Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 16 September 2021 [1]

Case C-251/20

Gtflix Tv
v
DR

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France))

(Request for a preliminary ruling – Judicial cooperation in civil matters – Regulation No 1215/2012 – Publication on the internet of comments disparaging a legal person – Actions for rectification of data, deletion of content and compensation for damage suffered – Jurisdiction to hear actions for compensation for damage suffered – Strategic lawsuits against public participation (SLAPP))

I. Introduction

1. Ever since the entry into force of the Brussels Convention on jurisdiction and the enforcement of judgments [2] and its subsequent replacement by the various iterations of the Brussels Regulation, [3] this entire corpus of 'Europeanised' private international law has sought to promote foreseeability and certainty in the allocation of jurisdiction in civil matters to the courts of the individual Member States. The Brussels system has also sought, where possible, to concentrate possible jurisdictional venues in respect of a particular case in as few legal systems as possible, namely those with the closest connection with the action.

2. These objectives have, however, been challenged by a series of cases dating back at least to the decision of the Court in *Shevill* [4] in 1995. The problem is most acute where a claimant has sought damages for non-contractual liability in respect of defamatory and other similar types of publication where it is alleged that the wrongful act has caused harm in a variety of different jurisdictions. In such circumstances it does not seem possible to seize upon a rule which satisfactorily addresses these potentially conflicting objectives of certainty, foreseeability and proximity on the one hand while avoiding a multiplicity of possible judicial fora on the other. These difficulties are heightened by technological advances in the contemporary world where the allegedly defamatory or otherwise wrongful comments have been published on the internet.

1 Original language: English.

2 The Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1972 L 299, p. 32).

3 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 2012, L 351, p. 1).

4 Judgment of 7 March 1995, *Shevill and Others* (C-68/93, EU:C:1995:61).

3. This is the general legal background to the complex jurisdictional questions presented by this reference for a preliminary ruling which concerns the interpretation of Article 7(2) of Regulation No 1215/2012.

4. The request was made in the context of a dispute between Gtflix Tv, an adult entertainment company based in the Czech Republic, and DR, a director, producer and distributor of pornographic films based in Hungary, regarding compensation for allegedly derogatory statements made by DR on several websites and forums. Before considering the facts or the substantive legal issues, it is first necessary to set out the relevant legal framework.

II. Legal framework

A. International law

5. The Paris Convention for the Protection of Industrial Property, signed on 20 March 1883, revised at Stockholm on 14 July 1967, and amended on 28 September 1979 (*United Nations Treaty Series*, vol. 828, No 11851, p. 305) concerns industrial property in the broadest sense of the term and covers patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications, and the repression of unfair competition.

6. Article 10bis of that agreement states:

'(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.'

B. EU law

1. Regulation No 1215/2012

7. Recitals 13 to 16 and 21 of Regulation No 1215/2012 state:

‘(13) There must be a connection between proceedings to which this Regulation applies and the territory of the Member States. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a Member State.

(14) A defendant not domiciled in a Member State should in general be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seised.

However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the Member States in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant’s domicile.

(15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(16) In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

…

(21) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in different Member States. There should be a clear and effective mechanism for resolving cases of *lis pendens* and related actions, and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation, that time should be defined autonomously.’

8. The rules on jurisdiction are contained in Chapter II of the said regulation, which includes Articles 4 to 34.

9. Article 4(1) of Regulation No 1215/2012, which belongs to Section 1 of Chapter II, entitled ‘General Provisions’, reads as follows:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

10. Article 5(1) of that regulation, which appears under Section 1, states:

'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'

11. The wording of Article 7(2) of Regulation No 1215/2012 is identical to the wording of Article 5(3) of 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 2001 L 12, p. 1), which was repealed by Regulation No 1215/2012, and corresponds to that of Article 5(3) of the Brussels Convention. This provision, which is part of Section 2 entitled 'Special Jurisdiction' of Chapter II of Regulation No 1215/2012, states:

'A person domiciled in a Member State may be sued in another Member State:

…

(2) in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;'

12. Article 30 of Regulation No 1215/2012 reads as follows:

'1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

2. Regulation (EC) No 864/2007

13. Recital 7 of 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) [5] states:

'(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (Brussels I) [6] and the instruments dealing with the law applicable to contractual obligations.'

14. Article 4 of that regulation, entitled 'General Rule', states:

'1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs

5 OJ 2007 L 199, p. 73.

6 OJ 2001 L 12, p. 1.

irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.'

15. Article 6(1) to (2) of the same regulation, entitled 'Unfair competition and acts restricting free competition', states:

'1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.'

C. French law

16. In French law, unfair competition refers to any act of making excessive use of one's freedom of enterprise, by resorting to procedures that are contrary to rules and customs and that cause damage. Among the recognised forms of unfair competition is the act of disparagement which, according to the case-law of the French Court of Cassation, consists in the disclosure of information likely to discredit a competitor.[7] This civil wrong – which is distinct from defamation – is governed by the French rules on civil liability.

III. The facts of the main proceedings and the reference for the preliminary ruling

17. Gtflix Tv is a company based in the Czech Republic that produces and distributes what is sometimes euphemistically described as adult content television programmes. DR is a director, producer and distributor of pornographic films, domiciled in Hungary. His films are marketed via websites hosted in Hungary and owned by him.

[7] Cass. com., 24 September 2013, No 12-19.790. See also cass. com., 18 October 2016, No 15-10.384; cass. com., 15 January 2020, No 17-27.778; and cass. com., 4 March 2020, No 18-15.651.

18. It is claimed that DR regularly made disparaging remarks against Gtflix Tv on several websites and forums. Gtflix Tv furnished DR with a formal request to withdraw those remarks. When he failed to do so, Gtflix Tv then issued summary proceedings against DR before the president of the Tribunal de grande instance, Lyon (Regional Court, Lyon, France). In those proceedings Gtflix Tv sought an order requiring DR:

– under penalty of a payment, to cease all acts of disparagement against Gtflix Tv and its website and to publish a legal notice in French and English on each of the forums concerned;

– to allow Gtflix Tv to post a comment on the forums managed by DR;

– to pay Gtflix Tv one symbolic euro as compensation for his economic loss and of one euro for his non-material loss.

19. The defendant's response was to contest the French court's jurisdiction. The Tribunal de grande instance, Lyon (Regional Court, Lyon) agreed with the defendant's submission in that regard.

20. Gtflix Tv appealed that order to the Cour d'appel de Lyon (Court of Appeal, Lyon, France), raising the provisional amount claimed for commercial and non-material damages suffered in France to EUR 10 000. By judgment of 24 July 2018, the appellant court also upheld the French court's lack of jurisdiction.

21. The applicant then lodged an appeal to the Cour de cassation (Court of Cassation, France). Before that court, Gtflix Tv contests the Court of Appeal's judgment of 24 July 2018 declaring that the French courts lacked jurisdiction in favour of the Czech courts, since, in its view, the courts of a Member State do indeed have jurisdiction to hear cases involving damage caused in the territory of that Member State by online contents as soon as those contents were accessible there. By excluding the jurisdiction of the French courts on the ground that it is not sufficient that the comments deemed to be disparaging and posted on the internet are accessible in the jurisdiction of the court seised, but that those contents must also be of some interest for the resident of that Member State, the Cour d'appel de Lyon (Court of Appeal, Lyon) infringed Article 7(2) of Regulation No 1215/2012.

22. The referring court seems to consider that the decision of the Cour d'appel de Lyon (Court of Appeal, Lyon) is indeed vitiated by an error of law, but that the lack of jurisdiction of the French courts to hear the request for rectification or removal of the remarks is nevertheless justified. Indeed, it follows from the judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766) that a request seeking the rectification or the removal of data cannot be brought before the courts of a State simply because that data is accessible from that Member State. This reasoning was, of course, contained in a judgment delivered in the context of defamation proceedings. But in so far as it was based on the ubiquitous nature of the data at issue, that reasoning would be applicable by analogy to requests for removal or rectification of allegations likely to constitute (allegedly) acts of disparagement.

23. However, the referring court wonders whether, with regard to claims for compensation linked to the existence of such acts of unfair competition, the applicant may bring an action before the courts of each Member State in whose territory content posted online is or was accessible, while acting simultaneously for the purpose of rectifying data, deleting content and compensating for

non-material and economic damage, or whether it must bring that claim for compensation before the court competent to order the rectification of data and the deletion of the disparaging comments.

24. In these circumstances, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 7(2) of Regulation (EU) No 1215/2012 be interpreted as meaning that a person who, considering that his or her rights have been infringed by the dissemination of derogatory comments on the internet, brings proceedings not only for the rectification of information and the removal of content but also for compensation for the resulting non-material and material damage, may claim, before the courts of each Member State in the territory of which content published online is or was accessible, compensation for the damage caused in the territory of that Member State, in accordance with the judgment of 25 October 2011, *eDate Advertising and Others* [(C-509/09 and C-161/10, EU:C:2011:685, paragraphs 51 and 52)] or whether, pursuant to the judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* [(C-194/16, EU:C:2017:766, paragraph 48)], that person must make the application for compensation before the court with jurisdiction to order rectification of the information and removal of the derogatory comments?'

IV. Analysis

25. From the outset, it should be emphasised that the mere fact that several types of claims are brought jointly in a single request has no effect on the rules of jurisdiction applicable to each of those claims, since the request may be split up if necessary. [8] Moreover, in the main proceedings, it should be emphasised that even though the applicant raised several types of claim, the question asked by the referring court refers only to the determination as to which courts should be deemed to have jurisdiction to entertain action for damages due to disparagement.

