating little availability for a reconsideration of the solutions adopted in light of the further developments supervened in the practice of online activities as well as of the risks inherent in encouraging a multiplication and fragmentation of related litigation, with the inherent undue inducement to *forum* and *law shopping*.[31]

In fact, the Court did not consider it necessary to embark on a closer examination, such as had instead been attempted by Advocate general Hogan in its opinion on the case, of the arguments on which the doubts raised by the referring court rested as concerns the appropriateness of maintaining the so-called mosaic approach in respect of actions for damages, while rejecting it as concerns actions for rectification and removal of the allegedly disparaging information.[32] As noted, the Court limited itself to exclude, in rather formalistic terms, the need for actions of the two kinds arising from the same publication to be decided jointly, affirming, but not demonstrating, that while those actions were based on the same facts, their purpose, their cause and their regime of divisibility were different.[33]

Those assumptions on which the Court relied appear extremely questionable, and likely to neglect the reality of the matter at hand. In fact, frequently, and as it appears evidently from the facts of the case before the Court, the two claims, that for rectification and removal, and that for damages, are little else than two faces of the same coin. Actually, in the specific circumstances of the case at hand, we have already noted that the claim for damages brought by the plaintiff appeared as purely ancillary to the application for rectification and removal, since, at least at first instance, it was reported to be limited to a purely symbolic amount of euro 1 for material damages plus euro 1 for moral damages.[34]

Furthermore, and more decisively, the assumption, having a pivotal role in the reasoning of the Court, whereby the two actions should have a different regime in terms of divisibility is not convincing. The Court, in fact, as noted already, sticks, insofar as actions for rectification and removal are concerned, to the datum of the ubiquitous nature of information published on the web, thereby not even taking into consideration the possibility that reliance might be placed, for the purposes of contemplating forms of rectification or removal limited to online information as accessible from certain geographical areas, on geo-blocking techniques as would currently be technically availa-

[31] See already M Buzzoni, 'CJEU Adds a New Piece to the "Mosaic" in Gtflix TV' cit. 4 ff., for comments concerning the acritical upholding by the Court of the mosaic solution in the circumstances of the case at hand.

[32] See *Gtflix TV v DR*, opinion of AG Hogan, cit. paras 42 ff.

[33] *Gtflix TV v DR* cit. para. 36.

[34] *Ibid*. para. 13.

ble.[35] At the same time, instead, the Court presupposes that for the purposes of compensation of damages caused by online publications a geographical delimitation of the circulation of information published online is inherently practicable, so as to enable to distinguish damage caused by the same information published online in one Member State from another in substantially the same terms as it would have been feasible in respect of printed publications. In this respect, the superficiality of the Court's reasoning in *eDate*[36] has been followed relentlessly in *Gtflix TV*, radically understating the arguments against the upholding of the mosaic solution in the online context, most evidently raised already by Advocate general Bobek in its opinion on *Bolagsupplysningen*,[37] and neglecting the reluctance of the Court itself in that case to confirm the applicability of the mosaic solution as concerns actions for damages.[38]

On a more thorough consideration of the issue, as it would have been for the Court to undertake,[39] it shall be kept in mind that, on the one side, information published online is in principle accessible everywhere, and, accordingly, pure accessibility as such cannot be held, as noted, as a relevant and foreseeable criterion for founding jurisdiction. On the other side, it must be considered that some factors may have an impact on identifying, with a higher or lower degree of reliability, those countries, and, particularly,

[35] *Ibid*. paras 32-33; *Bolagsupplysningen and Ilsjan* cit. para. 48.

[36] *eDate Advertising GmbH and Others* cit. paras 44-46, where the Court actually acknowledged the difficulties inherent in transposing the solution contemplated in its earlier *Shevill* judgment to the different scenario of online publication, while nonetheless concluding, somewhat inconsistently, in favour of upholding that solution, with the sole adaptation of adding the alternative *forum* at the centre of interests of the person concerned. See, among others, for a discussion of the Court's reasoning in *eDate*, O Feraci, 'Diffamazione internazionale a mezzo di Internet: quale foro competente? Alcune considerazioni sulla sentenza eDate' (2012) RivDirInt 461; G Guiziou, note (2012) Journal du droit international 201; S Marino, 'La violazione dei diritti della personalità nella cooperazione giudiziaria civile europea' (2012) Rivista di diritto internazionale privato e processuale 363; F Marongiu Buonaiuti, *Le obbligazioni non contrattuali nel diritto internazionale privato* (Giuffré Editore 2013) 25 ff.

