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Provisional text

OPINION OF ADVOCATE GENERAL

BOBEK

delivered on 13 July 2017(1)

Case C-194/16

Bolagsupplysningen OÜ

Ingrid Ilsjan

v

Svensk Handel AB

(Request for a preliminary ruling from the Riigikohus (Supreme Court, Estonia))

(Regulation No 1215/2012 — Jurisdiction in matters relating to tort, delict or quasi-delict — Publication of information on the internet — Personality rights of legal

persons — Centre of interests — Injunction to have information deleted and corrected in a different Member State — Claim for damages)

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I. **Introduction**

1. An Estonian company operating in Sweden was blacklisted for its allegedly questionable business practices on the website of a Swedish employers' federation. As inevitably happens in the era of anonymous internet bravery, universally known for its genteel style, subtle understanding, and moderation, the website attracted a number of hostile comments from its readers.

2. The Estonian company brought an action before the Estonian courts against the Swedish federation. It complained that the published information has negatively affected its honour, reputation and good name. It asked the Estonian courts to order that the Swedish federation rectify the information and remove the comments from its website. It also requested damages for harm allegedly suffered as a result of the information and comments having been published online.

3. The Riigikohus (Supreme Court, Estonia) entertains doubts about the jurisdiction of the Estonian courts in this case. It therefore seised the Court with essentially three questions: first, can the Estonian courts assert jurisdiction to hear this action on the basis of the claimant's 'centre of interests', a special ground of jurisdiction that the Court previously applied to natural persons, but so far not legal persons? If they can, then second, how should the centre of interests of a legal person be determined? Third, if the jurisdiction of the Estonian courts were to be limited to situations in which the damage occurred in Estonia, the referring court wonders whether it can order the Swedish federation to rectify and remove the information at issue.

4. There are two novel elements that invite the Court to take a fresh and perhaps more critical look at its previous case-law: a *legal person* (not a natural one) is primarily asking *for rectification and removal* of information made accessible on the internet (and only secondarily for damages for the alleged harm to its reputation). This factual setting leads to the question of how far the seemingly quite generous rules on international jurisdiction previously established in *Shevill* (2) with regard to libel by printed media, and then further extended in *eDate* (3) to the harm caused to the reputation of a natural person by information published on the internet, may be in need of an update.

II. **Applicable law**

Regulation No 1215/2012

5. Pursuant to recital 15 of Regulation (EU) No 1215/2012 (4), the rules of jurisdiction should be 'highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile'.

6. Further to recital 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'.

7. The general rule governing international jurisdiction is found in Article 4(1), pursuant to which 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

8. Under Article 5(1) of the same regulation, the latter rule can be derogated from only in the cases provided for in Sections 2 to 7 of Chapter II.

9. The rule in Article 7(2) (contained in Section 2 of Chapter II of Regulation No 1215/2012) is relevant for the present case. In matters relating to tort, delict or quasi-delict, a person domiciled in a Member State may be sued in another Member State before 'the courts for the place where the harmful event occurred or may occur'.

III. **Facts, procedure and questions referred**

10. Bolagsupplysningen OÜ ('the Appellant') is a company established in Tallinn, Estonia which apparently does most of its business in Sweden. Ms Ingrid Ilsjan is an employee of the Appellant.

11. Svensk Handel AB is a Swedish trade federation ('the Respondent').

12. The Respondent placed the Appellant on a blacklist published on its website, stating that it 'deals in lies and deceit'. An internet forum on the website garnered some 1 000 comments in response to the blacklisting, including calls for acts of violence against the Appellant and its employees.

13. On 29 September 2015, the Appellant and Ms Ilsjan brought an action against the Respondent before the Harju Maakohus (District Court, Harju, Estonia) ('first-instance court'). The Appellant and Ms Ilsjan asked that the Respondent be ordered to rectify the information published about the Appellant and to remove the comments from its website. The Appellant also asked for damages for pecuniary loss sustained, in particular for loss of profit, in the amount of EUR 56 634.99. Ms Ilsjan claimed damages for non-pecuniary loss, to be assessed by the court. The Appellant and Ms Ilsjan submitted that they have suffered harm as a result of the Respondent's actions. They stated that the publication of incorrect information has crippled the Appellant's business in Sweden.

14. By a decision dated 1 October 2015, the first-instance court dismissed the action. It held that the harm in question had not been proven to have been sustained in Estonia. Therefore, it could not establish its jurisdiction based on Article 7(2) of Regulation No 1215/2012. The information and comments were written in Swedish, a language incomprehensible to Estonian speakers without a translation. Furthermore, the fall in turnover was in the Swedish currency, which was indicative of the fact that the harm was actually sustained in Sweden. The mere fact that the website could be accessed in Estonia could not automatically establish the jurisdiction of the Estonian courts.