26. In that respect, it should be recalled that, by way of derogation from Article 4 of Regulation No 1215/2012, which confers jurisdiction to determine the merits of a dispute on the courts of the Member State in which the defendant is domiciled, Article 7(2) of that regulation provides that in matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may be sued in another Member State in the court for the place where the harmful event occurred or may occur. [9]

27. In so far as that Article 7(2) of Regulation No 1215/2012 reproduces the wording and objectives of Article 5(3) of Regulation No 44/2001, as well as, even before that, those of Article 5(3) of the Brussels Convention, the interpretation given by the Court with regard to those two provisions must be considered to apply equally to Article 7(2). [10]

8 See, for an example in EU proceedings, order of 12 June 2012, *Strack* v *Commission* (T-65/12 P, EU:T:2012:285).

9 This option is favoured by applicants in so far as they may fear, rightly or wrongly, the existence of protectionist biases on the part of the courts of the Member State of the defendant's domicile or wish to avoid any possible additional costs related to the remote management of the proceedings.

10 See, to that effect, judgments of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraph 39); of 25 October 2012, *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664, paragraphs 31 and 32); of 13 March 2014, *Brogsitter* (C-548/12, EU:C:2014:148, paragraph 19); and of 9 July 2020, *Verein für Konsumenteninformation* (C-343/19, EU:C:2020:534, paragraph 22).

28. According to the Court's established analysis, the rule of special jurisdiction laid down in Article 5(3) of the Brussels Convention and in Article 5(3) of Regulation No 44/2001 is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings. [11] In matters relating to tort, delict or quasi-delict, the courts of the place where the harmful event occurred or may occurred are indeed usually the most appropriate for deciding the case, in particular on the grounds of proximity and ease of taking evidence. [12]

29. However, in so far as this provision derogates from the fundamental principle currently set out in Article 4 of Regulation No 1215/2012, which attributes jurisdiction to the courts of the defendant's domicile, Article 7(2) must be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged by that regulation. [13]

30. Nevertheless, according to an equally consistent line of the Court's case-law, the concept of the 'place where the harmful event occurred or may occur' [14] must be understood as envisaging two distinct places, namely, the one where the damage materialised, and the place of the event giving rise to it (also called place of the causal event), each of which is likely, depending on the circumstances, to provide a particularly useful indication as regards evidence and the organisation of the proceedings. [15] Therefore, in the case where the place in which these connecting criteria are located are different, the defendant may be sued, at the option of the applicant, in the courts for either of those places. [16]

31. In the present case, the question referred concerns solely the determination of the place where the damage occurred.

32. In that regard, the Court has specified that this connecting factor is the place where the event which gave rise to the damage produces its harmful effects, that is to say, the place where the damage caused by the defective product actually manifests itself. [17] However, this place may vary according to the exact nature of the right allegedly infringed. [18]

11 See, to that effect, judgments of 1 October 2002, *Henkel* (C-167/00, EU:C:2002:555, paragraph 46); of 16 May 2013, *Melzer* (C-228/11, EU:C:2013:305, paragraph 26); of 3 April 2014, *Hi Hotel HCF* (C-387/12, EU:C:2014:215, paragraph 28); and of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 39); of 17 June 2021, *Mittelbayerischer Verlag* (C-800/19, EU:C:2021:489, paragraph 27)

12 See, to that effect, for example, judgment of 16 May 2013, *Melzer* (C-228/11, EU:C:2013:305, paragraph 27).

13 See, to that effect, judgments of 27 September 1988, *Kalfelis* (189/87, EU:C:1988:459, paragraph 19) or of 15 January 2004, *Blijdenstein* (C-433/01, EU:C:2004:21, paragraph 25); judgment of 16 May 2013, *Melzer* (C-228/11, EU:C:2013:305, paragraph 24); and of 12 September 2018, *Löber* (C-304/17, EU:C:2018:701, paragraph 17 and 18). However, according to the Court's case-law, the need for a strict interpretation of the rules of special jurisdiction only implies that the rules provided for in Article 7 should not be interpreted in a broader sense than their purpose requires. See, to that effect, judgments of 16 November 2016, *Schmidt* (C-417/15, EU:C:2016:881, paragraph 28) or of 25 March 2021, *Obala i lučice* (C-307/19, EU:C:2021:236, paragraph 76).

14 The causal event is defined as the fact giving rise to the damage. See, to that effect, judgment of 16 July 2009, *Zuid-Chemie* (C-189/08, EU:C:2009:475, paragraph 27).

15 See, to that effect, judgments of 9 July 2020, *Verein für Konsumenteninformation* (C-343/19, EU:C:2020:534, paragraphs 23 and 38) or of 17 June 2021, *Mittelbayerischer Verlag* (C-800/19, EU:C:2021:489, paragraph 29). On that ground, as I will explain, the Court has recognised the jurisdiction of the courts of the place of the victim's centre of interests, without such a criterion being included in Regulation No°1215/2012.

16 See, to that effect, judgments of 16 January 2014, *Kainz* (C-45/13, EU:C:2014:7, paragraph 23), and of 29 July 2019, *Tibor-Trans* (C-451/18, EU:C:2019:635, paragraph 25).

17 See, to that effect, judgment of 16 July 2009, *Zuid-Chemie* (C-189/08, EU:C:2009:475, paragraph 27).

18 See, to that effect, judgments of 3 October 2013, *Pinckney* (C-170/12, EU:C:2013:635, paragraph 32) and of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28, paragraph 29).

33. For example, the Court has held, in essence, that, in the case of fraud affecting the value of financial certificates, which, since they are dematerialised assets, are necessarily deposited in a particular bank account called a securities account, the courts which have jurisdiction on the basis of where the loss occurred are those of the applicant's domicile, when this bank account is held by a bank established within the area of jurisdiction of those courts.[19] Yet, the Court held that this solution is not applicable when the claimant complains of financial damage resulting from investment decisions taken as a result of inaccurate, incomplete or misleading information that is easily accessible worldwide, if the company which has issued the financial instruments in question was not subject to any legal disclosure requirement in the Member State in which the bank or investment firm on whose register the securities account is registered.[20]

34. In the case of alleged non-material damage caused by a newspaper article distributed in several Member States, the Court held in *Shevill* that the victim may bring an action for damages against the publisher either before the courts of the State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each State in which the publication was distributed and where the victim claims to have suffered injury to his or her reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised.[21] This last rule of jurisdiction has sometimes been described – in particular by its critics – as laying down a principle of distribution of jurisdiction which may be for convenience termed as the 'mosaic approach' to jurisdiction.[22]

35. Subsequently, in *eDate*, the Court was required to consider the issue of transnational defamatory online content. In that regard, it ruled that those situations are different from offline situations because of, on the one hand, the potential ubiquity of any online content and, on the other hand, the difficulty in quantifying that distribution with certainty and accuracy and therefore of assessing the damage caused exclusively in one Member State.[23] The Court accordingly ruled that when the website hosting the content at issue has not taken any restrictive measures, the court of the place where the alleged victim has the centre of his or her interests should have jurisdiction to determine the merits of a claim for compensation for the entirety of the damage suffered, on the grounds that this was the place where the impact of online content

19 See judgment of 28 January 2015, *Kolassa* (C-375/13, EU:C:2015:37, paragraph 55). In that judgment the Court refers to the concept of 'bank account' without further clarification. However, it should be recalled that the term 'bank account' is generic. Since in that case the Court uses this term in the singular, it can be inferred that the Court's intention was to refer to a specific type of account. Given the particular nature of the financial products at issue, it seems that this specific account is implicitly, but necessarily, the securities account in which the certificates were deposited, since it is in that account that the depreciation in the value of the certificates was recorded and, therefore, the damaged suffered by the claimant materialised itself.

20 Judgment of 12 May 2021, *Vereniging van Effectenbezitters* (C-709/19, EU:C:2021:377, paragraph 37).

21 Judgment of 7 March 1995, *Shevill and Others* (C-68/93, EU:C:1995:61, paragraph 33). With regard to the determination of the place of the causal event in the case of libel by a newspaper article distributed in several Contracting States, the Court held that the place is the place where the publisher of the newspaper in question is established, since that is the place where the harmful event originated and from which the libel was issued and put into circulation. Ibid. paragraph 24.

22 Laazouzi, M., 'L'extension du for européen aux personnes morales victimes d'atteintes aux droits de la personnalité sur Internet', *JCP G*, n°49, 4 December 2017, p. 2225.

23 Judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraphs 45 and 46).

on a person's personality rights could best be assessed.[24] For the Court, this place corresponds in general, but not necessarily, to his or her habitual residence. However, a person may have the centre of his or her interests in a Member State in which he or she does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.[25]

36. In addition to this connecting factor, the Court held, in paragraph 51 of the *eDate* judgment, that it also remained possible for the complainant to bring an action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.[26]

37. Thus, as a result of that judgment, a person who considers himself or herself to be the victim of an infringement of personality rights as a result of an act of defamation committed on the internet is entitled to bring proceedings in three fora for which the national courts concerned will enjoy jurisdiction over the entirety of the damage, namely, the defendant's place of residence, the place of the causal event – which is the place where the decision to disseminate the message in question was taken, whether expressly or tacitly[27] – and the place of the applicant's centre of interests. That person also has the possibility of bringing an action in several other fora, namely

[24] Judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraph 48). The Court then justified that solution by the fact that the concept of 'centre of interests of the relevant person' reflects the place where, *in principle*, the damage caused by online material occurs most significantly. Judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 33). That solution has been recently confirmed in judgment of 17 June 2021, *Mittelbayerischer Verlag* (C-800/19, EU:C:2021:489, paragraph 31). Admittedly, the Court held that the term 'place where the harmful event occurred' does not refer to the place where the claimant is domiciled or where 'his or her assets are concentrated' by reason only of the fact that he or she has suffered financial damage there resulting from the loss of part of his or her assets which arose and was incurred in another Contracting State. See, to that effect, judgments of 10 June 2004, *Kronhofer* (C-168/02, EU:C:2004:364, paragraph 21), and of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449, paragraph 35). In essence, the rationale for this line of case-law seems to be that the place where the harmful event occurred cannot be presumed: accordingly 'such an attribution of jurisdiction is justified if the applicant's domicile is *in fact* the place in which the events giving rise to the damage took place or the damage occurred'. Judgments of 12 September 2018, *Löber* (C-304/17, EU:C:2018:701, paragraph 25, emphasis added) and, to that effect, of 12 May 2021, *Vereniging van Effectenbezitters* (C-709/19, EU:C:2021:377, paragraph 29). However, it should be emphasised that, on the one hand, in cases of defamation, the claimant does not suffer from financial damage only, but also and above all from moral damage. On the other hand, in *Bolagsupplysningen and Ilsjan*, the Court did not make the centre of interests a connecting factor that would apply in all circumstances. Indeed, in order to reach the conclusion that the 'criterion of the "victim's centre of interests" reflects the place where, *in principle*, the damage caused by online material occurs most significantly, for the purposes of Article 7(2) of Regulation No 1215/2012', the Court relied on the premise that any infringement of a personality right 'is *usually* felt most keenly at the centre of interests of the relevant person'. Emphasis added. It can therefore be inferred that the Court did not rule out that, under certain circumstances, the place where the damage occurred might not be, *in fact*, the centre of the interests of the person concerned.