[37] Case C-194/16 *Bolagsupplysningen and Ilsjan* ECLI:EU:C:2017:554, opinion of AG Bobek, para. 73 ff.

[38] *Bolagsupplysningen and Ilsjan* cit. paras 31-33, where the Court, while recalling the mosaic solution adopted in *Shevill* as concerns defamation by means of printed materials, seems to omit to confirm it in respect of defamation by means of online publications, limiting itself to confirm, insofar as actions for damages are concerned, the criteria adopted in *eDate* in respect of actions seeking the compensation of the entire damages caused by the information published. See A Bizer, 'International Jurisdiction for Violation of Personality Rights' cit. 1950 ff.; see also Ch Kohler, 'Rückbau der Mosaiklösung' cit. 430; R Monico, 'Il foro in materia di diffamazione online' cit. 373 ff.

[39] See also the suggestions provided in *Gtflix TV v DR*, opinion of AG Hogan, cit. paras 42 ff., suggesting that, while the mosaic solution as concerns actions for damages should not be abandoned altogether, its potentially adverse effects in terms of fragmentation of the litigation arising from a single online publication might be contained by adding further requirements to pure accessibility, so as to demonstrate that the claimant, as a professional, has an appreciable number of consumers, likely to have had access and have understood the publication in question, in the jurisdiction of the court seized. See M Requejo Isidro, 'On Article 7(2) Brussels Ibis: the Opinion of AG Hogan on the "Mosaic" Solution, and More' (16 September 2021) EAPIL Blog eapil.org. This option has been discarded altogether by the Court, at paras 41-42 of its judgment.

as concerns the allocation of jurisdiction based on the Brussels I-*bis* Regulation, those Member States where information published on the web may be likely to affect the personal or commercial reputation of a natural or legal person, other than the country or, rather, the Member State where that person has the centre of his interests or where the publisher of the information is established. Probably a critical factor in that respect consists of the language in which the information is published, unless the language used is a vehicular language, like English or French, which could make the information in question palatable to a broader audience.[40] Still, the language factor may not be overemphasized. In fact, its relevance may be reduced by the availability of automatic translation devices, as are normally made available, though with inevitable limits in terms of accuracy, by the main search engines. Furthermore, the extent to which the natural or legal person concerned is known in one Member State rather than another is certainly relevant for the purposes of making the information concerning that person concretely likely to be accessed by a sensible number of Internet users from that Member State. This is notoriously due to the indexing techniques to which the main search engines recur, frequently directing users to a national version of the relevant website based on the IP address of the user, likely to display with priority information available in the language of the relevant country and forming the subject of more frequent access or download by users located there.

Still, it seems inevitable to note that the geographical dissemination of information published online cannot realistically be planned nor monitored to the same extent feasible as concerns printed publications, in respect of which the mosaic solution had been originally conceived in *Shevill*.[41] It shall also be observed that the *mosaic* rule as set out in *Shevill* expressly presupposed that, in order for the courts of a Member State other than

[40] See *Bolagsupplysningen and Ilsjan* cit. para. 11, noting that the relevant information, in that case, was published in Swedish, and was, accordingly, incomprehensible, without a translation, to persons residing in Estonia, Member State whose courts were seized. Apparently, the language factor did not come for consideration in the circumstances of the case of *Gtflix TV v DR*, where, as from paras 12-13, the publication of the disparaging comments complained of had taken place on a number of websites and forums, likely to be in different languages, and the legal notice which the claimant requested to be published was meant to be in French and in English.