15. The Appellant and Ms Ilsjan challenged that decision before the Tallinna Ringkonnakohus (Court of Appeal, Tallinn, Estonia). On 9 November 2015 that court dismissed the action, confirming the absence of international jurisdiction of the Estonian courts.

16. A further appeal was lodged against that ruling before the referring court, the Riigikohus (Supreme Court).

17. Before the Supreme Court, the Appellant argues that the Estonian courts have jurisdiction to hear the case because its centre of interests is in Estonia. The online content that was published in this case infringed the Appellant's right to pursue a business activity. Its management, economic activity, accounting, business development and personnel departments are located in Estonia. Its income is transferred from Sweden to Estonia. It does not have a foreign representative or branch abroad. Thus, the effects of the tortious act have been felt in Estonia.

18. The Respondent considers that there is no close connection between the subject matter of the claim and the Estonian courts. The international jurisdiction should thus be determined based on the general rule contained in Article 4(1) of Regulation No 1215/2012. The Respondent's seat is in Sweden. The Swedish courts therefore have jurisdiction over the case in the main proceedings.

19. The referring court decided to separate the actions of the Appellant and Ms Ilsjan. The latter's action was referred back to the first-instance court for reconsideration of its admissibility. As for the Appellant's action, the referring court considers that the Estonian courts have jurisdiction over its claim for damage possibly suffered in Estonia. However, it doubts that it has jurisdiction over other aspects of the Appellant's claim.

20. It is in this context that the Riigikohus (Supreme Court) stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 7(2) of [Regulation No 1215/2012] to be interpreted as meaning that a person who alleges that his rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to that information can bring an action for rectification of the incorrect information and removal of the harmful comments before the courts of any Member State

in which the information on the internet is or was accessible, in respect of the harm sustained in that Member State?

(2) Is Article 7(2) of [Regulation No 1215/2012] to be interpreted as meaning that a legal person which alleges that its rights have been infringed by the publication of incorrect information concerning it on the internet and by the failure to remove comments relating to that information can, in respect of the entire harm that it has sustained, bring proceedings for rectification of the information, for an injunction for removal of the comments and for damages for the pecuniary loss caused by publication of the incorrect information on the internet before the courts of the State in which that legal person has its centre of interests?

(3) If the second question is answered in the affirmative: is Article 7(2) of [Regulation No 1215/2012] to be interpreted as meaning that:

– it is to be assumed that a legal person has its centre of interests in the Member State in which it has its seat, and accordingly that the place where the harmful event occurred is in that Member State, or

– in ascertaining a legal person's centre of interests, and accordingly the place where the harmful event occurred, regard must be had to all of the circumstances, such as its seat and fixed place of business, the location of its customers and the way and means in which its transactions are concluded?'

21. Written observations were submitted by the Appellant, the Estonian, Portuguese and United Kingdom Governments, and by the European Commission. The Appellant, the Estonian Government and the Commission presented oral argument at the hearing on 20 March 2017.

IV. **Assessment**

22. The questions referred by the national court concern, in a nutshell, three issues. The crux of the matter lies, in my view, in the second question: is the ground of jurisdiction based on centre of interests developed in *eDate* (5)in relation to natural persons also applicable to legal persons? I therefore start by addressing that issue (A). Conditional upon a positive answer to that question is the need to address the third question posed by the national court: what would then be the test for establishing the centre of interests for legal persons (B)? Finally, the first question posed by the referring court asks the Court to assess the interplay between the 'mosaic' approach developed by the Court in *Shevill*, (6) through which the competence of the court is limited to the damages suffered within the respective national territory, and the indivisible (unitary) nature of the remedy sought by the Appellant (C).

23. Put succinctly, in this Opinion, first the personal scope of the relevant rules on jurisdiction is assessed (A), then the test to be employed (B), and finally the issue of remedies (C). The substance of the argument is as follows: for the attribution of

international jurisdiction in extra-contractual liability cases for harm caused to one's reputation, I see no good reason to start differentiating between natural and legal persons. My suggestion is that in terms of international jurisdiction, they should be treated the same. However, acknowledging the specific nature of the internet and the information communicated online, I also propose narrowing down the previous approach embraced by the Court. With regard to content made accessible on the internet, I see little purpose in maintaining the 'mosaic' jurisdiction established in *Shevill* specifically for the distribution of printed media. If such a tightening of the rules of international jurisdiction for internet-based libel is embraced, then the issue of available remedies in a territorially limited *Shevill*-type 'mosaic' jurisdiction does not even arise.

