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A way ahead toward a deeper integration of EU PIL: the unification of the rules on violations of privacy and rights relating to personality

Abstract

In the first part the article summarises and describes the evolution of the EU regulation on private international law by analyzing the relating rules of Lisbon Treaty in detail. The major part of the article deals with different aspects and issues considering the unification of the rules on violations of privacy and rights relating to personality, providing a profound interpretation of the jurisdiction and conflict of law rules. In addition to this, the article gives a short comparative overview of the substantive law of personality rights in EU Member States as well.

I. Brief summary of the evolution of the EU regulation on private international law

Over the past decade, building common European private international law (PIL) has become a primary goal for European institutions. This aim derives from the need to reconcile the diversity in EU Member States' substantive law. To achieve this goal, European institutions have been creating uniform private international law rules, because the advantage of uniform PIL rules is that they leave the Member States' differing national substantive law untouched, notwithstanding they promote the 'international uniformity of decisions' (*internationaler Entscheidungseinklang* as it was originally called by *Friedrich Carl von Savigny*) in the European judicial space.

Up to the present day, in order to provide an area of freedom, security and justice in civil matters, the European Union has employed a considerable number of legal instruments which deal with issues of PIL, such as matters of jurisdiction, applicable law and recognition and enforcement of foreign judgements. The PIL regime, described above, has been developed in the EU legislation in the form of conventions, regulations, directives and case law. This diverse evolution has been labelled in various ways: Europeanisation of Private International Law, European Private International Law, or EU Private International Law.[1]

Three periods are regarded as having particular importance in the above-mentioned development of EU PIL: the beginnings of PIL evolution (1957-1999), the accelerated years after the Treaty of Amsterdam (1999-2009) and the most recent period after the Treaty of Lisbon (2009-).

1. The beginnings: harmonization of PIL rules at European level

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[1] The topic of the work does not allow us to give detailed analysis of these definitions, all we can state here is that the use of different terms also shows the scattered character of PIL legislation at the European level.

The idea of harmonisation by means of international treaties was initiated by *Pasquale Stanislao Mancini* in 1874. According to him, the adoption of a comprehensive international convention establishing uniform PIL rules might be of great importance in order to harmonise judgements of different national jurisdictions.[2]

Before 1999 the harmonisation of private international law rules at the European Union level took the form of conventions, which could be concluded on the basis of Article 220 of the EEC Treaty (later renumbered as Article 293 of EC Treaty, but now repealed by the Lisbon Treaty).[3] Pursuant to the given legal basis, the Member States conducted the Brussels Convention on jurisdiction and enforcement of foreign judgments in civil and commercial matters (1968).[4] The Rome Convention on the law applicable to contractual obligations (1980),[5] which was initiated by the EEC, had no legal basis in the Treaty; however, it was created and conducted in order to continue the work of unifying the law, which had already been accomplished within the Community, in the field of private international law.[6] Incidentally, during the first period, conflicts rules appeared not only in international conventions but fragmentary and randomly in directives as well.

It is worth mentioning here that, apart from the authorisation of founding treaties, several multilateral conventions have been created by international organisations. The most important international institution in this respect is the Hague Conference on Private International Law (HccH). In the history of the evolution of PIL, it can be considered an important landmark when the EU finally became a member of the Conference on 3 April 2007. [7] The HccH has so far adopted a substantial number of conventions in different fields of private international law. As such, it was essential that the EU was granted a status which enables it to participate as a full member in the negotiations of conventions organised by the HccH.[8] It should be emphasised that the accession of the EU was also generated by the fact that the EU was conferred with new legislative competence after the Treaty of Amsterdam.

2. After the Treaty of Amsterdam: unification of PIL rules primarily by means of European regulations

The Treaty of Amsterdam opened up new perspectives for the European legislation of PIL rules. Namely, competence in the field of judicial cooperation in civil and commercial matters was transferred from the former third pillar to the first pillar, which thus afforded the EU institutions the competence to legislate in the area of PIL.

After the entry into force of the Treaty of Amsterdam (1 May 1999), the unification of private international law rules at European level was effected primarily by means of EC

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[2] Marcin CZEPELAK, *Would we like to have a European Code of Private International Law*, European Review of Private Law 4/2010, 705. [hereinafter referred to as CZEPELAK]

[3] „Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

…

- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

[4] OJ L 299/32 (1972)

[5] OJ L 266/19 (1980)

[6] OJ L 266/19 (1980); cf. the 2nd recital of the Preamble

[7] After the Statute of Hague Conference was amended which enables the admission of a Regional Economic Integration Organization and the Council's decision from the accession of the EC to the HccH. 2006/719/EC: Council Decision of 5 October 2006 on the accession of the Community to the Hague Conference on Private International Law OJ L 297, 26.10.2006, p. 1–14

[8] The EU has ratified the Protocol on the Law Applicable to Maintenance Obligations (2007), and has signed the Convention on Choice of Court Agreements (2005).

regulations adopted by the Council, or jointly by the Council and the Parliament, under Title IV (from Article 61 to Article 69) of the EC Treaty. Under Article 65, measures were adopted in the field of judicial cooperation in civil matters with cross-border implications, in so far as necessary for the proper functioning of the internal market. Such measures included the following: (i) improving and simplifying the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases (Article 65 (a)); and (ii) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction (Article 65 (b)). They also included measures eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. However, these measures adopted did not apply to Denmark, and did not apply to the United Kingdom or Ireland either, unless they elected to participate in the adoption of or to accept the measure in question.

Since the Amsterdam Treaty empowered the EU to create rules in the field of private international and international procedure law, a few legal instruments have been adopted that provide common legal rules in these areas. Following a path already established by conventions in many PIL areas, the Council (later with the European Parliament) first enacted regulations in the same fields. It is a well-known fact that the Brussels I Regulation replaced the Brussels Convention and the Rome I Regulation replaced the Rome Convention. By 2009 (when the Treaty of Lisbon entered into force), numerous new regulations covering jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, family matters and matters relating to maintenance obligations, as well as the law applicable to contractual and non-contractual obligations and maintenance obligations, had been adopted. The specific instruments are as follows: the Brussels I, the Brussels II bis, 4/2009/EC, Rome I, Rome II Regulations. Of course these regulations do not represent exclusive law sources of the EU PIL rules, because many other PIL provisions are scattered among other EU instruments, e.g. directives on company, consumer, labour law, insurance contracts, intellectual property rights, securities.

3. After the Treaty of Lisbon: on the way towards a deeper integration

The major innovations of the Lisbon Treaty considering our topic are the Union competences, Denmark's position, the competence of the European Court of Justice (ECJ) and the special legislative procedure (passerelle clause included) in family matters.

3.1. The Union competences

Since the Treaty of Lisbon (initially called the Reform Treaty) entered into force (1 December 2009), the most remarkable change with regard to PIL is the widening EU competences. The Treaty of Lisbon replaced Title IV on visas, asylum, immigration and other policies with a renamed and renumbered Title V "Area of Freedom, Security and Justice". In the area of freedom, security and justice the EU competence is limited by the principle of conferral and is expressly shared between the EU and the Member States (Article 4 of the Treaty on the Functioning of the European Union (TFEU)).[9] Measures on judicial cooperation

[9] *Article 4*

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

in civil matters can therefore be taken by the Member States only to the extent that the Union has not exercised its competence or has ceased to exercise its competence.

While the former Article 61 (c) and Article 65 of EC Treaty required that any measures in the field of judicial co-operation in civil matters, including measures of PIL and international procedural law adopted, had to assist with the proper functioning of the internal market, the Lisbon Treaty modified this requirement. According to the new Article 81 TFEU, the European Parliament and the Council may adopt the above mentioned measures "*particularly* (the italics are the authors') when necessary for the proper functioning of the internal market".[10] In this way the EU relieved itself of the internal market criterion. However, it does not give the European Union *carte blanche*,[11] because the Union competence is limited by the general principles, and on the other hand the grounds of measures are also limited, althought the Lisbon Treaty adds some new measures to the already existing grounds listed in the second paragraph of Article 81 TFEU[12] by the following: "(e)

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2. Shared competence between the Union and the Member States applies in the following principal areas:

...