[25] See, to that effect, judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraph 49). In so far as the justification for this connecting factor, according to paragraph 42 of *Bolagsupplysningen and Ilsjan*, lies in the fact that, in particular in the case of online content, such an infringement is, in general felt most keenly at the centre of the interests of the person concerned, in view of the reputation he or she enjoys in that place, the concept of 'centre of interests' must be understood as referring more precisely to the place where the person concerned draws the most important economic, political, social or even simply relational benefits from his or her reputation.

[26] Judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685 and C-161/10, paragraph 51). With regard to the determination of the place of the causal event in the case of infringement of a right on the internet, the Court has ruled that it is not the place where the message was injected, but where the decision to disseminate it was taken (explicitly or tacitly), which place is presumed to be the seat of the company that manages the website or the place of residence of its owner. See, in relation with an infringement of copyright on internet, judgment of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28, paragraph 25) and, in matters of advertising displays that infringe on a trademark, judgment of 19 April 2012, *Wintersteiger* (C-523/10, EU:C:2012:220, paragraph 38). In the case of defective products, however, the Court considers that the place of the causal event is not the place where it was decided to put the product into circulation, but, in principle, the place where the product in question was manufactured. See judgment of 16 January 2014, *Kainz* (C-45/13, EU:C:2014:7, paragraph 26).

[27] This criterion, based in substance on an objective conception of the concept of act of dissemination, might be called upon to evolve in order to take into account the more subjective approach developed by the Court regarding the intellectual property concept of an act of communication to the public, as developed in the judgments of 8 September 2016, GS Media (C-160/15, EU:C:2016:644, paragraphs 35 and 48 to 55), and of 22 June 2021, YouTube and Cyando (C-682/18 and C-683/18, EU:C:2021:503, paragraphs 68, 81 to 89).

the various Member States in which the publication in question is or has been *accessible*, but for which the relevant national courts will only enjoy jurisdiction over the damage occurred within the territory of the Member State concerned.

38. In a subsequent trilogy of cases the option of bringing an action before the courts of each Member State in the territory of which content placed online is or has been accessible was restated and applied to infringements of copyright on the internet on the ground that those courts are best placed, first, to ascertain whether that right has in fact been infringed and, secondly, to determine the nature of the damage: *Pinckney*,[28] *Hejduk*[29] and *Hi Hotel HCF*.[30] In particular, in *Hejduk*, the Court confirmed that analysis even though in the latter instance it did not adopt the opinion of Advocate General Cruz Villalón, who considered that such a principle would contribute to creating legal uncertainty for the parties.[31] In each of those cases, the Court justified its position on the ground that copyright protection is usually subject to a principle of territoriality, namely, that, as a matter of fact, the law of States sanctions only copyright violations committed on their territory.[32]

39. Finally, in *Bolagsupplysningen and Ilsjan*, the Court was asked, in a first question, to determine whether the analysis contained in *eDate* was applicable to a legal person wishing to obtain the rectification of allegedly incorrect content published on a website and the deletion of related comments on a discussion forum on that website, as well as the compensation for harm allegedly suffered.

40. In those regards, the Court ruled, in relation to the requests for rectification and deletion, that the rule of jurisdiction to determine the merits of the damage suffered in its entirety, which was laid down in *eDate* in favour of the courts of the Member State in which the victim's centre of interests is situated, also applies to legal persons, regardless of whether the content in question is of such a nature as to give rise to a material or non-material damage.[33]According to the Court, in that situation, the centre of interests of an undertaking must reflect the place where its commercial reputation is most established and it must therefore be determined according to the place where it carries on the essential part of its economic activity. In that context, while the centre of interests of a legal person may coincide with the place of its registered office when it carries out all or the main part of its activities in the Member State in which that office is situated and the reputation that it enjoys there is consequently greater than in any other Member State, the location of that office is, not, however, in itself, a conclusive criterion for the purposes of such an analysis.[34]

41. In response to a second question regarding which courts have jurisdiction to rule on an application for rectification or deletion of online comments, the Court held that such a request could not be brought before the courts of each Member State since, having regard to 'ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal … an application for the rectification of the former

28 Judgment of 3 October 2013, *Pinckney* (C-170/12, EU:C:2013:635, paragraphs 36 and 45).

29 Judgment of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28, paragraphs 22 and 36).

30 Judgment of 3 April 2014, *Hi Hotel HCF* (C-387/12, EU:C:2014:215, paragraph 39).

31 Opinion of Advocate General Cruz Villalón in *Hejduk* (C-441/13, EU:C:2014:2212, point 43).

32 See, respectively, paragraphs 36 and 39 of Opinion of Advocate General Cruz Villalón in *Hejduk* (C-441/13, EU:C:2014:2212).

33 Judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraphs 36 and 38). As the Court notes in paragraph 37 of that judgment: 'while the question whether the damage is material or non-material may, depending on the applicable law, have an influence on whether the damage allegedly suffered is reparable, it has no bearing on the determination of the centre of interests as the place in which a court can best assess the actual impact of the publication on the internet and its harmful nature.'

34 Judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 41).

and the removal of the latter is a *single and indivisible* application'.[35] For the Court, such an application could only be brought before the same courts as those which had been granted jurisdiction to hear the merits of the case for full compensation for damage.

42. It is in that context that the referring court wonders whether, in view of the reasons given by the Court to justify the exclusive jurisdiction of certain courts in relation to the *deletion or rectification* of disputed content, it would be appropriate also to recognise the exclusive jurisdiction of those same courts in relation to *compensation*. This implicitly raises the question of whether, in the judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766), rather than simply *distinguishing* earlier case-law in this manner, the Court further intended to effect a *complete reversal* of its case-law and thus abandon the mosaic approach with regard to claims for damages as well.[36]

43. At the outset, I should like to make it clear that, in my view, the wording of Article 7(2) of Regulation No 1215/2012 does not preclude the abandonment of the mosaic approach, nor does it require its retention. Indeed, as explained above, that provision is limited to establishing a principle of jurisdiction of the courts of the place where the damage materialises, without further specification.

44. Secondly, I find it difficult to draw a conclusion about the mosaic approach from the judgment in *Bolagsupplysningen and Ilsjan*. Even though Advocate General Bobek had explicitly invited the Court to review its case-law, the Court took the position, with regard to the first question, which was the one in which it could have addressed the issue of maintaining the mosaic of jurisdictions with respect to claims for compensation, to formulate a relatively brief answer, relating only to the national courts having jurisdiction to hear actions seeking the rectification or deletion of comments.[37] In so far as, in order to justify the exclusive jurisdiction of certain courts to adjudicate on actions to rectify or deleted online content, the Court relied on the single and indivisible nature of such kind of action, this answer does not necessarily imply the abandonment of the mosaic approach with regard to action for compensation.

45. The fact, for example, that a national court decides, by virtue of the law applicable in the Member State of that court and having regard, in particular, to the nature and accessibility of the content in question, the reputation of the person concerned in that Member State, that there is no need to compensate the applicant for the damage suffered in the territory of that same Member State does not exclude the possibility that a court in another Member State might decide, on the basis of another law and other considerations, to compensate him or her. It is quite possible to envisage circumstances where a claimant might fail in Member State A on the grounds such as that it was very likely that the publication had only been accessed by a very limited number of people in that State or that as the claimant had no real reputation to protect in that State while at

35 Judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 48). Emphasis added.

36 Although the present case does not deal with this issue, the question of the application of the principle of mosaic jurisdictions also arises with respect to actions seeking not the deletion or rectification of a content, but to block its access. Indeed to justify its solution regarding actions for deletion of rectification of content, the Court based itself on the single and indivisible nature of requests for rectification or deletion of content, which is not the case for requests for blocking, since that blocking can be geolocated. See judgments of 15 September 2016, *Mc Fadden* (C-484/14, EU:C:2016:689, paragraph 95), and of 24 September 2019, *Google (Territorial scope of de-referencing)* (C-507/17, EU:C:2019:772, paragraph 73).

37 See Bizer, A., 'International Jurisdiction for Violations of Personality Rights on the Internet: *Bolagsupplysningen*' *Common Market Law Review*, Volume 55(6), 2018, pp. 1941-1957. While the Court referred, in the answer to the second and third question concerning the possibility of seizing the courts of the Member State in which the centre of one's interests is located, to the situation of a person who had filed an action for the rectification of certain data *and* for full compensation for the damage, in answering the first question the Court only took into account, as is clear from the wording of the answer, requests for the rectification or deletion of content.

the same time succeeding in Member State B where more persons might have read the publication in question or where the claimant had a more extensive reputation which was in fact injured or affected thereby.