A. **Applicability to legal persons of the 'centre-of-interests' head of jurisdiction**

1. *Introduction: the evolution of the case-law (how the exception became the rule)*

24. The present case concerns the interpretation of the rule in Article 7(2) of Regulation No 1215/2012 establishing international jurisdiction for tortious claims. According to that rule, 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 courts for the place where the harmful event occurred or may occur'.

25. This is a *special* rule of jurisdiction. It allows for departure from the *general* rule, contained in Article 4(1) of Regulation No 1215/2012, according to which the defendant shall be sued in the Member State of his domicile. (7)

26. The rule in Article 7(2) of Regulation No 1215/2012 is, pursuant to settled case-law, based on the existence of a *particularly close connecting factor* between the dispute and courts in a Member State other than those in the defendant's domicile. This is justified by reasons relating to the sound administration of justice and the effective conduct of proceedings. (8)

27. The expression the 'place where the harmful event occurred' in Article 7(2) of Regulation No 1215/2012 (and its predecessors (9)) has been interpreted by the Court, since the judgment in *Bier*, (10) as covering both the place where the damage *occurred* and the place of the event *giving rise* to it. Thus, the claimant may choose to sue the defendant in the courts of either of those places. (11)

28. In *Shevill*, the Court clarified that where libel results from an article published in a newspaper, which is distributed in several Member States, the claimant may choose to bring the action for damages (in application of the rules of special jurisdiction) before the courts of two places. Either the courts of the Member State in which the harmful event *originated* can be seised, (12) which corresponds to the place of the establishment of the publisher,or the courts of each Member State where the publication in question was distributed and where the victim alleges to *have suffered* harm to his reputation. The jurisdiction of the latter courts will be limited solely to the injury caused in that Member

State. (13) This second type of special jurisdiction resulting in territorially limited competence created in *Shevill* has been referred to as the 'mosaic' approach. (14)

29. In *eDate*, the Court first confirmed the applicability of this jurisdictional ground to claims concerning infringement of personality rights caused by information published on the internet. The Court held that a claim for damages may be brought before the courts of each Member State in the territory of which content placed online is or has been accessible. The competence of those courts remains territorially limited. (15)

30. The Court however also added a further head of jurisdiction in *eDate*: that such a claim may also be brought before the courts of the place of the claimant's centre of interests. That place corresponds to the Member State in which the claimant has his habitual residence or to another Member State with which a particularly close link may be established, such as where the claimant pursues a professional activity. (16)

31. The Court developed this third special head of jurisdiction for claims falling under Article 7(2) of Regulation No 1215/2012 considering the 'serious nature of harm' and the worldwide accessibility of the information that allegedly causes it. (17) These are characteristics specific to the internet that, as a medium, was rather marginal when *Shevill* was decided. (18)

32. To sum up: the combined reading of *Shevill* and *eDate* means that in a case of alleged harm to reputation caused by information on the internet today, if the claimant is a natural person, there is a choice of *four types* of fora. Three of them are '*full*' fora: the totality of damage can be claimed. The fourth is '*partial*': damage that may be claimed is limited to that suffered on the territory of that state. The full fora include one forum that is *general* (the domicile of the defendant) and two *special* fora (where the harm originated, which is likely to be the same as the general forum in most cases; and where the claimant has his centre of interests). In addition to that, all the remaining Member States are likely to constitute partial fora, since information on the internet is accessible in all Member States.

33. The present case concerns international jurisdiction for a claim for damages arising out of an alleged infringement of the Appellant's personality rights. The Appellant is a *legal* person. An injunction ordering the Respondent to *correct and remove* the information and comments from the Respondent's website has been requested. As confirmed at the hearing, the primary purpose of the Appellant's action is not compensation for the pecuniary damage sustained but rather the rectification and deletion of the allegedly harmful online content. Damages are requested only on a secondary basis.

34. As alluded to at the beginning of this Opinion, taken together, these two elements may be seen as pushing the extant case-law of the Court somewhat too far, into realms it was perhaps not originally designed for. However, being pushed to the outer limits of an intellectual edifice is also useful: it allows for a critical re-assessment of the very foundations of that structure.

35. Before that exercise can be carried out however, a preliminary issue needs to be addressed: in relation to harm to personality rights caused through the internet, is it possible to distinguish between natural and legal persons?