(j) area of freedom, security and justice;

[10] *Article 81*

(ex Article 65 TEC)

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(b) the cross-border service of judicial and extrajudicial documents;

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

(d) cooperation in the taking of evidence;

(e) effective access to justice;

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;

(g) the development of alternative methods of dispute settlement;

(h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

[11] Gerard-Rene DE GROOT – Jan-Jaap KUIPERS, The New Provisions on Private International Law in the Treaty of Lisbon, 1 *Maastricht Journal of International and Comparative Law* 111 (2008). [hereinafter referred to as DE GROOT – KUIPERS]

[12] Article 81(2) TFEU reads: "For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases; (b) the cross-border service of judicial and extrajudicial documents; (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction; (d) cooperation in the taking of evidence; rules on civil procedure

ensuring effective access to justice, (g) the development of alternative methods of dispute settlement and (h) support for the training of the judiciary and judicial staff".

Finally, we should briefly focus on the new wording of the first paragraph of Article 81 TFEU, which provides that "the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases". The introduction of the principle of mutual recognition in the field of PIL into the Treaty is novelty, but not a surprisingly new idea, because we can find this principle in regulations like the Brussels I regulation and the decisions of the ECJ, such as the *Grunkin-Paul* case, which expanded the principle to the recognition of decisions duly taken by the public authorities of another Member States.[13]

3.2. Denmark's position

With a protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark has changed its position regarding the measures to be taken on the basis of the former Title IV of EEC.[14] Thus Denmark now enjoys an opting-in position similar to that of the United Kingdom and Ireland.

Article 1 of the protocol maintains Denmark's former negative position, namely, Denmark does not take part in the adoption by the Council of measures proposed pursuant to Article 81 of the TFEU. However, within three months after a proposal or initiative has been presented to the Council, Denmark may notify the President of the Council in writing that it wishes to take part in the adoption and application of any such measure under Article 3.[15] According to Article 4 the procedure for enhanced cooperation shall apply *mutatis mutandis*.

3.3. The competence of the ECJ

It goes without saying that one of the crucial issues has always been how national courts apply these common EU instruments in a uniform manner; the European Court of Justice therefore plays an important role in shaping the private international law regulation at European level. As such, another notable change with regard to PIL resulted from the Lisbon Treaty: the granting of full legal review competence in preliminary references to the European Court of Justice.

Before the Lisbon Treaty, the ECJ had limited jurisdiction as a result of the former rule (Article 68 (1) of the EC Treaty). According to it, the only national courts that were

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applicable in the Member States; (e) effective access to justice; (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States; (g) the development of alternative methods of dispute settlement; (h) support for the training of the judiciary and judicial staff."

[13] Court of Justice of the European Communities, 14 October 2008, C-353/06, *Grunkin-Paul*, not yet published.

[14] Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community

[15] *Article 3*

1. Denmark may notify the President of the Council in writing, within three months after a proposal or initiative has been presented to the Council pursuant to Title V of Part Three of the Treaty on the Functioning of the European Union, that it wishes to take part in the adoption and application of any such proposed measure, whereupon Denmark shall be entitled to do so.

2. If after a reasonable period of time a measure referred to in paragraph 1 cannot be adopted with Denmark taking part, the Council may adopt that measure referred to in paragraph 1 in accordance with Article 1 without the participation of Denmark. In that case Article 2 applies.

enabled to refer a case for preliminary ruling to the ECJ were those where there was no legal remedy against their decisions. This rule was abolished by the Lisbon Treaty; consequently, the normal preliminary procedure of Article 267 TFEU was applicable to Title V as well, which means that every national court may request a preliminary ruling. Some authors find that this extension of the Court's jurisdiction was an appropriate amendment, because "[w]ith the increased adoption of acts on the basis of Article 81 TFEU, that national courts have the widest possibility to address the European Court of Justice is necessary to guarantee a uniform interpretation of regulations and directives".[16]

3.4. Special legislative procedure in family matters

Last but not least, although the Treaty of Lisbon has not essentially changed the ordinary legislative procedure (co-decision procedure) considering measures adopted on the basis of Article 81, Article 81(3) of TFEU establishes a special legislative procedure which requires unanimity with regard to family matters.[17] The Lisbon Treaty, however, has introduced a special passerelle clause in this respect. Generally speaking, the passerelle clause allows the European Council to unanimously decide to replace unanimous voting in the Council of Ministers with qualified majority voting (QMV), with the previous consent of the European Parliament in the above mentioned area, and to move from a special legislative procedure to the ordinary legislative procedure. The passarelle clause under Article 81(3) of the TFEU requires that the national parliaments be notified of the Commission and if any national parliament protest against the proposed decision within six months, the Council cannot adopt the decision. Consequently, the Council can only adopt the decision in the absence of any opposition from national parliaments.

It is worth mentioning that Denmark, Ireland and the United Kingdom may participate in the adoption and application of specific acts within three months after the proposal has been published by the Commission. In order to facilitate the opt-in of these Member States, the passerelle clause also applies to these Member States. However, objections by their national parliaments are restricted, because if a measure cannot be taken within a reasonable period of time with Denmark, Ireland or the United Kingdom included, the Council may adopt the decision without these countries.[18]

All in all, we can state that this legislative procedure can be applied effectively only in those matters which are considered as less sensitive politically; however, family matters are closely connected to the significantly diverse national substantive laws and the different traditions of certain national legal institutions. The main problem is that there is not a

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[16] See DE GROOT – KUIPERS 114. With similar conclusion: Michael WELLS-GRECO, *Evolving EU Private International Law: A brief overview of the Commission's proposal on the law applicable to divorce and legal separation*, 4. http://www.collyerbristow.com/fileserver.aspx?oID=1598&lID=0

[17] Article 81(3) TFEU reads: "Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision."

[18] See Articles 3(2) of the Protocol on the Position of the United Kingdom and Ireland as well as of the Annex to the Protocol on the Position of Denmark.

consistent approach within the Member States' family laws (just consider the different approaches over same-sex marriage or registered partnerships). Because of this, integration in this area is limited by differences between Member States' political will and intentions. Since enormous tensions and conflicts have characterised the unification process to date at a European level, it becomes more difficult to further enhance the Europeanisation process in family matters.

To overcome these obstacles, a possible solution to reconcile divergence utilising the discipline of PIL can be the enhanced cooperation procedure under Article 20 TEU in conjunction with Articles 326-334 TFEU. For the first time in the history of the European Union, Austria, Belgium, Bulgaria, Germany, France, Hungary, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of law applicable to divorce and legal separation. On 12 July 2010 the Council adopted the Decision 2010/405 authorising the procedure in this field.[19] According to Article 328(1) TFEU, enhanced cooperation is to be open to all Member States, subject to compliance with any conditions of participation laid down by the authorising decision and it also to be open to them at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions.