[41] See, noting the criticalities inherent in the adaptation of the mosaic principle to the context of online publications, particularly, C Kohler, 'Rückbau der Mosaiklösung' cit. 300; E Lein, 'Jurisdiction in Matters Relating to Tort, Delict or Quasi-Delict (Art. 7(2))' cit. 169; A Bizer, 'International Jurisdiction for Violation of Personality Rights' cit. 1950 ff.; A Merchán Murillo, 'El centro de intereses de la persona jurídica: comentario a la sentencia del TJUE de 17 de octubre de 2017, Bolagsupplysningen OÜ, Ingrid Ilsjan y Svensk Handel AB, C-194/16' (2018) Cuadernos de derecho transnacional 887 and 894; R Monico, 'Il foro in materia di diffamazione online' cit. 376 ff.; see also, arguing that the forum based on the centre of interests of the person concerned will take the forefront, S Corneloup and H Muir Watt, 'Le for du droit à l'oubli' cit. 300; more favourably in general terms to the mosaic principle, while noting that mere accessibility may not be held as sufficient as a ground for jurisdiction in the field concerned, P Mankowski, 'Article 7' cit. 278 ff. and 316 ff.

that of establishment of the publisher of the allegedly defamatory publication to have jurisdiction, not only ought the publication to have been distributed in that other Member State, but the claimant also had to assert that his or her reputation had been affected there.[42] This second limb apparently dropped from the reconstruction of the rule as adapted to online publication in *eDate* and now confirmed in *Gtflix TV*. Accordingly, all the claimant apparently has to assert for the purposes of establishing the jurisdiction of courts in Member States other than those of establishment of the publisher or of the centre of interests of the person concerned, is accessibility of the information from that Member State. This, as noted, is of itself not particularly telling as a criterion in respect of information available online. In fact, in the less clear terms in which the rule has been reformulated in *eDate* and maintained in *Gtflix TV*, the fact that the claimant's reputation shall have been affected in the Member State concerned is no longer expressly posed as a requirement for the assertion of jurisdiction by the courts of that Member State, while the same limitation clearly remains as concerns the extent of such a jurisdiction, which remains confined to damage suffered in the Member State concerned.[43]

Furthermore, the Court, in strenuously clinging to the mosaic approach, appeared to underestimate its most critical feature, consisting of its favouring an unfortunate fragmentation of litigation and providing an undue encouragement of *forum shopping*. In fact, in case parallel actions are introduced before the courts of more Member States under the ground of pure accessibility, the object of each of these actions will strictly speaking be different, as limited in each case to damage caused in the Member State of the court seized.[44] This would be likely to exclude the operation of *lis pendens* pursuant to art. 29 of the Regulation,[45] something which is unfortunate from the perspective of a sound administration of justice within the European judicial space.[46]

Such actions will in fact rather be likely to be considered as related for the purposes of the rule currently embodied under art. 30 of the Brussels I-*bis* Regulation, since they find as their common origin the same online publication, and pursue the same aim of obtaining compensation for damage caused by that publication to the same person. Ac-

[42] *Shevill and Others v Presse Alliance* cit. paras 30-31.

[43] Cf. *eDate Advertising GmbH and Others* cit. paras 51-52, and *Gtflix TV v DR* cit. paras 41-43.

[44] As noted by the Court in *Gtflix TV v DR* cit. para. 36.

[45] Notoriously, the requirement of substantial identity of the actions pending before the courts of different Member States as stated under art. 29 Brussels Ibis Regulation, whereby they shall have "the same cause of action" has been consistently interpreted by the CJEU as implying the identity of the object of the two actions as well as of their title, consisting of the facts and legal rules lying at the basis of each action, as contemplated by most of the other language versions of the Regulation. See particularly case C-144/86 *Gubisch Maschinenfabrik v Palumbo* ECLI:EU:C:1987:528; case C-406/92 *Tatry v Maciej Rataj* ECLI:EU:C:1994:400. See generally F Marongiu Buonaiuti, '*Lis alibi pendens* and Related Actions in Civil and Commercial Matters Within the European Judicial Area' (2009) YPIL 511, 528 ff.