46. Given that the laws of defamation remain a matter for the laws of the Member States and as these have not been harmonised, it is also possible to envisage circumstances where certain words might be held to be defamatory in Member State C but where this would not be the case in Member State D. By contrast, in the case of actions for rectification or deletion of the same online content, if several national jurisdictions were to render judgments in opposite directions, the persons who manage the internet site on which the content in question is and has been made available would not be able to comply simultaneously with these decisions.

47. It is true that in paragraph 31 of its judgment in *Bolagsupplysningen and Ilsjan*, in which the Court refers to the mosaic approach, it only mentions the *Shevill* judgment as a precedent. However, this does not seem to me to be significant, since the Court does not always cite all of its earlier case-law. [38]

48. In this context, it is most likely that in *Bolagsupplysningen and Ilsjan*, the Court deliberately avoided taking a position on the question of whether or not to maintain the mosaic approach in compensation matters. [39] This does not mean, however, that the question of the appropriateness of that solution does not deserve to be assessed.

49. In his Opinion in *Bolagsupplysningen and Ilsjan*, Advocate General Bobek considered that this approach served neither the interests of the parties nor the general interest. To support this view, he put forward several arguments in favour of abandoning it, three of which are likely to be relevant to claims for damages.

50. *First*, the Court did not take into account, when it extended the solution of the *Shevill* judgment to online content, the specificity of the internet, namely that it would give to any content published on it a ubiquitous nature. [40] In such a context, the application of the mosaic approach would lead to a multiplication of competent jurisdictions, which would make it difficult for the author of a content to predict which court would have jurisdiction in case of litigation. [41]

51. *Secondly*, the principle of mosaic jurisdiction would entail a risk of fragmentation of the claims within the courts of the Member States having jurisdiction only for damage caused on their national territory. In practice, it would be difficult to coordinate such claims with each other. [42]

38 One might conversely argue that paragraph 48 of judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766), which set out the reasons which led the Court not to apply the principle of mosaic jurisdiction in matters of rectification or deletion, was formulated in such a way as to justify a distinguishing rather than a complete reversal of case-law. However, the wording of that paragraph does not seem to me to be so explicit that it could be deduced that the Court necessarily intended to maintain the mosaic principle with regard to claims for compensation.

39 See also, to that effect, L. Idot, 'Compétence en matière délictuelle, commentaire', *Europe*, No°12, December 2017, comm. 494, and Corneloup, S., Muir Watt, H., 'Le for du droit à l'oubli', *Rev. Crit. DIP*, 2018, p. 297 and p. 300.

40 Advocate General Bobek raises another argument in point 84 of his Opinion relating to the indivisibility of the remedies. However, in my view this argument only concern actions seeking for rectification or deletion of online contents.

41 See, to that effect, Opinion of Advocate General Bobek in *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:554, points 78 and 79).

42 See, to that effect, Opinion of Advocate General Bobek in *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:554, point 80).

52. *Thirdly*, the proliferation of special heads of jurisdictions would not serve to protect those who are defamed since in any case they are entitled to sue the authors of the libellous content in the jurisdictions where their interests are centred, which will be easiest for them. In that context such proliferation could only serve to encourage judicial harassment strategies. [43]

53. I recognise that these arguments carry considerable weight, in particular in the light of the objectives pursued by Regulation No 1215/2012. First, recital 21 of that regulation specifies that it aims to minimise the possibility of concurrent proceedings and to avoid irreconcilable judgments being given in different Member States. Secondly, it flows from recital 15 of that regulation that the rules of jurisdiction should ensure legal certainty. Thirdly, according to recital 16, if alternative grounds of jurisdiction to the fora of the defendant's place of residence exist, it is either because those fora have a closer connection with the action or in order facilitate the proper administration of justice.

54. In this context, one may be tempted to draw an argument from the fact that the solutions reached in the *Shevill* and *eDate* judgments concerned the interpretation of Regulation No 44/2001 and not of Regulation No 1215/2012 to justify the abandonment of the mosaic approach. Indeed, recital 16 of the latter, which is worded differently than recital 12 of the former, now emphasises the importance of the principle of legal certainty in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, an addition that might suggest that the EU legislature had intended to reverse aspects of the previous case-law of the Court.

55. However, such an interpretation seems to me somewhat excessive. For my part, I consider this addition may best be understood as a simple clarification of the objective pursued by Article 7 of Regulation No 1215/2012. It does not follow that the adoption of that regulation can properly be regarded as suggesting that the mosaic approach no longer corresponds to the state of the law. Any abandonment of this approach would therefore correspond to a reversal of the existing case-law.

56. While the Court does not adhere to a strict doctrine of precedent, any significant departure from an established body of case-law should be – and is – nonetheless exceptional. It is nonetheless true that the Court has overruled some of its case-law in the past. This has been the case, as pointed out by Prof. F. Picod, [44] for example, when it turned out that the interpretation that had been given to a provision led, in practice, to a rule that was not very effective, [45] or that it met with strong opposition from the national courts responsible for its application, [46] or that this interpretation has since become obsolete due to some social, political or technological developments. [47]

43 See, to that effect, Opinion of Advocate General Bobek in *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:554, points 85 to 88).

44 Picod, F., 'Les revirements de jurisprudence de la Cour de justice de l'Union européenne', *Intervention au Max Planck Institute Luxembourg for Procedural Law*, 14 June 2017. See also, on that subject, Carpano, E., *Le revirement de jurisprudence en droit européen*, Bruylant, Brussels, 2012.

45 Judgment of 30 April 1996, *Cabanis-Issarte* (C-308/93, EU:C:1996:169, paragraph 34).

46 See judgment of 17 October 1990, *HAG GF* (C-10/89, EU:C:1990:359, paragraph 10) and judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, EU:C:2017:936, paragraphs 13 to14 ; 16 to 20, 59 and 61).

47 See judgment of 30 April 1996, *P.* v *S.* (C-13/94, EU:C:1996:170, paragraph 13), and Opinion of Advocate General Tesauro in *P.* v *S.* (C-13/94, EU:C:1995:444).

57. However, since the principles of proportionality and of legal certainty also apply to the Court, any such over-ruling of earlier case-law should not take place absent a serious reason to do so and be limited to what is necessary. Moreover, even when such a reason exists, such overruling should in particular seek to limit any retroactive effects while also respecting the principle of *res judicata*.

58. In the present case, the question is therefore whether the (admittedly) problematic features of the mosaic approach are so fundamental as to justify its abandonment and, even if this were so, whether there is any other approach open to the Court short of this potentially far-reaching approach. While fully recognising the force of the arguments presented by Advocate General Bobek in his Opinion in *Bolagsupplysningen and Ilsjan*, I nevertheless find myself unpersuaded that the post-*Shevill* case-law should suffer a reversal in this manner. I say this for the following reasons.

59. *First*, the ubiquitous nature of any content posted online is not new.[48] It is true that social networks have grown considerably since the *eDate* ruling in 2011 but even at that time Facebook already had more than 500 million users, half of whom logged on daily.[49]

60. *Secondly*, the problems generated by the possibility of bringing cases before several courts should be put into perspective. Indeed, from a strictly legal point of view, the mosaic principle does not generate any problem of coordination in case of concomitant proceedings. Since each national court is only competent to rule on the damages occurring on the territory of the Member State to which it belongs, in the absence of harmonisation of the rules relating to defamation, each will logically apply a different law, namely that applicable in each of these territories, those proceedings will not have the same subject matter, which corresponds to the claims of the person concerned, and cause of action, which refers, under EU law, to the legal and factual basis of those claims.[50]

61. From a practical perspective, the application of the mosaic approach leads to conferring jurisdiction not on all the courts of the Member States, but only on those of the Member States in which the disputed content is accessible.[51] Depending on how the concept of accessibility is to be understood, which remains unclear in the Court's case-law, not all the courts of all the Member States will be competent. Moreover, even when several courts will have jurisdiction, that does not necessarily mean that damage will be found to have occurred on the territory of each of the Member States concerned. As I have already observed, the degree of notoriety of the natural or legal person allegedly defamed,[52] the language used to draft the publication in question, the presentation,[53] the context, the references used to formulate the message, and the number of

48 By comparison, the first questioning about the consequences of ubiquitous computing, which is a broader concept, seem to date back to an article written by M. Weiser entitled 'The computer for the XXIst century' and published in *Scientific American*, 1991, vol. 265, p. 3.

49 http://www.digitalbuzzblog.com/facebook-statistics-stats-facts-2011/.

50 See, for example, judgment of 2 March 2017, DI v EASO (T-730/15 P, not published, EU:T:2017:138, paragraph 86). Similarly, since the rules of jurisdiction do not presume the applicable law, the mosaic approach is in principle neutral with regard to the risk of over-regulation arising from the obligation on the author and publisher of the content to ensure compliance with the requirements of the legislation of the various Member States in which the content will be accessible. Indeed, the fact that certain courts have exclusive jurisdiction is not meant to prejudge the applicable law. Even if this might be a fiction in practice, the courts with jurisdiction over the entirety of the damage should theoretically apply the law of the various Member States in which the content is accessible in order to determine the amount of damages due.

51 Judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 47).

52 It is true that the internet increases the potential audience of a message. However, in terms of reputation, this does not mean that the person defamed is necessarily known throughout Europe.

53 It should be noted that, for example, internet users from different Member States do not look at the same elements of a web page or do so with different attention spans. See, for example, Miratech, *Étude internationale: les habitudes des internautes suivant les pays*, 2013.

visitors from the Member States at issue who accessed this publication [54] are all elements that may lead the courts to find that the person concerned has not suffered any damage in the territory for which they are geographically competent.

62. In this context, the problem posed by the mosaic principle appears to be in reality mostly related to the existence of a risk of judicial harassment. The multiplication of competent jurisdictions creates a fertile ground for strategies of judicial harassment and, in particular, for strategic lawsuits against public participation (SLAPP, *recours bâillon* in French). [55] Since any lawsuit obliges the defendant to devote energy and resources to it, regardless of the merits of the claim, by multiplying legal actions, or simply by threatening them, a person can inflict damage (or, for a company, a competitive disadvantage, by wasting management time and resources) on another.