2. *Personality rights of legal persons*

36. Although not explicitly mentioned in the judgment, it would appear that the idea strongly underlying the creation of an additional special head of jurisdiction in *eDate* was the protection of fundamental rights. That idea was clearly articulated in the reasoning in Advocate General Cruz Villalón's Opinion in that case. (19)

37. Be that as it may, the issue of whether or not the protection of personality rights qua fundamental rights can be also extended to legal persons has certainly been the subject of extensive discussion in the present case. Do legal persons have personality rights? The views of the parties in this case differed.

38. In its written observations and at the hearing, the Estonian Government stated that the personality rights protected under the judgment in *eDate* can by definition only be for natural persons. Estonia puts forward that this is due to their nature and effects (such as pain and suffering). Similarly, the United Kingdom stressed in its written submissions that the damage sought in response to harmful information published on the internet corresponds in reality to commercial loss for legal entities. That raises issues different to those that arise for a natural person whose reputation is affected.

39. The Commission admits that personality rights are protected in some Member States but maintains that the centre-of-interests-based *forum actoris* should not be extended to legal persons. Such an extension would not correspond to the balance of interests at stake.

40. I cannot subscribe to those positions. First, on the level of *principle*, it is difficult to see why legal persons could not be endowed, as far as that analogy reasonably permits, with personality rights (a). Second, however, it is perhaps worth stressing that on a more *pragmatic* level, the issue of whether or not legal persons enjoy some fundamental personality rights is of rather limited relevance for the purpose of the present case. There is no doubt that in the laws of a number of Member States, legal persons enjoy protection of their reputation or good name as part of their statutory rights. Those exist and must be adjudicated upon largely irrespective of the (non-)existence of any fundamental rights of legal persons. Such claims, if of transborder nature, are likely to involve 'harm' within the meaning of Article 7(2) of Regulation No 1215/2012, but a potentially heated discussion about the scope of fundamental rights of companies is not really the key element of the present case (b). Those considerations lead to the conclusion that there is no reason to treat natural and legal persons differently when applying special head of jurisdiction (c).

(a) *Principled answer*

41. Within the system of the European Convention on Human Rights (ECHR), it was, in the beginning, only Article 1 of Protocol 1 to the ECHR on the right to property that *expressly* provided for its application to legal persons. However, subsequently, both the European Court of Human Rights (ECtHR) as well as the Court have gradually extended fundamental rights protection to legal persons where such an approach appeared to be appropriate with regard to the specific fundamental right in question.

42. In the case-law of the ECtHR therefore, a gradual extension over the years has taken on board, for example, the freedom of expression; (20) the right to respect for the home and correspondence; (21) and the right to a fair trial. (22) At the same time, however, the ECtHR also admitted that when limitations to fundamental rights are concerned, Signatory Parties enjoy greater discretion in cases concerning professional activities of the persons involved. (23)

43. Similarly, within the system of EU law, the Court confirmed that legal persons enjoy not only the right to property; (24) but also the freedom to conduct a business; (25) the right to an effective judicial remedy; (26) and, also more specifically, the right to legal aid. (27) The Court also held that legal persons benefit from the presumption of innocence and the right to a defence. (28)

44. On the whole, it would appear that in both systems, save for some exceptions, (29) the extension of fundamental rights to legal persons occurred gradually, and rather naturally and spontaneously, without deeper philosophical reflections on the nature or function of fundamental rights. (30) The underlying considerations appear to be of a more functional nature: can the fundamental right at issue, by a reasonable analogy, be applied to a legal person? If yes, that right tends to be extended to legal persons, with perhaps room for greater limitations and restrictions. (31)

45. More *specifically*, as far as the personality rights of legal persons are concerned, their indirect acknowledgement can be found in *Fayed v. United Kingdom*. (32) The ECtHR stated that for the right to a good reputation, the limits of acceptable criticism are wider with regard to business persons involved in large public companies than for private individuals. (33) Furthermore, the ECtHR held that the fact that a given party was a large multinational company should not deprive it of a right to defend itself against defamatory allegations. Nor did that fact entail that the applicants (natural persons) should not have been required to prove the correct nature of the statements at issue. (34)

46. However, it is fair to admit that the case-law of the ECtHR on this issue is perhaps not entirely conclusive, in particular for two reasons. First, the nature of personality rights of legal persons might be somewhat different from those of natural persons depending on the particular right, within the context of which it is invoked — Article 8, Article 10, or perhaps Article 1 of the First Protocol, or even within any of the procedural rights. Second, in concrete cases, the ECtHR would often defer to the assessment already made by the domestic court as to the (non-)existence of personality violations of a legal person. (35)

47. There are two ways in which the protection of personality rights of legal persons as fundamental rights might be approached: *intrinsic* and *instrumental*.