[46] See Recital 21 in the Preamble to the Brussels I*bis* Regulation and *Gtflix TV v DR*, opinion of AG Hogan cit. para. 53.

cordingly, the requirement for the application of the said rule, whereby the actions in question shall be so closely related as to make it more expedient for them to be decided together in order to prevent the risk of irreconcilable judgments, will allegedly be met. Nonetheless, the mosaic solution upheld by the Court would risk jeopardizing the achievement of the fullest effects of the rule under art. 30 of the Regulation. In fact, while any court subsequently seized of any action brought in respect of damages having been caused within its jurisdiction will be entitled to suspend its proceedings under para. 1 of the rule, it will not be entitled to decline jurisdiction pursuant to para. 2 of the same rule. For this second purpose, the rule requires that the court first seized has jurisdiction in respect of both actions, which it would not have if jurisdiction of any court in a Member State where the online publication in question was accessible would have jurisdiction only in respect of damage caused in that Member State.[47]

The undesirability of the results to which the upholding of the mosaic solution leads in terms of fragmentation of litigation is made more serious by the incentive to *forum shopping* and *law shopping* inherent in this state of affairs. With particular regard to the circumstances of the *Gtflix TV* case, it seems, as noted, most likely that the claimants decided to bring their action before the French courts, not only in consideration of the size of the audience their services received in France as compared to other Member States where they could also have claimed to have suffered damages, but also, if not predominantly, in consideration of the effectiveness of the *astreinte* procedure contemplated under French law. Pursuant to that procedure, in fact, the defendant is subject to a penalty for every day he remains non-compliant with the court order.[48]

Furthermore, the absence so far of common conflict-of-laws rules in matters of violation of personality rights, due to the exclusion of those matters from the scope of application of the Rome II Regulation as a consequence of the difficulty to reach agreement on a suitable solution to be retained in that respect,[49] produces an unwelcome incentive to law

[47] See *Gtflix TV v DR*, opinion of AG Hogan, cit. para. 64, suggesting that proceedings might be joined based on Article 30 Brussels I-*bis* before a court having jurisdiction to rule on the entire damages caused by the publication, in case the publisher of the information brought and action before such a court for a negative declaration, while the person claiming to be affected sued before the courts of another Member State which would be competent to rule solely on damages produced in that Member State.

[48] *Gtflix TV v DR* cit. para. 13. Incidentally, it shall be noted that Regulation (EU) No. 1215/2012 (Brussels Ibis) expressly regulates under art. 55 the enforcement in other Member States of court decisions, like the French *astreintes*, ordering the payment of penalties: see G Payan, 'Article 55 Brussels Ibis Regulation, Enforcement by Penalty and the "astreinte"' in P Mankowski (ed.), *Research Handbook on the Brussels Ibis Regulation* (Elgar 2020) 329 ff.

[49] Art. 1(2)(g) of Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II). Cf. art. 6 of the initial Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II") COM(2003) 427 final of 22 July 2003 setting out a special rule on the law applicable to violations of privacy and rights relating to the personality. The rule formed the subject of an extensive debate, with the subsequent proposal of amendments by the European Parliament, on which K Siehr, 'Violation of Privacy and Rights Relating to the Personality' in A Malatesta

shopping, since courts sitting in each Member State will be deemed to find the applicable law based on their national conflict-of-laws rules.[50] This would inevitably lead to the risk that each of the courts hypothetically seized in a different Member State pursuant to the mosaic rule would be likely to decide upon the defamatory nature of the same online publication based on a different law, and, accordingly, that the same publication published online and accordingly accessible at the same time from the Member States in question might be considered as defamatory by the courts of one Member State, and as not by the courts of another, something which sounds hardly reconcilable with the objectives pursued by a common European system of private international law.[51]

V. The isolated nature of the mosaic solution in the international arena: The alternative model advocated by the Institute of International Law, based on a holistic approach