63. However, if such strategies can be advantageously implemented by some unscrupulous applicants, this is in part because the existing rules in the Member States relating to the reimbursement of legal costs are often insufficiently rigorous with regard to the obligation of the unsuccessful party to compensate the successful party for the damage caused, as the case may be, either by the action or by the fact of having abusively resisted the applicant's claims. Indeed, these rules do not always take into account sufficiently the indirect costs generated by the management of a procedure (in particular the costs of hardship caused by the litigation), although in practice those costs can be significant, both economically and non-materially. [56] If those costs were systematically and better compensated, in particular in the case of abuse of process, applicants would be dissuaded from abusing the mosaic principle, since this would expose them to the risk, in the event that they are unsuccessful in their claim, of having to pay significant damages to the defendant.

64. In addition, defendants may take certain actions to protect themselves against this type of risk. For example, depending on the context, they can bring a negative declaratory action before a court with full jurisdiction. [57] Since that jurisdiction will be competent to rule on the damage on the whole territory of the EU, the application of the rules of mutual recognition of decisions, provided for by Regulation No 1215/2012, will have the effect of depriving any other courts of their jurisdiction to rule on the damage occurring in the territory of only a single Member State. More generally, parties also have the option, under Article 30 of Regulation No 1215/2012, to apply for a stay of proceedings, or even a dismissal, in the case of related claims, namely, claims that are so closely related that it is expedient to hear and determine them together to avoid the

54 See, for example, the judgment of the Supreme Court of Ireland of 15 March 2012, *Coleman v. MGN Ltd.* [2012] IESC 20, where that Court held it had no jurisdiction to entertain defamation proceedings under what is now Article 7(2) of the Brussels Regulation as there was no evidence that any person residing in Ireland had in fact accessed the online publication in question.

55 See, on that subject, Prings, G.W., 'SLAPPs: Strategic Lawsuits Against Public Participation', vol. 7, *Pace Envtl. L: Rev.*, 1989, 3; Canan, P., 'The SLAPP from a Sociological Perspective', vol. 7, *Pace Envtl. L: Rev.*, 1989, 23; and Landry, N., *SLAPP – Bâillonnement et répression judiciaire du discours politique*, Ecosociété, 2012.

56 Even direct costs can be insufficiently taken into account. Indeed, most often only fees charged at standard legal rates are refundable whereas very often lawyers charge more, in particular when someone turns to an international law firm in order to avoid having to correspond with various law firms in different countries. In addition, rules on reimbursement of legal costs often do not take into account the fact that the party has to pre-finance all of those costs.

57 See, for example, judgment of 25 October 2012, *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664). The possibility of bringing a negative declaratory action exists, for example, under Dutch law, but not under French law. See Committee of experts on Human Rights Dimensions of automated data processing and different forms of artificial intelligence, *Study on forms of liability and jurisdictional issues relating to the application of civil and administrative law in matters of defamation in the member states of the Council of Europe*, Council of Europe Study, DGI(2019)04, p. 24. See also, on this subject, Bouthinon-Dumas, H., De Beaufort, V., Jenny, F., Masson A., *Stratégie d'instrumentalisation juridique et concurrence*, Larcier, 2013, p. 37.

risk of irreconcilable judgment resulting from separate proceedings.[58] As a result, in particular, the author of the alleged defamatory content will not have to bear the stress of having to manage several procedures at the same time.

65. Most importantly, because the resources of potential claimants are not unlimited, implementing a litigation strategy based on the multiplication of actions will rarely be to their advantage. Accordingly, such strategies will be mostly implemented by economic actors with significant resources. However, for them, the disappearance of the mosaic principle will not prevent them from implementing this type of strategy. For example, according to the Court's case-law, the criterion of centre of interests is to be assessed at the level of each legal subject.[59] Consequently, in the case of a corporation organised in the form of a group of companies with similar corporate names, the application of the criterion of the centre of interests will effectively mean that each legal entity in that group (which may not be 100% controlled by a parent company) will be entitled to bring an action against the author of the message for the damage suffered before the courts of the State in which each of them have their centre of interests.[60]

66. Thirdly, it is not really clear whether the mosaic approach would actually contravene the objectives pursued by Regulation No 1215/2012. Indeed, as underlined in *Bolagsupplysningen and Ilsjan*, the rule of special jurisdiction in matters relating to tort, delict or quasi-delict set out in Article 7(2) of Regulation No 1215/2012 was not designed to offer the weaker party stronger protection.[61] Accordingly, it is, in principle, irrelevant that the application of the mosaic approach could potentially disadvantage one of the parties.

67. Turning now more specifically to the three objectives pursued by the provisions of Regulation No 1215/2012 which relate to jurisdiction, it may be noted as regards the objective of legal certainty set out in recital 15 of Regulation No 1215/2012, that the Court considers that it is satisfied if the defendant is able to determine on the ground of the criterion used in which courts it can be sued. From that perspective, it can be pointed out, as highlighted by the High Court of Australia in a landmark decision, *Dow Jones and Company Inc v Gutnick*, that when a person decides to post content on the internet that is 'accessible' from all Member States, that person can expect to be sued in each of those Member States.[62]

68. It is, however, true that in its judgment of 12 May 2021, *Vereniging van Effectenbezitters* (C-709/19, EU:C:2021:377, paragraph 34 et seq.), the Court seems to have given the objective of legal certainty a certain precedence over any other consideration, including that relating to the wording of Article 7(2) of Regulation No 1215/2012. In fact, in that judgment, which concerned actions for damages suffered by shareholders due to a lack of information, the Court rejected the argument that a company can expect to be sued in the place where the securities accounts of its shareholders are located on the sole ground that the criteria relating to the domicile and location of the shareholders' accounts do not allow the issuing company to anticipate the determination of the international jurisdiction of the courts before which it could be sued, as it would be contrary to

58 Some legal systems provide mechanisms to prevent this type of litigation strategy, such as, for example, the *forum non conveniens* rule in common law.

59 See to that effect, judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 41).

60 The same is true, for example, in the case of damages resulting from a cartel between suppliers. Indeed, most often, if the parent company negotiates the purchase of raw materials, the latter are generally paid by the subsidiaries, which may not be 100% owned. It is therefore in their accounts, and not in those of the parent company, that the additional costs generated by that cartel have been materialised. Therefore, depending on how a group organises its purchases, the victims may be the parents or each of the subsidiaries.

61 See, to that effect, judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 39).

62 See *Dow Jones and Company Inc v Gutnick* [2002] HCA 56; 210 CLR 575; 194 ALR 433; 77 ALJR 255 (10 December 2002), paragraph 39 ('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').

the objective, referred to in recital 16 of Regulation No 1215/2012, of avoiding the possibility – in order to guarantee the principle of legal certainty – that the defendant might be sued before a court of a Member State which it could not reasonably have foreseen. For the Court, the objective of foreseeability requires that, in the case of a company listed on the stock exchange, such as the one at issue in that case, only the courts of the Member States in which that company has complied with the statutory disclosure requirements for the purposes of its listing on the stock exchange may be established as having jurisdiction in respect of the occurrence of the damage. Accordingly, it is only in those Member States that such a company can reasonably foresee the existence of an investment market and the incurrence of its liability.

69. However, this solution does not seem to me to indirectly call into question the mosaic approach. If, on the one hand, it is possible to consider, even if only approximately,[63] that the investment market of a listed company is located in the place of its listing, the geographic 'market' for an opinion will be determined by the accessibility of that opinion. On the other hand, one may note that the solution reached in *Vereniging van Effectenbezitters*, combined with the jurisdiction of the courts of the place of issuance of the shares, which derives from the jurisdiction of the place of residence of the defendant provided for in Article 4 of Regulation No 1215/2012, leads to conferring jurisdiction on the courts of the Member States whose law will be, in principle, that which is applicable to the dispute. In that sense, this solution is consistent with the objective of sound administration set out in recital 16 of Regulation No 1215/2012. By contrast, however, in matters of defamation, the applicable law is likely to be that of the various Member States in which the message will be accessible. In my opinion, this is a crucial difference since if the mosaic approach were to be abandoned in matters of defamation, the claimant may be deprived of the possibility of bringing an action before the courts of the Member States in which the message in question was accessible and, therefore, before the courts that are the better placed to apply the different relevant laws and to make all the necessary factual assessments.

70. In any case, the mosaic approach does not seem likely to lead to a result that is less predictable than that resulting, for example, from the application of the criterion of the centre of the victim's interests.[64] Admittedly, as far as non-economic operators are concerned, such a criterion might seem simple to apply since it corresponds more or less to the place where the victim has their centre of life and social activity. However, this criterion appears much more complex to apply in the case of economic operators since different views exist on what constitutes the 'interests' of a company,[65] as illustrated by the difference in approach between shareholder primacy and stakeholder theories.[66]

63 That is, by ignoring the fact that some shares of the same company may not be listed or may be sold outside the stock exchange where they are listed.

64 In that regard, it may be noted that the objective of predictability concerns both the author of the allegedly defamatory content and the person to which this content refers. See, for example, judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 35).

65 In particular, the determination of a precise location may be even more unpredictable when, for example, what is defamed is not the company name, but one of the many trademarks used by the company. On the one hand, the question might also arise as to whether, unlike a company name, a trademark belongs to personality rights. On the other hand, if this were to be considered the case, how can the centre of interests test be applied when the same products are sold under different brands in different countries? Should it be inferred from this that a separate centre of interest exists for each trademark, even though the Court had previously reasoned in terms of the centre of interest of the company concerned?