48. Personality rights as an *intrinsic* value means that they are worthy of protection in themselves. Personality rights may be seen as an emanation of human dignity. The mere fact of being a human is worthy in itself and by itself of protection. If that notion of personality rights is embraced, then there might indeed be some intellectual difficulty in ascribing such a status to a legal person.

49. Personality rights, however, may also be conceived of as *instrumental* for the effective protection of other fundamental rights rather than as an end in itself. Protection of the personality rights of legal persons leads to (or is the necessary realisation of) other rights those persons enjoy, such as the right to property (Article 17 of the Charter) or the freedom to conduct business (Article 16 of the Charter). Applying this logic, the violation of a company's personality rights consisting in harm to their good name and reputation will directly translate into the infringement of their economic rights. Thus, the effective protection of those economic rights (that legal persons certainly enjoy) also requires the protection of their personality rights.

50. Does the latter justification of the protection of personality rights of legal persons make those rights inferior, or even non-existent? Several observations submitted in the course of this case seem to be making that moral argument, implying essentially that 'if it is about money, it is not worthy of fundamental rights protection'.

51. I do not share that view, for three reasons. First, there are a number of other, essentially procedural rights, the protection of which cannot be said to be an end in itself, but rather instrumental to the safeguarding of other rights or values. Are those rights then 'inferior'? Second, what about other, substantive rights that relate to the protection of, for example, the right to property or right to engage in work, or freedom to conduct a business? Are those rights also 'morally inferior'? Third, even if such a stance was embraced, *quid non*, it would exclude profit-generating legal persons from the benefit of fundamental rights protection. But what about those that do not operate on a profit-making basis? What about non-profit legal persons, that might arguably have more 'noble' aims?

(b) *Pragmatic answer*

52. I see no reason why legal persons could not enjoy the protection of their personality rights as a fundamental right, provided that, following the overall logic outlined in the previous section, it is appropriate in the context of the individual case.

53. However, I do not think that the Court would actually need to address that issue in order to deal with the present case.

54. Looking past the 'compulsory' layer of the fundamental rights protection discourse of current times, (36) it ought to be recalled that what this case is really about is the

decision on attribution of international jurisdiction under Article 7(2) of Regulation No 1215/2012 for extra-contractual liability for harm caused to one's reputation.

55. However, liability for such type of harm is not limited to what is protected by constitutionally guaranteed fundamental rights. Quite to the contrary — in the laws of the Member States, the more detailed provisions on protection of personality and reputation are found at the statutory level, in national civil codes or rules on torts. Those rules are then, inevitably, applicable to both natural as well as legal persons.

56. To take German law as an example, protection of general personality rights has constitutional roots. Both natural and legal persons are protected. Legal persons enjoy such protection as long as it concerns their particular function, for example as an economic agent or employer. (37) The personality right of the undertaking protects an undertaking's reputation and its constitutionally guaranteed freedom to engage in business. (38) The scope of protection of the personality right of the undertaking is construed relatively broadly. (39) In France, the case-law seems to have accepted that legal persons enjoy certain personality rights, particularly when their honour or reputation is at stake. (40) In English law, concepts of libel and malicious falsehood appear to protect the reputation and the economic interest of legal entities. (41)

57. Thus, despite the differences in the type and scope, personality rights of legal persons protecting good name and reputation are not an uncommon phenomenon in the Member States. If such a statutory-based claim is therefore launched in a Member State against an entity from another Member State, the decision on such an action will naturally also require a decision on international jurisdiction under Article 7(2) of Regulation No 1215/2012.

58. Put differently, Article 7(2) is a multilayered provision in the sense that the jurisdictional rules contained therein will be applicable irrespective of the precise national legal basis for the claim, whether the substantive protection of personality rights is granted by a constitutionally protected fundamental right, a statutory or case-law-based protection, or both.

59. At the same time, even if multilayered as to the substantive basis of the claim under national law, Article 7(2) should be unitary as to its outcome. In other words, the possible differences as to the basis of the claim under national law cannot affect the assessment of the jurisdictional rules, provided of course that the nature of the claim still relates to tort, delict, or quasi-delict.

60. In sum, protection of at least some personality rights of legal persons is usually granted not only at the level of fundamental rights, but also (or even more frequently) at the statutory level. There must therefore be equivalent jurisdictional rules under EU law that allow for the determination of a competent court to hear a claim such as the one in the main proceedings.