Lastly, it shall be added that the mosaic solution appears as rather isolated. While it inevitably applies to the non-Member States parties to the new Lugano Convention of 2007 pursuant to the relevant Protocol on uniform interpretation, notwithstanding a refusal by the *ad hoc* working party to accept a proposal of the European Commission to amend the corresponding rule under art. 5(3) of the Convention in such terms as to confer jurisdiction on the courts of the "place where the damage or part thereof was sustained",[52] it seems that a comparable solution has hardly met with success in the

(ed.), *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe* (CEDAM 2006) 159 ff. The amendments proposed by the European Parliament not having been accepted by the European Commission, the rule was deleted from the revised Commission's Proposal for a European Parliament and Council Regulation Communication COM(2006) 83 final from the Commission of 21 February 2006 on the law applicable to non-contractual obligations ("Rome II"). Subsequent attempts to reintroduce a special conflict of laws rule on the subject within the framework of a revision of the Rome II Regulation have so far not met with success. See in this respect the European Parliament Resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI)).

[50] As noted by TC Hartley, 'Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)' cit. 1000.

[51] See, noting this criticality, while contending that the concrete risk of parallel actions being brought by the person claiming to be damaged before the courts of different Member States, seeking compensation of the damages suffered in each of those countries, is reduced by considerations of economic convenience related to the costs of bringing separate actions, in which respect an action for compensation of the entire damages suffered, either before the courts of the Member State where the person concerned has the centre of his interest or before those of the Member State where the publisher is established would probably appear as a more sustainable option, P Mankowski, 'Article 7' cit. 279.

[52] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters Document 22007A1221(03) of 30 October 2007 – Explanatory report by Professor Fausto Pocar, OJ C-319/1 of 23 December 2009, paras 58-59.

broader international arena.[53] It is noteworthy in this respect that, while the Hague Judgments Convention of 2019 excludes altogether from its scope of application judgments in matters of defamation and privacy,[54] the Resolution adopted on the subject by the Institute of International Law in 2019 provides clear suggestions in the opposite direction. The said resolution, embodying a model law on jurisdiction, applicable law and the recognition of foreign judgments concerning injuries to the rights of personality through the use of Internet, does not contemplate among the proposed options that of concurrent assertions of jurisdiction based on pure accessibility, with effect limited to damages caused within the jurisdiction of the court seized.[55]

In fact, the Resolution espouses as a general rule concerning the allocation of jurisdiction in respect of actions related to injuries to rights of personality having taken place through the use of Internet the "holistic principle", whereby a person seeking redress as a consequence of such an injury shall file a single action, before the courts of any of the countries contemplated in the resolution itself as possessing a relevant connection, through which he or she shall claim all damages caused in any country.[56]

The explicit rejection of the mosaic solution in the resolution adopted by the Institute of International Law is confirmed by setting out a rule on parallel proceedings based on a strict *lis pendens* logic. According to the said rule, once an action by a claimant for redress as a consequence of a given injury to personality rights has been brought before one of the courts designated as having jurisdiction pursuant to the rules contained in the Resolution, all other courts seized by either the claimant or the person assumed to be liable with regard to the same violation shall refrain to entertain the action brought before them, subject to narrow exceptions meant to prevent a denial of justice.[57]

The rejection of the mosaic principle is even more notable within the framework of the rules set out in the resolution adopted by the Institute of International Law if one considers that the grounds of jurisdiction contemplated in the said rules largely correspond, as plainly acknowledged in the final report by the 8th Commission of the Insti-

[53] See C Kohler, 'Rückbau der Mosaiklösung' cit. 431 ff.

[54] Art. 2(k)(l) of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters [2019]. See the Explanatory Report by F Garcimartín and G Saumier, *Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* (2020) paras 60-63.

[55] Resolution of Institute of International Law, Session of The Hague 2019, *Injuries to Rights of Personality Through the Use of the Internet: Jurisdiction, Applicable Law and Recognition of Foreign Judgments* (31 August 2019). See E Jayme, 'Internationales Privatrecht und Völkerrecht: Spannungen and Dialoge – 79. Session des Institut de Droit International in Den Haag' (2020) IPRax – Praxis des internationalen Privat- und Verfahrensrechts 77 ff.