66 See, for example, Rönnegard, D., & Craig Smith, N., 'Shareholder Primacy vs. Stakeholder Theory: The Law as Constraint and Potential Enabler of Stakeholder Concern', in Harrison, J. S., Barney, J., Freeman, R., & Phillips, R., (Eds.), *The Cambridge Handbook of Stakeholder Theory*, CUP, Cambridge, 2019, pp. 117-131, and, in French, Tchotourian, I, 'Doctrine de l'entreprise et école de Rennes: La dimension sociétale, politique et philosophique des activités économiques affirmée – Présentation d'un courant de pensée au service de l'homme', in Champaud, C. (Ed.), *L'entreprise dans la société du 21e siècle*, Larcier, Bruxelles, 2013, pp. 131-174.

71. To overcome this issue, logic would dictate that the concept of 'centre of interests', for a legal person, corresponds to their place of incorporation, since in particular on the one hand, defamation is an attack on the honour, dignity and good name of a person (and not of its products) and, on the other hand it is in their financial accounts that the effects of any damage to their reputation will materialise.[67] Such a rule would thus have made it possible, in accordance with the principle of legal certainty, for the author of any publication concerning that legal person to predict the result of the application of this connecting factor, in so far as the indication of the place of residence of an economic operator is easy to find, since its mention is made compulsory by various instruments of EU law.

72. However, the Court considered instead that, 'while the centre of interests of a legal person may coincide with the place of its registered office when it carries out all or the main part of its activities in the Member State in which that office is situated and the reputation that it enjoys there is consequently greater than in any other Member State, the location of that office is, not, however, in itself, a conclusive criterion for the purposes of such an analysis'.[68] What is relevant is the place where 'the economic activity of the relevant legal person is carried out mainly'.[69]

73. The concept of economic activity for a corporation is, of course, somewhat ambiguous. It can be understood in at least two ways, namely, from a commercial perspective, as designating the place where an economic operator makes most of its sales (without even entering into the debate of whether profit or turnover would be the relevant indicator in this respect since, in particular, for a company that carries out large projects worldwide, this might change on a regular basis)[70] or, from a more industrial perspective, as referring to the place where the financial, human and technical resources necessary for the legal entity to carry out its activity are combined and used to produce the goods or services sold.[71] Indeed, reputation is likely to have an impact on the relations that an economic operator may have, not only with its clients but with all its stakeholders (shareholders, creditors, suppliers, employees, etc.). For example, reputation can have a direct impact on a company's ability to raise funds on the financial markets,[72] or to obtain supplies.

74. The implementation of such a criterion necessarily comes up against other practical difficulties. Indeed, regardless of how the concept of economic activity should be understood, the information needed by the defendant to determine which court will have jurisdiction on this

67 For example, in judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraphs 52 and 53), the Court held that 'for loss consisting in additional costs incurred because of artificially high prices, [the place where the damage occurred] is located, in general, at that victim's registered office'.

68 Judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 41).

69 Judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 43). In that respect, it should be pointed out that the Court seems to give another meaning to the concept of 'centre of interests' from the one retained, for example, by the EU legislature in Article 3(1) of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19). Indeed, that provision defines the concept of 'centre of main interests' as 'the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties'.

70 While it may be tempting to consider, from this perspective, that the place where the company makes the most profit should be the centre of interests, since a company has to cover its costs in order to survive, I would rather consider that the centre of interests should correspond to the place where the company makes the largest commercial margin (turnover minus the cost of purchase of goods or services sold). Furthermore the question may arise as to the point in time when the centre of interests of a legal person should be assessed: at the time of the damage or when the action is brought?

71 In its judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766), the Court seems to suggest, in paragraph 42, that, in the circumstances of that case, the centre of the alleged victim's interests was in Sweden, since it carried out most of its activities there. However, the Court did not specify if by 'activities' it intended to refer to the applicant's clients or to the means of production employed to satisfy them.

72 Guimaraes, G., 'The Corporate Ad; Wall Street's Supersalesman', *Industry Week*, 10 June 1985, and Boistel, P., 'La réputation d'entreprise: un impact majeur sur les ressources de l'entreprise', *Management & Avenir*, vol. 17, no 3, 2008, pp. 9-25.

ground is very likely to be covered, for individuals, by Regulation 2016/679[73] and, for companies, to a certain extent, by business confidentiality.[74] In practice, therefore, one might wonder if it will be at least as difficult for the defendant to predict which courts will have jurisdiction on the basis of the centre of interests criterion as on the basis of the mosaic principle.

75. If one now turns to the objective of minimising the possibility of concurrent proceedings (in order to ensure a close link between those courts and the dispute or to facilitate the proper administration of justice), up until now the position of the Court seems to have been that the application of a criterion that may result in a variety of courts in different Member States having jurisdiction in cases of this kind is not a problem as long as the criterion used gives jurisdiction to courts which are likely to be better placed to assess the damage that has occurred. Indeed, such a position achieves the objective of the proper administration of justice mentioned in recital 16 of Regulation No 1215/2012 as justifying derogation from the jurisdiction of the courts of the defendant's place of residence.[75]

76. One may note, for example, that in paragraph 43 of the judgment of 3 October 2013, *Pinckney* (C-170/12, EU:C:2013:635), after having referred to the objective of the sound administration of justice, the Court held that the courts of the various Member States in which the alleged damage is likely to have occurred or to occur have jurisdiction to rule on actions for compensation for alleged infringement of a copyright, provided that the Member State in which that court is situated protects the copyrighted material relied on by the applicant.[76]

77. Similarly, in paragraphs 33 and 34 its judgment of 29 July 2019, *Tibor-Trans* (C-451/18, EU:C:2019:635), the Court concluded that the courts of the various Member States in whose territory the market affected by the infringement is located, and in which the victim claims to have suffered the damage, should be considered competent to rule on actions for damages caused by an infringement under Article 101 TFEU. It then added that '[t]hat approach is consistent with the objectives of proximity and predictability of the rules governing jurisdiction, since, first, the courts of the Member State in which the affected market is located are best placed to assess such actions for damages and, secondly, an economic operator engaging in anticompetitive conduct can reasonably expect to be sued in the courts having jurisdiction over the place where its conduct distorted the rules governing healthy competition'.

73 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ 2016, L 119, p. 1).

74 Even when some economic information is made publicly available due to the disclosure obligations imposed on certain companies by Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ 2013 L 182, p. 19), an ordinary person who has posted comments about a company might encounter difficulty in understanding information related to that company in order to deduce the company's centre of interests.

75 See, for example, to that effect, judgments of 5 June 2014, *Coty Germany* (C-360/12, EU:C:2014:1318, paragraph 48), and of 10 September 2015, *Holterman Ferho Exploitatie and Others* (C-47/14, EU:C:2015:574, paragraph 73). It is true that the Court has held that the criterion of the place where the harmful event occurred cannot be interpreted so broadly as to encompass any place where the harmful consequences of an event which has already caused damage actually occurring in another place may be felt. However, the Court made that observation in order to exclude the jurisdiction not of the courts of other Member States in whose territory the causal event would also have produced harmful consequences, but of the courts of the place where the victim claimed to have suffered damage subsequent to the initial damage which had occurred and been suffered by him or her in another State. See, judgments of 19 September 1995, *Marinari* (C-364/93, EU:C:1995:289, paragraphs 14 and 15); of 9 July 2020, *Verein für Konsumenteninformation* (C-343/19, EU:C:2020:534, paragraphs 27 and 28); and of 5 July 2018, *flyLAL-Lithuanian Airlines* (C-27/17, EU:C:2018:533, paragraph 32).

76 In that respect, it may be noted that if, as the Court points out in paragraph 39 of that judgment, copyrights are subject to a principle of territoriality, it is because those rights are not fully harmonised and are therefore subject to different regimes. From this point of view, the situation of copyright, is therefore no different from that of personality rights and, in particular, the right to be protected against defamation.

78. Finally, in paragraphs 56 and 57 of its judgment of 5 September 2019, *AMS Neve and Others* (C-172/18, EU:C:2019:674), the Court first ruled that the courts of the various Member States in whose territory consumers or professionals targeted by the advertisements or offers for sale are located should be considered to have jurisdiction to rule on infringement actions, before specifying that this solution is 'supported' by the fact that those courts are particularly suited to giving a ruling by reason of proximity and ease of taking evidence.

79. In this context, not only am I unconvinced that the mosaic approach is contrary to the objectives of Regulation No 1215/2012, but I am equally unconvinced that the use of one of the other connecting factors justifying a 'single-jurisdiction rule' (such as the place of residence of the defendant, the place of occurrence of the causal event or the centre of interests) will lead to the designation of courts that are necessarily *in a better position* to assess the defamatory or non-defamatory nature of a content, as well as the extent of the resulting damage.

80. Of course, there will be a number of cases where the defamatory nature of content will hardly be in doubt. This should not, however, obscure the fact that the defamatory nature of content may be perceived differently from one Member State to another. If one takes the example of an article falsely imputing certain abusive commercial or tax practices to a particular company, the message conveyed by that publication might be perceived differently and, accordingly, might have a different impact in one Member State as compared to another. [77]

81. In addition to this classic problem of intercultural discourse (which explains, for example, why companies develop different marketing strategies from one Member State to another), the lack of harmonisation of legislation on defamation tends to justify the maintenance of the mosaic principle. It is true that all Member States have enacted anti-defamation laws, but the content of these laws, their manner of application and, not least, the way in which damages are quantified, can vary significantly from one Member State to another, often reflecting deep divergences in the applicable legal culture. [78]

82. Consequently, as the Commission points out, a claimant may have a legitimate interest in bringing a case before a court other than the one of its centre of interests, even if this limits the amount of compensation he, she or it can obtain. On the one hand, as violations of privacy and rights relating to personality are excluded from the scope of Regulation No 864/2007, the applicable law will be determined according to the rules of private international law applicable in the Member State of each competent court, which may vary substantially. [79] On the other hand, an economic operator may wish to bring proceedings before the courts of the Member States in which it is trying to develop its economic activities rather than those of the Member State where it already enjoys a solid reputation, precisely because its reputation already protects it against the acts of the coarsest defamation or because it can hope to take advantage of a judgment on that

[77] On the existence of risk of damage on a company's reputation due to certain tax practices, see for example, PwC, *Tax Strategy and Corporate Reputation: A Business Issue*, 2013.