The reasons for the legislative procedure are to resolve the legal problems European citizens face when confronted with cross-border divorce or separation proceedings and to help the national courts when they have to deal with the problems of applicable law. However, opinions differ concerning the enhanced cooperation procedure. On the one hand, some have the view that it takes us further on the way toward a deeper integration, on the other hand others believe it can create a further risk of a 'two-speed' European Union.[20]

4. Conclusion

It is a positive fact that the regulation of private international law has profoundly changed in recent years. The underlying reasons are, as *Arroyo* states: "'Multi-location' and 'multi-connection', speed and mobility are characteristics of the present era. This is true for states and companies, and also rich and poor people. [...] To know only what 'our' courts do and what is the content of 'our' PIL rules can hardly allow us to solve real problems in an accurate way."[21] The legal codifications of international organisations and the European Union have a growing and strong impact on domestic legal systems. This phenomenon, which we called above the Europeanization of PIL, has undoubtedly intensified resulting in domestic PIL becoming "more and more residual".[22] As *Kramer* points out: „The impressive legislative activities, resulting in about a dozen regulations, also put private international law on the European map in a quantitative manner. Private international law nowadays is an important pillar of EU law, and has in the past decade certainly made more progress than the harmonisation of substantive law."[23]

The above described evolution has actually changed the regulation of private international law at European level. The EU is legislating in this area of law at an accelerating

[19] OJ L 189, 22.7.2010, p. 12–13.
[20] Karharina BOELE-WOELKI, To Be or not to Be: Enhanced Cooperation in International Divorce Law within the European Union, *Victoria U. Wellington Law Review* 779-792 (2008/2009).
[21] Diego P. FERNÁNDEZ ARROYO, Private international Law and Comparative Law: A Relationship Challenged by International and Supranational Law, in *Yearbook of Private International Law* 2009. 63.
[22] See *id.* at 57.
[23] Xandra KRAMER, *The Interaction between Rome I and Mandatory EU Private Rules.* 3. http://ssrn.com/abstract=1666740

pace, but there remains much to be defined and refined. The complexities of legislating in the European sphere on PIL have also resulted some disadvantages, e.g. difficulties arising from the multiplication of the sources of PIL (the labyrinth of PIL conventions, regulations, etc.), unsatisfactory technique of legislation (inconsistent, 'creeping unification'), lack of coordination, divergence in terminology and different methods applied as *Czepelak* demonstrates in his analysis.[24]

The question is which way will the EU take to move on toward a deeper integration?

The first way seems just a desire now; an ambitious project, as *Czepelak* remarks, the European Code of Private International Law should be a corollary of the current state of development, hereby achieving *Asser's* idea for an overarching codification. However, *Czepelak* also adds correctly that it should not be carried out because of the lack of common political will.[25]

The second way to a deeper integration can be to develop 'European approaches' to PIL based on 'European values'. Because the difficulties of establishing common approaches stem from the differences and divergent interests between the Member States, these should be reconciled, taking common values and approaches in PIL, especially those based on human rights, into consideration.[26]

The third way (with or without the above described second way) can be the same route that the EU has taken recently, i.e. the further fragmentary unification of PIL rules as well as the application of the enhanced cooperation process in certain areas.

Nowadays the future success and appropriateness of the legislation in the area of the unification of the PIL rule(s) regarding non-contractual obligations arising out of violations of privacy and rights relating to personality can be next step, and one which can predict the depth of any further integration.

[24] CZEPELAK 705-728.
[25] CZEPELAK 728.
[26] See more details, Ruth LAMONT, Evaluating European Values: The EU's approach to European private international law, 2 *Journal of Private International Law* (371-381) 2009.

II. Brief comparison of the substantive laws of personality rights of EU Member States

Personality rights recognise a person as a physical and spiritual-moral being. The modern concept of personality rights is established in many legal systems, but they do not have the same views on the protection of these rights.[27] For example, the French and Belgian laws do not recognise a general right to personality,[28] while the German law considers this right as a general clause for comprehensive personality protection. Austria and the Netherlands recognize a general right to personality, despite the fact that they have another basis for comprehensive personality protection.[29] In contrast with the above mentioned ideas, under English law the concept and recognition of personality rights are virtually non-existent, although their protection is based on tort law.[30] The personality rights include, *inter alia*, the rights to life, physical integrity, reputation, dignity, privacy and identity (name and image included).

Considering the nature of personality rights, they do not fit into the private-public law dichotomy: to put it in other words, they are "hybrids, [a] sort of private human rights".[31] Therefore, some of the personality rights (such as right to personal and family intimacy, right to honour and the right to the protection of personal reputation) are included in national constitutions. Regarding the topic, we must emphasise that defamation has been constitutionalised in many countries, thus in these legal systems not just the freedom of speech (or expression) enjoys constitutional protection but also the rights to reputation and dignity. Briefly, we can state that the level of constitutional protection varies. While in some countries a wide range of personal rights are explicitly ensured in the national constitution, in others the above rights are less obviously presented, however "the fact is that the Member States' legal systems are tending to align their constitutional interpretation techniques and are increasingly adopting similar approaches as they enact jurisprudence"[32]. In addition, the trend mentioned is also supported by the common principles of the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, as well as the case law of the European Court of Human Rights.

It is an important question whether the protection of personality rights is considered to have civil or criminal nature. According to the old tradition, the protection of personality interest occurs through criminal law. It is reflected in legal systems of certain countries, such as the Nordic countries, where civil personality rights are not acknowledged.[33] Generally speaking, we can state that in most EU Member States' criminal law, at least the crime of defamation (with other offences linked to personality rights) is regularly to be found (for example in the criminal codes of Bulgaria, the Czech Republic, Denmark, , Estonia, Finland, France, Germany, Greece, Ireland, Italy, Hungary, Latvia, Lithuania, Luxembourg, Malta, the

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[27] *Elgar Encyclopedia of Comparative Law*, Edited by Jan M. SMITS, Maastricht 2008. 530. [hereinafter referred to as *Elgar Encyclopedia of Comparative Law*]

[28] Because they developed the protection of personality rights on the basis of general delictual principles. See *id*.

[29] See *id.*

[30] See *id* 531.

[31] *Personality Rights in European Tort Law*. Edited by Gert BRÜGGEMEIER, Aurelia COLOMBI CIACCHI, Patrick O'CALLAGHAN, Cambridge 2010. 6. [hereinafter referred to as *Personality Rights in European Tort Law*]

[32] See *Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.* (JLS/2007/C4/028. Final Report) 41. [hereinafter referred to as *Comparative study*]

[33] *Personality Rights in European Tort Law* 9.

Netherlands, Poland and Spain). In the United Kingdom defamation is a crime, but it can be prosecuted when it is justified in the public interest, and so civil lawsuits for defamation are common.[34] In practice, however, the majority of the Member States do not apply criminal penalties for defamation.[35] Nowadays, a new phenomenon can be detected in several Member States' law. Some states have reformed their regulations of crimes of defamation by decriminalising them or making criminal penalties less severe (e.g. Bulgaria, Cyprus, the Czech Republic, Estonia and Portugal).[36]

Personality rights are also protected through the national civil codes. The legal consequences of a tortuous personality infringement are very similar under the differing legal systems e.g. retraction or correction, apology, the right to reply or damages for personality harm. However there are also differences between the counties' regulations e.g. with regard to the compensation, because many national laws (such as the German and Dutch) require that the infringement of personality interest must be serious, while others compensate all harm irrespective of its seriousness (for instance Spanish law).[37]

To summarise, the EU Member States' various substantive law rules regarding violations of privacy and rights relating to personality are divergent, therefore determining which law is applicable in these cases has a great importance for stakeholders, when conflict arises between personality rights and freedom of expression. The above explained differences are the reason for the need for the unification of private international law rules in this field.

[34] *Comparative study* 42-44.
[35] See *id* 44.
[36] See *id* 44.
[37] See *Elgar Encyclopedia of Comparative Law* 534.

III. Jurisdiction in matters related to the breach of privacy and personality rights

In Europe, the jurisdictional rules in cases concerning claims related to the breach of privacy and personality rights are mainly included in the Brussels I Regulation[38]. These provisions are, for the most part, applicable if the defendant is domiciled in the EU.[39] Accordingly, these jurisdictional rules do not replace national regimes completely; on the other hand, national rules persist in respect of non-EU defendants. In the following, the analysis will focus on the judicial practice of the Brussels I Regulation's corresponding rules.

1. Jurisdiction over delictual liability (torts) under the Brussels I Regulation

Jurisdiction regarding claims related to the breach of privacy and personality rights can essentially be founded on two bases. First, the alleged wrongdoer can be sued on the basis of general jurisdiction.