(c) *Treating legal persons differently under Regulation No 1215/2012?*

61. Once it is established that the rules of international jurisdiction under Article 7(2) of Regulation No 1215/2012 apply to a tortious claim of a legal person alleging infringement of its personality rights (irrespective of whether the basis of such claim would be constitutionally or statutorily guaranteed protection), another question logically follows. Is there any good reason for distinguishing between natural and legal persons for the purpose of application of a centre-of-interests-based special head of jurisdiction? If yes, how could such a distinction be justified?

62. The only justification argued in these proceedings, apart from the denial, referred to above, of the personality rights of legal persons has been the 'weaker party' rationale. That argument runs as follows: natural persons are by nature 'weaker' when facing legal persons, as was the scenario in both the cases joined in *eDate*. The serious harm that can be caused instantly by an online publication of information justifies the interpretation of jurisdictional rules in their favour. However, the same special protection is not needed in the case of legal persons, since they are by definition not 'weak'.

63. I do not agree, for four reasons.

64. First, similarly to what was stated by the Commission at the hearing, I note that the jurisdictional rule under Article 7(2) of Regulation No 1215/2012 does not aim at protection of the weaker party. I acknowledge that other heads of special jurisdiction provided by Regulation No 1215/2012 do. That is the case for jurisdictional protection afforded to consumers, employees, and to specified persons in matters relating to insurance. (42) However, the 'weaker party' rationale is clearly not present within the special jurisdictional rule for tortious matters. That type of jurisdiction relies instead on the *close connection* between the claim and the court competent to adjudicate upon it. (43)

65. Second, even if it were to be accepted that the weaker party rationale should be considered in this context beyond the clear wording of Regulation No 1215/2012, *quod non*, I wonder how such a rule, applied automatically, would really be appropriate and generate correct results in most individual cases. Are natural persons by definition always weak and legal persons always strong, independently of the concrete 'rapport des forces' in a given dispute? What about legal persons that are, as a matter of fact, small and rather weak? What about all the borderline cases, such as one-person companies, self-employed professions, or, on the other hand, powerful and rich individuals? Furthermore, should it be relevant in this context whether the legal person is a non-profit or a profit-making organisation?

66. Third, when looking specifically at potential harm caused via information on the internet, it serves to be mindful that there is not only likely to be quite some diversity on the side of the claimant, but also on the side of the potential defendant. When *Shevill* was decided, the defamation was likely to be caused by printed media. In most (certainly not all) cases, the defendant-publishers were likely to be legal persons.

67. The internet, for better or for worse, completely changed the rules of the game: it democratised publication. In the age of private websites, self-posting, blogs, and social networks, natural persons may very easily distribute information concerning any other person, whether they are natural or legal, or public authorities. Within such technical settings, the initial idea that might have governed the early rules on harm caused by defamatory publications, and which assumed that the claimant is likely to be a weak individual whereas the defendant is a (professional) publisher, falls entirely to pieces.

68. Finally, even if one were to embrace the logic of an individual assessment of mutual rapport de forces in concrete cases, such an approach often runs, as to its practical realisation, contrary to the objective of the 'high predictability' of jurisdictional rules that Regulation No 1215/2012 pursues. (44) What exactly would be the criteria then? Money? The size of the respective legal departments of each entity? Whether or not the entity in question publishes professionally? Again, such a laborious examination with an uncertain result is perhaps not the best approach for deciding on international jurisdiction, which ought to be as swift and easy as possible. (45)

69. In sum, I see no good reason why the rules on special jurisdiction contained in Article 7(2) of Regulation No 1215/2012, including the centre-of-interests-based head of jurisdiction, should differ according to whether or not the claimant is a natural or a legal person.

B. **International jurisdiction for claims concerning harm to personality rights caused by information published online**

70. For the reasons outlined in the previous section, I fail to find convincing arguments that would mandate a distinction between natural and legal persons for the purpose of determining international jurisdiction for tortious claims concerning an alleged violation of their personality rights.

71. However, for reasons that will be discussed in this section, I see quite compelling arguments to revisit the overly broad rules on special jurisdiction that have developed in the case-law of this Court over the years. When elaborating on those rules, due attention should be paid to the fact that the internet is simply a very different medium. (46)

72. The proposition outlined in this section therefore is: for potentially defamatory statements published on the internet, there ought to be only two special (and full) jurisdictions available. A narrower ground of special jurisdiction should then be applicable to both natural and legal persons, without distinction.

1. *The difficulties in maintaining the 'mosaic' approach for internet-related tortious claims*

73. It should be recalled (47) that in *Shevill*, the Court stated that a claim for reputational harm caused by a newspaper can be brought before the courts of the Member

State of establishment of the publisher as well as of the place of distribution of the journal.