[56] See art. 3 of the Resolution and the Final Report of the 8th Commission of the Institute of International Law, E Jayme and SC Symeonides (Rapporteurs), 'Internet and the Infringement of Privacy: Issues of Jurisdiction, Applicable Law and Enforcement of Foreign Judgments' (2019) AnnIDI 245, 261 ff.

[57] Resolution of Institute of International Law, *Injuries to Rights of Personality Through the Use of the Internet* cit. art. 3(2); Final Report, 264 ff.

tute, to those contemplated by the CJEU in its case law as *fora* where the claimant may sue for compensation of the entire damages suffered as a consequence of the online publication in question.[58] In fact, attempting to strike a balance between the respective positions of the parties, the rules embodied in the Resolution on the one side refer, as *fora* closer to the position of the defendant as the person held to be liable, to the defendant's home State, expressly meant to correspond to the defendant's domicile in the Brussels system, or to the State of the defendant's critical conduct. The second criterion is meant to correspond to the rule pointing to the Member State where the publisher is established, as adopted by the CJEU in *Shevill* and *eDate* concerning printed and online publication respectively.[59] On the other side, the rules embodied in the Resolution refer, as *fora* closer to the position of the claimant as the person having allegedly suffered damage, to the plaintiff's home State, assumed to correspond to the criterion of the plaintiff's centre of interests adopted by the CJEU in *eDate*, or to the State in which the most extensive injurious effects occurred. The last criterion is assumed to correspond to the solution found by the Court in *Bolagsupplysningen* in respect of a person carrying out the great part of his or her professional activities in a country other than that of his or her habitual residence.[60]

The rules embodied in the Institute's resolution are commendable in their effort of maintaining equality of arms between the parties as concerns the allocation of jurisdiction, by subjecting the applicability of the rules establishing *fora* closer to the legal position of the plaintiff to exceptions. In fact, the defendant as the person claimed to be liable may object to such *fora* in those cases where it can demonstrate that it did not derive any pecuniary or other significant benefit from the accessibility of the information in question in that State, or where a reasonable person could not have foreseen that the materials in dispute could have been accessible in the State of the court seized or that damage would have been caused in that State.[61]

Ultimately, it is certainly true that the Institute's resolution, in setting out a model law intending to provide a self-contained set of legal rules in respect of the topic, could venture well beyond the limits inherent in the preliminary rulings handed down by the CJEU for the purposes of interpreting the relevant rules of the Brussels I or I-*bis* Regulation in view of the specific circumstances of the individual case. Still, it would not be inappropriate to suggest that a sort of cross-fertilization might arise between the works of the Institute and the future developments of the Court's case law, in such terms as to

[58] *Ibid*. art. 5; Final Report, 267 ff.

[59] *Ibid*. art. 5(1)(a-b); Final Report, 268 ff.

[60] *Ibid*. art. 5(1)(c-d); Final Report, 269 ff.

[61] Resolution of Institute of International Law, *Injuries to Rights of Personality Through the Use of the Internet* cit. art. 5(2); Final Report, 270 ff.

reconsider the appropriateness of clinging to a solution, such as that based on the mosaic principle, which is not attuned to the reality of the online environment.[62]

[62] See, for comparable wishes, though noting that the solutions embodied under art. 5(2), of the Institute's Resolution in terms of escape clauses from the grounds of jurisdiction contemplated therein would eventually need to be reformulated in terms more consistent with the Brussels logic, based, as a matter of principle, on the compulsory nature of jurisdiction conferred pursuant to the Regulation, C Kohler, 'Rückbau der Mosaiklösung' cit. 432. Ultimately, it shall be considered that in more recently adopted legal acts in the field of European private international law the traditional rigidity in the application of rules of jurisdiction has been progressively abandoned in favour of a more flexible approach, not totally alien to *forum non conveniens*-like considerations. See, with particular regard to the example offered by EU Regulation 650/2012 in matters of succession, F Marongiu Buonaiuti, 'Article 6' in AL Calvo Caravaca, A Davì and HP Mansel (eds), *The EU Succession Regulation. A Commentary* (Cambridge University Press 2016) 162, 164 ff.