> *Article 2*
> *1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.*

Second, the jurisdiction of the court may be based on Article 5(3) of the Brussels I Regulation, which is applicable in matters relating to tort, delict or quasi-delict and confers jurisdiction on *"the courts for the place where the harmful event occurred or may occur"*. The notion of 'tort, delict or quasi-delict' has been interpreted in the case-law of the ECJ rather broadly. The basic definition was established in *Kalfelis v Schröder*, where the ECJ held that

> *the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1).*[40]

Accordingly, the notion of 'tort, delict or quasi-delict' is established negatively, through the notion of contract. The concept of contract covers situations where there are obligations *"freely assumed by one party towards another"*.[41] Accordingly, the basic notion of 'tort, delict or quasi-delict' has two elements: there are no obligations freely assumed by one party towards the other and the action seeks to establish the liability of the defendant.

Claims based on the breach of privacy and personality rights meet both requirements: there are no freely assumed obligations and the purpose of claim is to establish the liability of the defendant. It is to be stressed that the latter element embraces not only claims for monetary recovery but also declarations of illegality and injunctions.

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[38] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. OJ L 12, 16.1.2001, p. 1-23.

[39] There are exceptions, though. For instance, the rules on jurisdiction (Article 22) are applicable irrespective of the defendant's domicile. Likewise, the rules on the prorogation of jurisdiction (Article 23) are applicable if any of the parties are an EU domiciliary.

[40] Para 17.

[41] See e.g. Case C-26/91 *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA,* [1992] ECR I-3967, para

In *Danmarks Rederiforening v SEKO*[42] the plaintiff instituted a law-suit against a trade union to establish the illegality of the industrial action. The ECJ held that

> *Article 5(3) of the Brussels Convention must be interpreted as meaning that a case concerning the legality of industrial action, in respect of which exclusive jurisdiction belongs, in accordance with the law of the Contracting State concerned, to a court other than the court which has jurisdiction to try the claims for compensation for the damage caused by that industrial action, falls within the definition of tort, delict or quasi-delict.*[43]

As a response to the defendant's arguments that, for meet the requirements of Article 5(3) of the Brussels I Regulation an "*industrial action must have taken place and have caused harm giving rise to financial loss, and that a claim for damages must have been submitted*", the ECJ established that "*Article 5(3) (…) may be applied to an action seeking to prevent the occurrence of future damage*."[44] Accordingly, the action at stake had some connection to damages because there was a reasonable potential that damages may emerge.

In *Verein für Konsumenteninformation v Karl Heinz Henkel*[45] a consumer protection organisation brought a preventive action for the purpose of deterring a trader from using terms considered to be unfair in contracts with private individuals. The ECJ held that such an action comes under the concept of 'tort, delict or quasi-delict'.[46] The ECJ explained that

> *such an action meets all the criteria established by the Court in the case-law (…) inasmuch as, first, it does not concern matters relating to a contract (…) and, second, it seeks to establish the liability of the defendant in tort, delict or quasi-delict, in the present case in respect of the trader's non-contractual obligation to refrain in his dealings with consumers from certain behaviour deemed unacceptable by the legislature."*[47] The ECJ also established that the notion of 'harmful event' "*covers not only situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms which it is the task of associations…*[48]

Accordingly, the judicial practice of the Brussels I Regulation suggests that the notion of 'tort, delict or quasi-delict' contains two elements: there are no freely assumed obligations and the purpose of the action is to establish the liability of the defendant. The latter element has been interpreted broadly, embracing situations where the damage has not occurred, yet, but where there is a risk of damage and the action relates somehow to the prevention of damage. The latter element also embraces situations where the plaintiff is seeking an injunction against the defendant's illegal conduct with the purpose of preventing the emergence of damages in a wide sense. Accordingly, despite the vague interpretation of the notion of 'tort, delict or quasi-delict', the element of 'establishing the defendant's liability' still plays an important role.

The interpretation of the term 'place of the harmful event' is central to the application of Article 5(3) of the Brussels I Regulation. Nevertheless, the construction of this concept is

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[42] C-18/02 *Danmarks Rederiforening, acting on behalf of DFDS Torline A/S v LO Landsorganisationen i Sverige, acting on behalf of SEKO Sjöfolk Facket för Service och Kommunikation*, [2004] ECR I-1417.
[43] Para 28.
[44] Para 33.
[45] C-167/00 *Verein für Konsumenteninformation v Karl Heinz Henkel*, [2002] ECR I-8111.
[46] Para 50.
[47] Para 41.
[48] Para 42.

dubious since, as held by the ECJ, it refers to the whole line of causally interrelated events, starting with the delict (tort) giving rise to the loss and ending with the *damnum* (damages) representing all the detrimental consequences emerging from the delict. This has considerable consequences in cases of distance delicts, as, for example, in certain instances of violations of privacy or personality rights.

This principle was established by the ECJ in *Mines de Potasse d'Alsace*,[49] which involved a pollution matter: a mine in Alsace polluted the water of the Rhine, thus damaging a nursery-garden in the Netherlands; a typical distance delict.[50] The ECJ held that, due to the close causal links between them, it would be senseless to choose between the *delictum* and the *damnum* and, hence, it brought both of them under the notion of the 'place of the harmful event'. The consequence of this approach is that the plaintiff can sue at both places.[51] This notion is in conformity with national jurisdictional rules, as well.[52]

The direction opened in *Mines de Potasse d'Alsace* raised several questions of interpretation. If the notion of 'harmful event' is restricted neither to the delict, nor to the injury, how far should we go on the causal line? Are all detrimental effects caused by the delict relevant from the point of view of the jurisdictional rules? For instance, do Hungarian courts have jurisdiction if a paper published in England but not distributed in Hungary contains false factual allegations concerning a Hungarian person, and the false allegation is, in turn, read by some Hungarians who travel from London to Budapest? Or even more radically: can it be argued that false allegations made anywhere in the EU cause loss to the reputation of the victim in all Member States due to the fact that the allegations spread from mouth to mouth and reach different countries? Or, more realistically, an allegation made in a French newspaper published in France (and not distributed in Hungary) is read by a Hungarian journalist spending some days in France or reading the content online, and the Hungarian journalist refers to the French newspaper's allegation in one of his articles in Hungary.

In *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*[53] the French parent company of certain German subsidiaries sued some German banks in France because they suspended the disbursement of a loan to certain contractors in a construction development project, which, in turn, stopped the project and, as a corollary, the sub-contractors, including the subsidiaries of the French parent, went bankrupt. Here, the elements of the causal chain were the following: suspension of the loan to the contractor, stoppage of the construction development project, bankruptcy of the sub-contractors, loss suffered by the parents of the sub-contractors. The ECJ held that the arguments of the French parent companies went too far: although the concept of 'harmful event' embraces both the place of the delict and the place where the loss was suffered, the latter is confined to the place where the delict took its direct effects against the direct victim.[54]

A similar approach was taken by the ECJ in *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*[55], which also touched upon issues of privacy and personality rights. Mr. Marinari wanted to discount bills of exchange in Lloyds Bank's office in Manchester. However, the bank considered the bills of exchange to be of dubious origin and informed the police about its concerns. Furthermore, it refused to return them. Mr. Marinari was arrested by the police but discharged afterwards. Subsequently, Mr. Marinari sued the bank for damages in Italy. First, he claimed the payment of the value of the bills of exchange and non-monetary damages that emerged primarily due to the inconvenience caused by the

[49] 21/76 *Bier BV v Mines de Potasse d'Alsace*, [1976] ECR 1735.
[50] The defendant was also sued by a foundation for the protection of the water of the river as secondary plaintiff.
[51] Paras 5-23.
[52] Paras 22-23.
[53] C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*, [1990] ECR I-49.
[54] Para 20.
[55] C-364/93 *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*, [1995] ECR 2719.

arrest and due to the damage to his reputation. The Italian Court of Cassation submitted a reference to the ECJ.