74. In *eDate*, the Court added a third head of special jurisdiction: the centre of interests of the claimant. Importantly, the Court also confirmed the applicability of the *Shevill* distribution-based head of jurisdiction for claims arising in the context of harm alleged to have been caused through the internet. As in *Shevill*, that international jurisdiction remains limited to harm occurring in the national territory in question.

75. However, in *Shevill*, this 'mosaic' approach was built up on the basis of, by definition, limited distribution of printed copies of a specific journal in a certain Member State. The idea of territorial distribution seems therefore to fit with the territorially limited international jurisdiction over the claim for damages at hand.

76. The problem with this particular head of special jurisdiction is simply that the internet operates very differently. Information published online is accessible instantly and everywhere. In principle, there are no geographic boundaries. (48) Certainly, one can start making arguments about access and the language of the information, assessing whether or not in the setting of an individual case information could or could not have been reasonably understood. However, with machine translation developing and information being published in broadly spoken languages more than ever, those concerns are perhaps no longer as significant as they used to be.

77. In my opinion, the root of the current problem is the automatic extension of the *Shevill* 'mosaic' approach to the internet-related claims in *eDate,* which perhaps did not fully take into account the considerable differences between the two types of medium. That translates into a number of structural and operational problems. I will outline three.

78. First, 'putting *Shevill* online' essentially means granting the forum to a large number of jurisdictions simultaneously, 28 within the European Union. The information is instantly accessible in all Member States. As pointed out by Advocate General Cruz Villalón in the Opinion in *eDate*, while the number and origin of 'hits' on a given website may be indicative of an impact within a given territory, it does not constitute a reliable criterion for measuring the distribution of the specific information on the internet. (49) Therefore, even one single hit leads to the conclusion that 'distribution' within the meaning of *Shevill* occurs and makes the forum available to the claimant.

79. Such multiplicity of fora stemming from the distribution criterion is very difficult to reconcile with the objective of predictability of jurisdictional rules and sound administration of justice enshrined in recital 15 of Regulation No 1215/2012. (50)

80. Second, apart from the multiplicity of fora, there is also considerable *fragmentation* of the claims within those fora: each of the 28 possible fora will be competent for damages limited to the national territory concerned. Such apportioning of the harm is, in the light of the specific medium of the internet, difficult if not impossible to exercise. (51)

81. It is also difficult to see how such multiple claims could be coordinated with each other and how they would interplay with other mechanisms provided for by Regulation No 1215/2012 that aim at rationalising the conduct of proceedings, such as *lis pendens,* (52) or the joinder (53) of closely connected claims (or with the principle of *res judicata*).

82. As for the *lis pendens* rule, would its possibly barring effect be triggered between two (and up to 28) territorially limited claims because they relate to the same harmful information whose deletion would be sought together with the award of damages? Would the operation of that rule depend on the type of the remedy sought? And how would it operate in the presence of one 'full' and several 'partial', territorially limited claims? One may also wonder what would be the effect of *res judicata* attached to a judgment issued on the totality of damage claimed by the court in, for example, the claimant's centre of interests, in relation to a possible subsequent claim for damages under one or more of the partial jurisdictions?

83. Certainly, the present case is not concerned with those specific elements. Nonetheless, their potential (im-)practical implications should be kept in mind when considering the operation of a jurisdictional rule essentially granting jurisdiction to 28 different Member States' courts.

84. Third, there is also the interplay between the scope of the jurisdiction and the type of the remedy requested, which is specifically addressed in the present case. The *Shevill-eDate* case-law made it clear that the jurisdiction may be 'full' (when based on centre of interests or establishment/domicile of the defendant) or 'territorially limited' (based on distribution). However, that flexibility as regards the scope of the jurisdiction has been explicitly adduced only in relation to claims for damages. Such claims are, by nature, quantitatively adjustable. This, however, may not be the case for other remedies requested, such as an injunction for rectification or deletion of information. That remedy is by nature indivisible. This issue is at the heart of the third question referred by the national court. I will turn to it in more detail below, in Section C of the present Opinion.

85. In sum, the practical operation of the 'online' version of *Shevill* appears problematic. At this stage, however, it is perhaps opportune to take a step back and look not at the practical details, but at what are arguably the guiding values and interests at stake. Whose interests could such a proliferation of special heads of jurisdiction serve? For whom were they intended?

86. It is debatable whether that abundance of fora is in the interest of the operation of the system as such. It ought to be recalled that the head of jurisdiction under Article 7(2) of Regulation No 1215/2012 is an expression of the objective of the sound administration of justice because it confers competence on a court that has a *close connection* with the specific claim. (54) As already explained, (55) that head of jurisdiction is not supposed to protect the weaker party. Therefore, both the claimant's and the defendant's interests should be taken into account in the same way.