[78] In its proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [COM(2010) 748 final], the Commission noted that 'defamation cases in which an individual claims that rights relating to his [or her] personality or privacy have been violated by the media … are particularly sensitive and Member States have adopted diverging approaches on how to ensure compliance with the various fundamental rights affected, such as human dignity, respect for private and family life, protection of personal data, freedom of expression and information'. Similarly, according to Professors Corneloup and Muir Watt, the respective place to be given to freedom of expression and protection of privacy is the subject of very contrasting legal cultures. Corneloup, S., Muir Watt, H., 'Le for du droit à l'oubli', *Rev. Crit. DIP*, 2018, p. 296. See, also, Kramberger Škerl, J., 'Jurisdiction in On-line defamation and Violations of Privacy: In search of a Right Balance', *LeXonomica*, vol. 9, no 2, 2017, p. 90.

[79] See Article 1(2)(g) of that regulation.

market on the understanding that the decision handed down by a local court received in an overall greater media coverage in that member State than a decision given by the courts of the Member State where the centre of its interests is situated. [80]

83. To consider, as the opponents of the mosaic approach seem to do, that it would be preferable to concentrate all claims for damages in one court, tends to overlook the reality that neither the laws of the Member States relating to defamation, nor even the rules for determining the applicable law, are currently harmonised.

84. Indeed, in the absence of harmonisation in these areas, the courts that enjoy exclusive jurisdiction to decide on the whole of the damage will have to apply the law of each of the Member States in which the alleged damage is likely to have occurred to rule on any claim for compensation. This implies that, in principle, they will have to take into consideration for each of these Member States, the applicable law, the reputation enjoyed by the victim in that same territory as well as the perception of the message by the public of those States. [81]

85. In this context, can one really consider that one single court in one identified (or identifiable) Member State with complete jurisdiction would be better placed to make such an assessment? [82] Should it not rather be considered that the existence of a plurality of competent fora is the inexorable consequence of the right enjoyed by applicants, in accordance with the principle of subsidiarity, to have their dispute decided by the courts that are, because they are the closest to the territory of each of the Member States, the best able to make all the factual assessments, together with the fact that defamation laws of each Member States are diverse and culturally sensitive to the separate legal traditions of each of these States? [83]

86. Of course, the objective of predictability must also be taken into account, but in my view it is precisely after balancing this objective against the objective of the sound administration of justice that the Court has come to endorse the mosaic approach. [84]

[80] Reputation is one of the key factors in penetrating a new market, but this reputation does not necessarily turn into an immediate increase in sales volume. On the issue of legal communication strategies, see Bouthinon-Dumas, H., Cheynel, N., Karila-Vaillant, C. and Masson, A., *Communication juridique et judiciaire de l'entreprise*, Larcier, 2015, p. 323 et seq.

[81] See, to that effect, Bogdan, M., 'Regulation Brussels Ia and Violations of Personality Rights on the Internet', *Nordic Journal of International law*, vol. 87, 2018, p. 219.

[82] In that regard, I respectfully disagree with the argument draw by the Court in paragraph 46 of judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685) that it is not always technically possible to quantify the number of people who have viewed a message or, at the very least, this argument seems to me outdated. Indeed, site owners generally use such tools, such as *Google Analytics*, to refine their marketing policy. Admittedly, the data collected has a certain degree of approximation in so far as, for example, some users may use a proxy server. However, these tools are favoured by the said owners, which tends to show that they are nevertheless considered by the market players as relevant. For example, according to Wikipedia, Google Analytics is used by more than 10 million sites, or more than 80% of the global market. Moreover, this approximation resulting from the use of these tools does not seem to me to be higher than those that other quantification methods might present. In any case, the Court has since accepted that it is possible to geolocate an internet user (see, judgment of 24 September 2019, *Google (Territorial scope of de-referencing)* (C-507/17, EU:C:2019:772, paragraph 73)).

[83] Recital 21 of Regulation No 1215/2012 states that that regulation aims to minimise the possibility of concurrent proceedings. The use of the verb 'to minimise' implies that such a possibility may nevertheless exist, in particular, where necessary to achieve the other objectives pursued by that regulation. Moreover, it is clear from the position of this recital that this objective is supposed to be implemented by the rules applicable to *lis pendens* and related actions.

[84] See judgment of 7 March 1995, *Shevill and Others* (C-68/93, EU:C:1995:61, paragraph 31).

87. Finally, before abandoning the mosaic approach, it would in any event be necessary to ensure that there are no other solutions that are less far-reaching than such a complete reversal of the case-law. In that regard, it may indeed seem less radical simply to combine the mosaic approach with what might be termed 'a focalisation criterion', as provided by EU law in certain areas. [85]

88. According to that criterion, in order for the courts of a Member State to have jurisdiction, the content in question must not simply be accessible by means of the internet, but that instead the publication must also have been specifically directed towards the territory of the Member State concerned. If that criterion were to be applied, it would help to ensure that it was only the courts of those Member States at which the publication was particularly directed would be entitled to assume jurisdiction on the basis of Article 7(2) of Regulation No 1215/2012. This would make it possible, in accordance with the objectives pursued by this provision, to reduce the number of competent courts and to ensure a certain legal certainty, while at the same time ensuring that there is a close link between the courts and the dispute and therefore guaranteeing the proper administration of justice.

89. Admittedly, the Court rejected in general the application of the focalisation criterion with respect to the application of Article 7(2) on the ground that, unlike Article 15(1)(c) of Regulation No 44/2001 (now Article 17(1)(c) of Regulation No 1215/2012), Article 5(3) of Regulation No 44/2001 (now Article 7(2) of Regulation No 1215/2012) does not require that the activity in question be 'directed to' the Member State of the court seised. [86]

90. However, one might note, first, that the fact that Article 7(2) of Regulation No 1215/2012 does not provide for the application of such a condition does not mean that this circumstance may not be relevant, in certain particular circumstances, in order to determine the place where the damage occurred. It may be noted, for example, that in paragraph 42 of *Bolagsupplysningen and Ilsjan* the Court refers to the fact that the website at issue was intended to be understood by residents of a particular Member State, which suggests that, according to the Court, at least in matters of defamation, focus on the markets of specific Member States should be taken into account in determining jurisdiction.

91. Secondly, so far as trademark infringements are concerned, Article 97(5) of Regulation (EC) No 207/2009 [87] – which establishes a derogating jurisdictional rule for trademark infringement – does not contain any reference to a condition which would require that in order for the courts of a Member State to have jurisdiction, the website in question was intended to direct its activities towards that Member State. Nevertheless, for the purposes of establishing jurisdiction in such cases, the Court of Justice has recently expressly taken into account the fact that the online content at issue – advertisements and sales offers – were not only accessible to, but also intended for, consumers in certain Member States. [88]

85 See, for example, judgments of 12 July 2011, *L'Oréal and Others* (C-324/09, EU:C:2011:474, paragraph 65); of 21 June 2012, *Donner* (C-5/11, EU:C:2012:370, paragraph 27); and of 18 October 2012, *Football Dataco and Others* (C-173/11, EU:C:2012:642, paragraph 39).

86 Judgments of 3 October 2013, *Pinckney* (C-170/12, EU:C:2013:635, paragraph 42), and of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28, paragraph 33).

87 Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (codified version) (OJ 2009 L 78, p. 1). This regulation has been replaced by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017, L 154, p. 1) which Article 125(5) is worded in substance as Article 97(5) of Regulation (EC) No 207/2009.

88 Judgment of 5 September 2019, *AMS Neve and Others* (C-172/18, EU:C:2019:674, paragraph 56 and 65).

92. Thirdly, with regard to the broadcasting of television programmes, the European Court of Human Rights ('the ECtHR') found, after examining the content of Regulation No 44/2001, that Sweden had violated Article 6 of the European Convention on Human Rights on the grounds, in substance, that once a television programme, although accessible outside Sweden, had been produced for the Swedish public, that State should have provided a person who alleged that he or she had been defamed by that programme with effective access to its courts. [89] It seems therefore that for the ECtHR, States must provide for the possibility for defamed persons to bring an action before its courts on the sole condition that the message is directed to its residents.

93. In the light of the above, one can therefore consider that the use of the focalisation criterion would possibly constitute a less radical change in the Court's case-law than by simply dropping or otherwise abandoning the mosaic approach. It would also have the merit of avoiding the assumption of jurisdiction by the courts of another Member State where there was simply a tenuous connection between the internet publication in question and any alleged damage suffered by the claimant as a result or where the claimant opportunistically seeks to take advantage of the technical fact of publication via the internet in order to secure a more favourable venue for his or her proceedings. The application, moreover, of such a criterion, which is not expressly excluded by the wording of Article 7(2) of Regulation No 1215/2012, might well amount to a better balancing of the purpose of proximity and that of reducing the number of competent courts. [90]

94. All in all, therefore, it has to be recognised that the quest for a perfect solution in the case of trans-national defamation is an idle one. Experience has demonstrated that this is so. There are difficulties with both the mosaic and the 'single jurisdiction' approaches. But since the decision of the Court in *Shevill* in 1991 the Court has, on the whole, opted for the mosaic approach. It cannot, I think, be said that this approach is so clearly wrong or unsatisfactory that the case-law based on this approach should now be over-ruled or otherwise departed from.