The ECJ held that the freedom of choice cannot be extended beyond the circumstances underlying the very existence of this freedom of choice. The reason that the plaintiff can sue both in the country of the delict and the country where the damages occurred (i.e. the term 'harmful event' embraces both places) is justified by the fact that both places are similarly closely connected to the matter.[56] An excessive interpretation would be contrary to the fundamental principle of the Brussels I Regulation to exclude exorbitant plaintiff-favouring jurisdictional rules.[57] Namely, if the notion of 'harmful event' is interpreted excessively and it embraces all places where the conduct's negative consequences can be perceived, even if indirectly, this would lead to the forum that is most favourable to the plaintiff, i.e. the country of the plaintiff's domicile. The injured person normally has property and a reputation in their country of domicile, so the conduct always entails some negative consequences in this Member State.

The mostly cited case in the context of privacy and personality violations is *Shevill and Others*[58]. The French newspaper *France-Soir* published an article accusing an English person (a student) of money laundering. The injured person was working in France when the alleged wrong occurred, but returned subsequently to England where she instituted a proceeding for defamation. The French newspaper *France-Soir* was primarily marketed in France; nevertheless, it also had some circulation in several other countries.[59] The jurisdictional question was whether all Member States where the newspaper has some circulation have jurisdiction taking into account that the damages are the consequence of the article's alleged breach of the plaintiff's reputation and, hence, damages emerged in all countries where the periodical is read. This thinking would excessively expand the number of courts with jurisdiction Nevertheless, the ECJ advanced that, since the *raison d'être* of the special rules of jurisdiction is that there is a close relationship between the legal dispute and proceeding court,[60] this cannot imply that all courts where someone read the incriminated article would have jurisdiction over all the damages suffered by the defendant throughout the globe. Afterwards, the Court identified the place of delict and the place of *damnum*. The former is the place where the publisher[61] is located, since this is the place where the causal chain leading to the loss started and eventuated in the alleged violation of the plaintiff's reputation.[62] As far as the place where the damages occurred is concerned, the ECJ came to the conclusion that loss emerges in every country where the newspaper is distributed, provided the plaintiff is known here. Nevertheless, in such cases the court's jurisdiction is confined to the damages that occurred in that Member State.[63] The plaintiff can choose to sue in the country where the publisher is located or in each country where the newspaper is distributed; hovever, in the latter case she would have to parcel out her claim for damages.[64]

In *Réunion v Spliethoff's*[65] the controversy emerged from the following fact pattern. Insurers, after having compensated the injured person for the loss suffered, turned against the

[56] Paras 11-12.
[57] Paras 13-15.
[58] Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, [1995] ECR I-415.
[59] Paras 2-3. and 9.
[60] Para 19.
[61] Though the above case concerned the printed media, the term 'publisher', for the sake of simplicity, will be used widely, as a surrogate for all content providers (printed press, broadcasters, websites etc.).
[62] Para 24.
[63] Paras 29-30.
[64] Para 33.
[65] C-51/97 *Réunion européenne SA and Others v Spliethoff's Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002*, [1998] ECR I-06511.

Dutch defendants as tortfeasors. The defendants transported fruit from Australia to France and the freight perished due to the breakdown of the heating system. The insured enforced the subrogated claim; nevertheless, they did not sue the person who issued the bill of lading but the actual tortfeasor. Both the court of first instance and the court of second instance denied jurisdiction.[66] The *Cour de Cassation* referred the question of jurisdiction to the ECJ.

The Court came to the conclusion that the harmful event cannot be interpreted to embrace all places where the injured person happened to have felt the detrimental effects of the delict. In the case at stake, the place of the harmful effect cannot be the destination of the transportation, since this changed during the transportation. Similarly, the place of the harmful effect cannot be the place where the damage was discovered. The place of the harmful effect is the initial place of destination.[67] This conclusion is in conformity with the principles of foreseeability and legal certainty.

The violation of privacy and personality rights is, in several countries, also chased by criminal law; a circumstance often neglected in the scholarship dealing with libel suits and defamation. This circumstance is relevant from the point of view of civil jurisdiction as well. In most Member States, criminal courts have the power to award damages or other restitutive remedies in connection with the criminal act convicted. In such cases, criminal courts exercise civil jurisdiction. Article 5(4) envisages such a situation and conjugates the jurisdiction to award damages or other restitutive remedies with criminal jurisdiction, which is a concept external to the Regulation.

Article 5(4) of the Brussels I Regulation provides that

> *a person domiciled in a Member State may, in another Member State, be sued: (…) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings.*

The ECJ, in *Dieter Krombach and André Bamberski*[68], made it clear that the question of criminal jurisdiction is out of the reach of the Regulation and no requirements can be extracted from the Regulation against the features of criminal jurisdiction, which is a matter for Member State law. In other words: it is irrelevant whether the national rule of criminal jurisdiction is completely one-sided, unilateral and unfair (exorbitant); once the Member State claims that it does have such a power, the jurisdiction over civil claims for damages or restitution automatically follows. It cannot be argued that the Member State, having the subjective perception of being competent, has no criminal jurisdiction in an international sense. This question is completely up-to the Member States.[69]

For instance, under Hungarian criminal procedural law, the victims of a criminal act (felony or misdemeanour) can enforce their civil claims during the proceeding. "*The private party can enforce those claims against the defendant that emerged due to the act serving the subject matter of the indictment.*"[70] If the Hungarian Code on Criminal Procedure does not provide otherwise, the rules of civil procedure are applicable to the adjudication of civil

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[66] Paras 8-9.

[67] Para 35.

[68] C-7/98 [2000] ECR I-1935. *See* Cs. I. NAGY, *Az Európai Unió nemzetközi magánjoga* [in English: The Private International Law of the European Union], Budapest: HVG-Orac, 2006, 91.

[69] Another crucial point of interpretation is that Article 5(4) applies only if the criminal and the civil claims are settled in the same procedure, i.e. the criminal court deals with the civil claims. One the other hand, Article 5(4) cannot be used to bring a case to the civil courts of the Member State the criminal courts of which are entertaining the criminal procedure: if the civil claims do not adhere to the criminal procedure the requirements of Article 5(4) are not met.

[70] Sections 54(1)-54(2) of Hungarian Code on Criminal Procedure

claims, provided these are not contrary to the nature of the criminal procedure. Nevertheless, the court cannot confirm the settlement of the parties.[71] The criminal court can refuse to adjudicate the civil claim in the criminal procedure (in this case the claim is to be brought before the civil courts) if it considerably delayed the completion of the criminal procedure, in the event of acquittal and if the adjudication of the merits of the matter is excluded by any other circumstance.[72] Nevertheless, if the court establishes the amount of the detriment in its judgment (damages or loss caused by the criminal act, reduction in tax or customs income etc.) it has to adjudicate the civil claims at least up-to this amount.[73]

2. Summary and conclusions on jurisdiction

The problems of the judicial practice of the jurisdictional rules contained in the Brussels I Regulation are extensively analysed in the scholarship and criticised because it enables 'distributive' law enforcement, i.e. the plaintiff can chop up the claim for damages and litigate the different parcels in different Member States.

First, this jurisprudence is criticised because of the fact that if the defendant is compelled to face a lawsuit before an inconvenient forum this encourages it to settle the dispute even if this was less substantiated.[74] Second, it is also criticised that, although under Article 5(3) the jurisdiction of the court is limited to the loss occurred in the Member State concerned (i.e. the court's jurisdiction is based on the circumstance that *damnum* emerged here), winning the law-suit in one country, (notwithstanding that this is not the most closely connected country to the matter) gives the plaintiff a symbolic victory over the defendant having extra-territorial implications, though not from a legal perspective.

It is submitted that the above criticism does not justify overturning the ECJ's approach established in *Shevill*. The first counter-argument might seem to work the other way around too: the plaintiff might find it heavily inconvenient to sue in the defendant's forum. Nevertheless, the value judgment of the Brussels I Regulation is clear in this regard: due to the *actor sequitur forum rei* principle, it is the plaintiff who has to bear the inconveniences of the litigation. At the same time, in this case there is a special circumstance that establishes a link between the forum and the matter: the place of the occurrence of the damages. Although it could be argued that the rules of special jurisdiction, including the one on torts, are senseless and they turn the general principle of *actor sequitur forum rei* upside down, these rules are currently part of the architecture of the Brussels I Regulation. In other words, it could be argued that the rules on special jurisdiction should be revised and amended; nevertheless, it seems to be misplaced to argue that, within the existing scheme, matters concerning privacy and personality rights should be treated differently from other matters in general.

It is also a maxim of interpretation that the purview of the special rules of jurisdiction is to be kept as narrow as possible: since these provisions represent an exception to the general rule, their application is to be restricted to those cases where the relationship between the forum and the matter warrants such derogation. Since the emergence of harm cannot be denied if the newspaper containing the defamatory content is distributed here and the plaintiff is known is this country, the most that could be done by the ECJ in order to keep the purview of the special jurisdiction rule on delicts as restricted as possible was to confine the

[71] Section 54(7) of Hungarian Code on Criminal Procedure
[72] Section 335(1) of Hungarian Code on Criminal Procedure
[73] Section 335(2) of Hungarian Code on Criminal Procedure
[74] Aaron WARSHAW, Uncertainty from abroad: Rome II and the choice of law for defamation claims. 32(1) *Brooklyn Journal of International Law* 269, 282 (2006)

jurisdiction of the courts of this place to the damage occurred in the territory of the Member State concerned. And, indeed, there is such a close linkage between the forum and the harm suffered by the plaintiff's reputation in this country.

Unfortunately, the jurisprudence and the scholarship are at fault for the answer to a very important question of interpretation in respect of the application of Article 5(3) of the Brussels I Regulation. Although the ECJ made clear that, if the plaintiff sues in the Member State where the damage was sustained, the court's jurisdiction is confined to the loss occurred in that country, not all remedies can be constrained in the bed of Procrustes of national borders. The awarding of damages may be limited to the negative consequences that happened in the Member State concerned. Nevertheless, one of the pre-requisites of awarding damages is that the conduct giving rise to the negative consequences is designated as illegal. Harmful consequences emerging from lawful acts normally entail no duty to compensate, albeit there are exceptions to this rule (for instance, the owner runs through the lot of his neighbour, damaging his fences, in order to fight the fire on his lot: this conduct is lawful, though the neighbour has a right for compensation). If the court in one Member State awards damages, even if the amount is trivial, it implicitly establishes that the conduct was unlawful; does this ruling on illegality impact or even bind the decision of another court dealing with the negative consequences of the same conduct in another country? The ECJ in *Shevill* provided that the national court's jurisdiction, on the basis of Article 5(3) of the Brussels I Regulation, is limited to awarding compensation for the damages sustained in that country; nevertheless, the ruling failed to specify whether the Article 5(3) court's decision on illegality should also be limited to the national borders. If the question is answered in the negative, then the Article 5(3) court would exercise quasi general jurisdiction in respect of the issue of illegality. If the question is answered in the affirmative, there is a very high risk of irreconcilable judgments; a circumstance going counter one of the core aims and principles of the Brussels I Regulation.

Assume that a French newspaper published in France and distributed in France (98 000 copies), England (1 000 copies) and Belgium (1 000 copies) contains an allegedly defamatory article about a Dutchman, who in turn institutes a libel suit in Belgium, where the courts establish that the French newspaper violated the injured person's personality rights and awards him some compensation in respect of the negative consequences perceivable in Belgium. Afterwards, the Dutchman sues the French publisher in France for damages and argues that since the Belgian judgment is to be recognised in France automatically (on the basis of Article 33 of the Brussels I Regulation), the French court cannot review whether the article published was indeed defamatory and its competence is restricted to the question of quantum of damages. Here, the perversity of the plight relies on the circumstance that a court with a modest connection with the fact pattern (only 1 % of the newspaper's circulation is achieved here) would render a final and *erga omnes* judgment concerning the question of illegality if the proceeding is launched first in this country. It has to be taken into account that, in European libel cases, the amount of damages awarded is normally not extreme and – from a practical point of view – the most important point for the plaintiff is whether the defendant's act was illegal.

A further question is how the rules on *lis pendens* and related actions are to be applied if parallel proceedings are pending. According to Article 27 (*lis pendens*), any court other than the court first seised shall *ex officio* stay its proceedings if the proceedings involve "*the same cause of action and between the same parties are brought in the courts of different Member States"*. If the court first seised establishes its jurisdiction, *"any court other than the court first seised shall decline jurisdiction in favour of that court."* In case of related actions the second seised court may (but it is not obliged to) stay its proceedings (Article 28).

Assume that in the above matter the victim sues in Belgium, and subsequently the publisher sues in the Netherlands for the declaration of non-violation. These two actions involve partially the same cause of action: while the Dutch action deals with the defamation in general, including the loss sustained in Belgium, the action pending in Belgium is confined to the loss occurred within the national borders of this country. This implies that the Dutch court has to stay its proceedings and await the Belgian court's decision on jurisdiction. If the latter establishes its jurisdiction, it is questionable how the Dutch court should proceed on the basis of Article 27. Similar uncertainties emerge if the publisher tries to avoid the lis pendens problem in limits its claims in the Dutch procedure to the loss allegedly sustained in the Netherlands, i.e. the plaintiff requests the court to declare that the conduct was not illegal in the Netherlands and no damages emerged here. Under such circumstances the Dutch court may (and honestly speaking: should) stay its proceedings under Article 28, since the actions in Belgium and the Netherlands are related: *"[w]here related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings."*

Another interesting, and mainly neglected, aspect of libel suits is their interaction with criminal liability. Although criminal law is an *ultima ratio* regulatory tool, which is the more true in the case of libel matters: here, there is a fundamental right requirement to keep criminal liability as with-held as possible. Nonetheless, in several countries criminal law may be used as a tool to prevent defamatory acts or to lift some of their consequences; furthermore, in most countries, the victim may enforce his civil rights and restitutive claims in the frame of a criminal procedure. This circumstance suggests that the interdiction of defamation, at least to the extent civil and criminal law overlap, is a conduct-regulating (and not a risk-allocating) tort rule.

Finally, the judicial practice of the Brussels I Regulation does not settle the problem of 'hearsay', i.e. the case where the allegedly defamatory content published in one country is 'retransmitted' in another country (e.g. an English newspaper includes a news published in France; a Hungarian website reports about a news broadcasted by a Polish television station. The ECJ made it clear that jurisdiction in not vested in all countries wherever the detrimental consequences could be sustained. In *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company* this proposition was confirmed in the context of defamation. Accordingly, indirect or negligible consequences are not capable of grounding jurisdiction.

IV. Conflict problems in matters related to the breach of privacy and personality rights

1. The legislative history of the exclusion of violations of privacy and rights relating to personality

The scope of the Rome II Regulation does not cover *"non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation."*[75] That is, this issue's conflict regulation comes under the purview of Member State law. The reason of this exclusion was that during the legislative process there was an essential disaccord between the Commission and the European Parliament, and the Commission was worried that this point of controversy would considerably delay the adoption of the entire the entire regime of non-contractual obligations. Hence, it decided to omit the rules on matters related to the breach of privacy and personality rights, and revised its initial proposal. Unfortunately, although the controversy related to libel matters concerning the media, and the notion of 'privacy and personality rights' is much wider than libel matters, Article 1(2)(g) of the Rome II Regulation excludes all matters related to 'privacy and personality rights'. Whereas the Commission's intention (as expressed in its Amended Proposal[76]) related only to the exclusion of *"press offences and the like"*,[77] the language of Article 1(2)(g) is rather categorical when excluding *"non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation"* from the Rome II Regulation's scope.