95. In any case, I consider that the present case is not the right one for the Court to take a position on whether or not the mosaic approach should be maintained, refined or even abandoned. Indeed, in the case in the main proceedings, the applicant is alleging not that the contents in question would constitute acts of defamation, but that those would instead violate French law relating to acts of *dénigrement*, which is a form of malicious falsehood. [91] Moreover, the referring court does not seem to question this classification. [92]

96. Under French law, disparagement does not fall within the scope of infringement of rights relating to the personality, but rather belong to unfair competition rules. [93] In particular, under French law, disparagement differs from defamation in that the later requires that the criticism be

89 ECtHR, 1 March 2016, *Arlewin v. Sweden*, CE:ECHR:2016:0301JUD002230210.

90 See, to that effect, in essence, Opinion of Advocate General Jääskinen in *Pinckney* (C-170/12, EU:C:2013:400, point 68).

91 Under French law, disparagement is found when a rival spreads information intended to discredit its competitor, unless the information in question relates to a matter of general interest, has a sufficient factual basis and, subject to the proviso, is expressed with a certain degree of restraint. See, Griel, J.-P., 'Entreprises – Le dénigrement en droit des affaires La mesure d'une libre critique', *JCP ed. G*, No 19-20, 8 May 2017, doctr. 543, and Cass. Com., 9 January. 2019, n°17-18350.

92 Admittedly, in its reference for a preliminary ruling, the referring court states that it considers that the solution set out in judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766) concerning an alleged infringement of rights relating to personality is transposable to acts of unfair competition resulting from the dissemination on internet forums of allegedly disparaging statements. However, for my part, I consider that, from the perspective of EU law, there is a significant difference between alleging an infringement of personality rights as compared to alleging an infringement of purely economic rights.

93 It follows from the recent Court's case law that the centre of interests approach specifically addresses the situation where a person is claiming that his or her personality rights have been infringed. See, to that effect, judgment of 17 June 2021, *Mittelbayerischer Verlag* (C-800/19, EU:C:2021:489, paragraph 31).

of such a nature as to harm the honour, dignity or good name of a natural or legal person whereas disparagement consists of publicly discrediting the products of an economic operator, whether or not they are in competition, with a view to influencing customers' purchasing patterns. [94]

97. Admittedly, those specific features of French law have no influence *in themselves* on the way in which Article 7(2) of Regulation No 1215/2012 is to be interpreted. However, the applicant's choice to rely on that qualification rather than on that of an act of defamation implies, implicitly but necessarily, that the damage relied on is of a strictly economic nature. [95]

98. According to the Court's case-law, in the case of infringement of economic rights conferred by the laws of different Member States, the courts of those Member States have jurisdiction to deal with the damage caused on the territory of their Member States in so far as those courts are best placed to assess whether those rights have actually been infringed and to determine the nature of the damage. [96]

99. In particular, according to the Court's case-law, an action relating to an infringement of unfair competition law may be brought before the courts of any Member State where that act caused or may cause damage within the jurisdiction of the court seised. [97] More precisely, where the market affected by the anticompetitive conduct is in the Member State on whose territory the alleged damage is purported to have occurred, that Member State must be regarded as the place where the damage occurred for the purposes of applying Article 7(2) of Regulation No 1215/2012. [98]

100. In so far as, in the case of an act of disparagement, the markets likely to be affected are those where, on the one hand, the disparaged services are marketed and, on the other hand, the disparaging message was accessible, I consider that, in the case in the main proceedings, the French courts should be deemed to have jurisdiction if Gtflix Tv actually has an appreciable number of customers resident in France and if the messages at issue were posted in French or English, in so far as the number of persons understanding those languages in that Member State cannot be considered as insignificant. [99]

101. That solution is consistent with the objectives of proximity and proper administration of justice pursued by Regulation No 1215/2012, referred to in recital 16 thereof. Indeed, the courts having jurisdiction under Article 7(2) of Regulation No 1215/2012, namely, in the circumstances at issue in the main proceedings, the courts of the place of residence of each customer likely to have accessed and understood the publications in question, are to be considered as the most suitable ones to assess whether an act of disparagement has actually had the effect of changing

94 In addition, under French law, disparagement may also constitute, under certain circumstances, an abuse of a dominant position. Cour d'appel de Paris (Court of Appeal, Paris, France), judgment No 177 of 18 December 2014, *Sanofi e.a. c. Autorité de la concurrence* (RG No 2013/12370). In its judgment of 23 January 2018, *F. Hoffmann-La Roche and Others* (C-179/16, EU:C:2018:25), the Court of Justice also found that an agreement between competitors marketing two competing products to communicate certain disparaging information to decision makers constituted a restriction of competition by object.

95 Under EU law, the same act might receive different qualifications and, therefore, to have different regimes applied to it, provided that the qualification criteria used, the purposes of these regimes, and the scope of the protection granted by each are different. See, by analogy, judgment of 27 January 2011, *Flos* (C-168/09, EU:C:2011:29, paragraph 34).

96 See, for example, judgment of 3 April 2014, *Hi Hotel HCF* (C-387/12, EU:C:2014:215, paragraph 39).

97 See, to that effect, judgment of 5 June 2014, *Coty Germany* (C-360/12, EU:C:2014:1318, paragraph 57).

98 Judgment of 29 July 2019, *Tibor-Trans* (C-451/18, EU:C:2019:635, paragraph 33).

99 According to a study entitled 'Eurobarometer – Europeans and their Languages, 2012', conducted by TNS Opinion & Social at the request of the Directorate-General Education and Culture, Directorate-General for Translation and Directorate-General for Interpretation of the Commission, 34% of the French population indicated that they consider themselves capable of understanding a conversation in English. Such a percentage seems to me sufficient to assume that a message in English posted on a forum frequented by French consumers is likely to be understood by French consumers.

their conduct. [100] It is also consistent with the requirement of foreseeability since any undertaking must expect, by referring to a competitor in public content, to be able to be sued before the courts of the various Member States in which that content is or was accessible and where that competitor had customers.

102. Lastly, and above all, this solution is corroborated by the requirement of consistency between the interpretation of the rule of jurisdiction and of the instruments dealing with the law applicable set out in recital 7 of the Rome II Regulation. [101] As it happens, while the conflict of laws rules applicable to defamation are not harmonised, the Rome II Regulation nonetheless unifies conflict of laws rules relating to unfair competition. [102]

103. In the case of acts of unfair competition affecting the interests of a particular competitor, as in the main proceedings, Article 6(2) of the Rome II Regulation provides for the application of the general rule laid down in Article 4 of the regulation, [103] namely, the law of the country in which the damage occurs. [104]

104. In the light of the above, I consider that the French courts will have jurisdiction if it is established that Gtflix Tv has an appreciable number of customers in France who are likely to have access to and understand the publication or publications at issue. The assessment of those facts is a matter for the national court.

[100] See, to that effect, judgments of 29 July 2019, *Tibor-Trans* (C-451/18, EU:C:2019:635, paragraph 34) and of 24 November 2020, *Wikingerhof* (C-59/19, EU:C:2020:950, paragraph 37).

[101] See, to that effect, judgments of 5 July 2018, *flyLAL-Lithuanian Airlines* (C-27/17, EU:C:2018:533, paragraph 41); of 29 July 2019, *Tibor-Trans* (C-451/18, EU:C:2019:635, paragraph 35); and of 9 July 2020, *Verein für Konsumenteninformation* (C-343/19, EU:C:2020:534, paragraph 39).

[102] Although there is no definition of the concept of 'unfair competition' in the Rome II Regulation, recital 21 thereof states that 'the conflict-of-laws rule should protect competitors, consumers and the public in general, and ensure the proper functioning of the market economy. Connection to the law of the country in which competitive relations or the collective interests of consumers are or may be affected generally makes it possible to achieve these objectives.' Furthermore, since EU provisions must be interpreted in accordance with international law, it should be emphasised that the Paris Convention requires the States party to that Convention, which is the case of all the Member States, to ensure effective protection against unfair competition, which includes, within the meaning of that Convention, 'false allegations, in the course of trade, of such a nature as to discredit the establishment, the products or the industrial or commercial activity of a competitor.' In view of those two elements, it must be considered that the concept of 'unfair competition' within the meaning of the Rome II Regulation includes acts of disparagement.

[103] Admittedly, that provision introduces an exception to the rule laid down in Article 6(1), according to which 'the law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected'. However, I understand this exception to mean that it is intended, in particular, to allow, where appropriate, the application of the specific rules laid down in Articles 4(2) and 4(3) of the Regulation. See Wautelet, P., 'Concurrence déloyale et actes restreignant la libre concurrence', *R.D.C.*, 2008/6, June 2008, p. 512. Consequently, in many cases, there will be no difference between the results produced by the application of these two rules, since the market will often be the place where the damage occurs. Moreover, according to recital 21 of that regulation, the special rule provided for in Article 6(1) does not derogate from the general rule set out in Article 4(1), to which Article 6(2) refers, but rather specifies it.

[104] The damage which must be taken into account in order to determine the place where the damage occurred is the direct damage, as is clear from recital 16 of that regulation. See judgment of 10 December 2015, *Lazar* (C-350/14, EU:C:2015:802, paragraph 23).

V. Conclusion

105. Given that a claim for the rectification of data and the deletion of certain contents can only be brought before the courts of the place of residence of the defendant, or before those of the place of the causal event, or before those where the claimant's centre of interests is located, I propose that the question referred should be answered as follows:

Article 7(2) of Regulation 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 must be interpreted as meaning that a claimant who relies on an act of unfair competition consisting in the dissemination of disparaging statements on the internet and who seeks both the rectification of the data and the deletion of certain content and compensation for the non-material and economic damage resulting therefrom, may bring an action or claim before the courts of each Member State in the territory of which content published online is or was accessible, for compensation only for the damage caused in the territory of that Member State. In order, however, for those courts to have the requisite jurisdiction it is necessary that the claimant can demonstrate that it has an appreciable number of consumers in that jurisdiction who are likely to have access to and have understood the publication in question.