At the same time, a review clause was inserted in Article 30, the second paragraph of which provides that the status of the conflict regulation of non-contractual obligations arising out of violations of privacy and rights relating to personality shall be reconsidered: *"[n]ot later than 31 December 2008, the Commission shall submit (…) a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality"*.

The Commission's Initial Proposal[78], in Article 6, specifically dealt with violations of privacy and rights relating to personality.

> *1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.*
> *2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.*

The above provisions would essentially extend the application of the general rule of *lex loci damni* to violations of privacy and rights relating to personality, introducing certain corrections warranted by the peculiarities of these matters. The general principle of *lex loci damni*, in libel cases, would normally mean that the law of the injured person would be applied. Since defamation cases are about harm caused to reputation, the victim almost always

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[75] Rome II Regulation, Article 1(2)(g)
[76] Amended proposal for a European Parliament and Council regulation on the law applicable to non-contractual obligations ("Rome II"). COM(2006) 83 final (hereafter: Amended Proposal)
[77] Amended Proposal, 6. (reaction to Amendment 57)
[78] Proposal for a European Parliament and Council regulation on the law applicable to non-contractual obligations ("Rome II"). COM(2003) 427 final (hereafter: Initial Proposal)

suffers some harm in the country of his habitual residence. Hence, in such cases the chain of causality leads to the place where the victim is present, physically.

The Commission was influenced by the ECJ's jurisdiction under the Brussels I Regulation, especially by *Shevill*.[79] The result of the above rule is that the law is to be applied on a 'distributive basis'.

> *"[I]f the victim decides to bring the action in a court in a State where the publication is distributed, that court will apply its own law to the damage sustained in that State. But if the victim brings the action in the court for the place where the publisher is headquartered, that court will have jurisdiction to rule on the entire claim for damages: the lex fori will then govern the damage sustained in that country and the court will apply the laws involved on a distributive basis if the victim also claims compensation for damage sustained in other States."*[80]

Accordingly, the general approach leads to the law of the victim's habitual residence if two conditions are met. First, the victim (or, to put it another way, his reputation) is known in the country concerned. Defamatory allegations concerning an unknown or almost unknown person cause no harm. The evil of such violations relies in affecting the opinion of 'others' in respect of the victim; a circumstance certainly not met if the victim has no reputation in the country. Second, a defamatory content may entail detrimental effects only if it appears (is published) in the country concerned. In the case of the printed press, this practically implies that the defamatory publication is distributed in this country. Nevertheless, the concept of 'distribution' does not mean too much in the context of the world-wide-web: a website is 'distributed' everywhere in the world.

Furthermore, in defamation matters the phenomenon of 'hearsay' may also raise some questions of interpretation. Assume that defamatory content about a Hungarian businessman is published in an English newspaper. Although this newspaper is not read by Hungarian customers, a Hungarian periodical subsequently takes this content from the English source. Can we say that there is a causal link between the publisher's conduct and the Hungarian businessman's harm? Although from a substantive law point of view this linkage may be relevant, the Rome II Regulation defines *damnum* in terms of direct or most direct damages. In the foregoing case, the Hungarian businessman has probably already suffered damages in England (provided he has reputation there), hence, this is the place of direct damages; from this point of view the harm suffered in Hungary was only an indirect consequence.

The Commission's Initial Proposal withdrew two questions from the ambit of the *lex loci damni*. First, there was a fear that the courts at the publisher's headquarters (if the plaintiff sued on the basis of general jurisdiction) would be obliged to condemn conduct perfectly in conformity with the *lex fori* on the basis of the law of the victim's habitual residence, and this could lead to public policy concerns, taking into account the delicate nature of the constitutional law treatment of human dignity and freedom of expression. Nevertheless, this special public policy clause seems to be redundant, since it adds nothing to the forum's already existing right to refuse to apply the foreign law if the latter would be contrary to its public policy. Second, the Commission considered that legal certainty for the press justifies that the *"the right of reply or equivalent measures"* should be subject to a single law and this should be *"the law of the country in which the broadcaster or publisher has its habitual residence."* Otherwise, on the basis of the *lex loci damni*, multiple laws would

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[79] Christopher J. KUNKE, Rome II and defamation: will the tail wag the dog? 19 *Emory International Law Review*, 1733, 1744 (2005); Aaron WARSHAW**,** Uncertainty from abroad: Rome II and the choice of law for defamation claims, 32(1) *Brooklyn Journal of International Law* 269, 280-281 (2006) 282.

[80] Initial Proposal, 18.

be applicable to the right of reply, leading to the situation that the victim could exercise the most favourable treatment afforded by any of the laws concerned. In case of a ZDF broadcast concerning a celebrity this would, in fact, mean that the right of reply exists if it exists in any Member State law (and even more widely: in the law of any country where ZDF is broadcasted).[81]

The Commission's Initial Proposal triggered noisy grumbling on the side of the media. The principle of *lex loci damni* leads to the application of different laws on a 'distributive basis', or at least to the application of a law different from the law at the publisher's head office or editorial headquarters. Although this law may be either more favourable or more stringent for the media, the result of the application of the *lex loci damni* is less predictable and calculable, and this uncertainty leads to a situation where the media cannot predict which laws are to be complied with; or if this prediction is possible, it may be subjected to the rules of numerous laws, which may easily have conflicting provisions. The unforeseeablity and the problem of conflicting defamation laws pose considerable burdens on the media.

Incited by the media's harsh criticism, the European Parliament rejected the Commission's *lex loci damni* approach and envisaged restricting the range of laws that could govern claims emerging from the violation of privacy and personality rights to a single law, and shepherded the applicable law in the direction of the publisher's or broadcaster's country.

The Parliament adopted the following proposal in Article 5 of its position.

> *1. As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable.*
> *Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.*
> *This provision shall apply mutatis mutandis to publications via the Internet and other electronic networks.*
> *2. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast shall be the law of the country in which the publisher or broadcaster has its habitual residence.*
> *3. Paragraph 2 shall also apply to a violation of privacy or of rights relating to the personality resulting from the handling of personal data.*

Article 5 submitted by the Parliament proceeds from the elusive principle of 'most significant elements of the loss'. In order to counter-balance the uncertainty related to this notion, the Parliament's position introduces presumptions for violations committed by the printed press, broadcast (radio and television) and electronic media (especially the Internet). Nevertheless, these presumptions point to the law of the alleged tortfeasor.

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[81] Peter STONE, *EU Private International Law*, Cheltenham: Elgar European Law, 2006, 367-368 (The rationale for Article 6(2) appears to be the impracticability of the distributive application to these issues of several laws under Article 3, and the inappropriateness of a reference to the law of the forum by analogy with Article 6(1).)

First, "*the country to which the publication or broadcasting service is principally directed*" shall be deemed to be the one where the 'most significant elements of the loss' occur. The language of Article 5 is guarded but clear: it consistently speaks about 'the' country. Furthermore, the term 'principally directed to' also makes it obvious that it is about a single country: a publication's or a broadcast's principal direction can relate only to one country. In terms of practice, "*to which the publication or broadcasting service is principally directed*" implies the publisher's law (law of origin).

Second, the presumption embedded in Article 5(1) seems to be irrefutable: the first sentence of Article 5(1) subparagraph 1 ends with the command that "*that country's law shall be applicable*".

Third, if the country to which the publication is principally directed cannot be established ("*this is not apparen*t"), the place of the editorial control determines the applicable law ("*the country in which editorial control is exercised*").

Subsequently, the Commission submitted a modified legislative proposal, the text of which shows that the fundamental divergence between the two texts deterred the Commission from going on with the issue on violations of privacy and rights related to personality. The Commission considered that the Parliament's position

> *"would change the substance of the rule applicable to violations of privacy, particularly by the press. The Commission cannot accept this amendment, which is too generous to press editors rather than the victim of alleged defamation in the press and does not reflect the solution taken by a large majority of Member States. Since it is not possible to reconcile the Council's text and the text adopted by Parliament at first reading, the Commission considers that the best solution to this controversial question is to exclude all press offences and the like from the proposal and delete Article 6 of the original proposal. Other privacy violations would be covered by Article 5 [i.e. the general rules]."*

2. Discussion of the conflict problems of violations of privacy and rights relating to personality

When determining the conflict rules applicable to violations of privacy and rights relating to personality, the basic tension lies between the approach (advocated by the European Parliament) favouring the law of origin (the law of the publisher, broadcaster, content provider) and the approach favouring the *lex loci damni* (law of destination), which points normally to the victim's place of domicile (or at least it also embraces the victim's place of domicile). The logic and fundamental principle of the Rome II Regulation suggests, as advocated by the Commission too, that the latter approach should be adopted. The EU legislator has already made the decision on the general conflict rules applicable to delicts and torts; although special rules are applicable to particular wrongs, these provisions either concretise the general rules of the *lex loci damni* principle, or establish exceptions justified by special considerations applicable to a particular type of issue. Nevertheless, exceptions are warranted only if the special considerations are compelling, since the general policy decision has already been cast the legislator. This is the legislative context of the question to be taken into account.

Accordingly, the first question is why is the principle of *lex loci damni* unwelcome? First, it subjects the publisher to different, potentially conflicting, laws. One cannot assume that the law where the loss occurs is more favourable to the victim or *vice versa*; these laws can be either more favourable or more hostile. Nonetheless, one thing remains certain: these

laws may conflict with each other; while one practice may be lawful under the first law, it may amount to a blatant violation under the second. The consequence of this situation is characterized by the implicit spill-over effects of the different national laws, where the publisher is compelled to comply with different, potentially conflicting, legal regimes. The result is that the publisher is expected to comply with the 'highest common factor' of the legal systems concerned. Second, even if the publisher is ready to take the most withheld position enabled by the legal systems concerned, it may not be in the position to identify these legal systems. It may lack certain factual information about where the victim has reputation and, hence, harm can be expected; moreover, in the mass media it is almost impracticable, though theoretically possible, to carry out a survey on where the persons affected by the content may have a reputation. Assume that the BBC broadcasts false news about an American celebrity: does this mean that the broadcaster is expected to comply with dozens of laws?

Notwithstanding the above objections, there are two very strong arguments against the principle that the law of the publisher (place of origin) should prevail. First, as suggested by the Rome II Regulation, the potential victims have a right of no interference. The most important message of the principle of *lex loci damni* is that delictual liability is mainly about the injured person's legitimate expectations of not being harmed. Delictual liability is, for the most part, not a strictly moral category: the relevant question is not whether the conduct (or omission) is detestable (a question certainly to be answered on the basis of the *lex loci delicti commissi*), but whether the victim had the right to non-interference with his situation. Now then, if delictual liability is not about the wrongdoer's sin but about the victim's rights, there is a compelling argument against applying the law of the publisher. Although the *lex loci damni* certainly complicates the picture in cases where damages emerge in different countries, the question is whether practical considerations should have the capacity to frustrate normative rights.

The second objection against the publisher's law is that in such cases the publisher could manipulate the applicable law. Practically, it is only the publisher that can, with its own facts, influence which law is applicable to the matter, although this can only be done before the defamation is committed. One cannot assume automatically that the publisher's law is less favourable to the victim than the *lex loci damni*. Nevertheless, it can be assumed that the publisher has the chance, by selecting the country where the editorial control is exercised or the periodical is first published, to 'choose' the law that is the least favourable to the potential victims.

3. Summary and conclusions on conflict problems

The discussion of the conflict regulation of violations of privacy and rights related to personality requires some modesty on the side of the researcher. First of all, one has to acquaint himself with the circumstance that there is no perfect solution; hence, the ambition to find the perfect solution should, instead, be converted to an endeavour to find the second-best solution. The reason behind this pessimism is simple: words know no borders. Content displayed (published, broadcasted etc.) in one country may inevitably have spill-over effects in another country. Although this spill-over effect has always been present, the Internet magnifies this phenomenon. A perfect example is the story of the famous *Yahoo* case, where the content displayed on the website was, as far as possible, illegal under French law (it was not simply illegal, it was chased by criminal law), while it was, as far as possible, lawful under US law (it was not simply not prohibited, but it was a right protected by the US Constitution). The case presented a perfect stalemate. If the French prohibition prevailed, this would amount to the exportation of French law to US soil; on the other hand, if the US

approach prevailed, this would mean that US law is exported to France. Since the Internet knows no borders (even less than words), this tension could not be solved. While Yahoo lost the case in France (i.e. it was found guilty),[82] the US court was fast in declaring that this French judgment is not recognisable and enforceable in the US as it is contrary to the First Amendment of the Constitution[83].

Accordingly, the law should content itself with the second-best solution. What is the, probably most important, expectation such a second-best solution is to meet? The requirement of foreseeability suggests that the parties should be in the position to foresee which law will be applicable to their case. The place of destination approach (*lex loci damni*) meets this requirement in respect of the victim: he can expect that his reputation will be protected according to the law of the country where he has reputation. One the other hand, the publisher may not foresee in which countries the damages occur, and the muster of the potentially applicable laws may be very burdensome. This uncertainty emerges from a question of fact: although the publisher may know where the publication is distributed, it may not know where the person concerned has reputation. Furthermore, if the person concerned is known in numerous countries, the legal analysis to be done before the content is published (or broadcasted) should cover several legal systems.

The rule of origin has the same merits and drawback in terms of foreseeability as the rule of destination (*lex loci damni*), with the difference that it shifts the burden onto the victim. If the rule of origin is followed, the publisher would naturally be in the position to predict the applicable law as this would be the one applicable at the site (headquarters, editorial control) of the publisher. Nevertheless, the victim suffering from a defamatory content could not predict under which law he would get protection: this could be any country.

While foreseeability is part of conflict justice, none of the basic approaches can meet this requirement completely. It would seem to be odd to argue that foreseeability for the victim is less important than predictability for the press. Moreover, it seems that the rule of destination serves the purpose of foreseeability more than the rules of origin. While the victim cannot predict from which origin defamatory content might appear, and, hence, he cannot predict the applicable law *a priori* (before the defamation occurs), the publisher is aware of the content to be published and can do the conflict analysis prior to publication. Although this may amount to a burdensome assignment, and it is a reasonable expectation of the side of the publisher that not all laws where some detriment emerged should be applied, the rule of destination serves the purpose of foreseeability to the widest possible extent. At the same time, it is to be stressed that in the application of the *lex loci damni* the *damnum* should be confined to substantial damages, i.e. 'some' loss should not justify the application of the law where the loss occurred.

One of the most important arguments against the *lex loci damni* approach is that it enables the alleged victim to institute vexatious suits against the publisher. This objection is, nevertheless, misplaced: vexatious trials are due to the rules on jurisdiction and not to conflict provisions. Although some of the matters used as examples for forum shopping were led by the desire to have the most favourable law applied, these were, without exception, global matters. Since in Europe there are no huge differences between national laws (although it is true that in practice a difference is always significant if it helps win a case), and the expected introduction of uniform conflict rules would make the striving for the better law mainly

[82] TGI Paris 20 nov. 2000, JCP 2000, Act, p. 2214)

[83] *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme,* 145 F.Supp.2d 1168, 1180 (N.D.Cal.2001) (Establishing personal jurisdiction.); *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme,* 169 F.Supp.2d 1181, 1194 (N.D.Cal.2001) (Declaring that "the First Amendment precludes enforcement within the United States."); on appeal: *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, L'Union Des Etudiants Juifs De France*, 433 F.3d 1199 (2006) (Remanding for lack of ripeness and lack of personal jurisdiction.); the Supreme Court denied certiorari in Order No 05-1302.

needless (although it is undeniable that whereas uniform law would be applied, different national judges may tend to follow different interpretations and be attracted to diverging value judgments), it is assumed that, within the EU, the reason for forum shopping would be limited to the desire to compel a law-suit in a country that is inconvenient for the defendant.