87. However, even if one were to assume that such multiplicity of jurisdictions were to protect the claimant, can the claimant's interests be said to be well protected because of the choice of multiple fora, including a large number of partial fora?

88. I do not think so. The claimant's situation is already made rather comfortable through the possibility to bring the defendant to the claimant's own forum, based on his centre of interests, as brought in *eDate*. (56) If, within that own forum, the claimant may ask for the totality of the alleged damage, would there be any reasonable incentive to go and seek collection of 'partial' damages in a number of other states? I fail to see how the availability of a further 27 jurisdictions helps either party, beyond the manifest potential offered to the claimant to harass the defendant with oppressive claims in parallel jurisdictions. The risk of harassment was already noted in relation to *Shevill.* (57)But it becomes indeed rather evident in the age of the internet.

89. Thus, while the current multiplicity of fora may be perceived, at first glance, as tipping the balance in favour of the claimant, it is difficult to maintain that it really serves any party. For the reasons set out above, it may bring about difficult procedural issues for both parties. The defendant in particular loses any possibility to predict in which Member State(s) he may be sued.

90. In sum, the extension of the *Shevill* 'mosaic' approach to allegedly defamatory statements published on the internet brings about a multiplication of fora that does not serve the legitimate interest of any party and defies the objectives of predictability and sound administration of justice.

2. *The narrower alternative*

91. The suggestion in this section is to bring the jurisdictional rules for internet-based defamatory statements back and arguably closer to the roots of extra-contractual/tortious liability of Regulation No 1215/2012 itself, limiting special jurisdiction to two scenarios: where *the event giving rise* to the harm occurred and *where the harm* occurred. The latter head of jurisdiction would be defined as where the reputation of the claimant was most strongly affected. That is the place of his centre of interests.

(a) *The redefined test*

92. According to the rule in Article 7(2) of Regulation No 1215/2012, the jurisdiction is attributed to 'the courts for the place where the harmful event occurred or may occur'. That covers both (i) the place of the *event giving rise* to the harm and (ii) the place where the harm *occurred*. (58) How would these two heads of special jurisdiction be ascertained in relation to defamatory statements published on the internet?

93. The *first* possibility concerns the place where the information emanates ('*event giving rise to harm*'). As the Court noted, this possibility will often overlap with the general jurisdictional rule of the domicile of the defendant contained in Article 4(1) of Regulation No 1215/2012. (59) Logically, the defendant is most likely to release and also

to control the information from where he or it is domiciled. This is also the place where legal enforcement can be carried out to correct or delete the harmful online content.

94. Thus, 'event giving rise to' is concerned with the location of the person(s) controlling the information, not about where the physical/or virtual substrate of the information was effectively created. In *Shevill*, the Court by implication did not consider the place where the newspaper was physically printed as the place where the '*event giving rise to harm*' occurred. Instead, the Court zoomed in on the domicile of the publisher. In my opinion, this is a parallel with *Shevill* which can be maintained: the physical location of the respective server(s) where the information is stored should not matter. The key is who can access the content, meaning whoever is normally (60) in charge of publishing and altering the content of the online information. (61)

95. The *second* possibility concerns the place where *the harm occurred*. The present case concerns harm allegedly caused to the reputation of a legal person. That harm is likely to be suffered in the place where that person does business or is otherwise professionally active.

96. If the *Shevill* 'mosaic' approach were to be discarded, (62) the place where the harm occurred would be limited to one jurisdiction. As what is protected is the reputation of the claimant, that place should be where that protected reputation was most strongly hit. That is in turn likely to be in the place where that person, whether natural or legal, has his or its centre of interests. Such a place would then represent the place of the true centre of the dispute, to which a special ground of jurisdiction, based on the closest link, should properly lead.

97. There would thus be two possible fora open to the claimant. The first one would be the domicile of the defendant as the general rule under Article 4(1) of Regulation No 1215/2012, which also corresponds to the place of the origin of the harm. The second would be the centre of interests of the claimant which corresponds to the place where the harm occurred. Both fora would confer upon the competent court *full* jurisdiction to adjudicate on the totality of the damages claimed and all the remedies available under the respective national laws, including the issue of a possible injunction if so requested.

98. That suggested limitation serves a dual purpose. First, it acknowledges and provides for the situation of the harmed person, who can bring the wrongdoer to his forum and sue for the totality of the damage suffered. Second, it furthers the objective of the sound administration of justice. This is because it gives jurisdiction to the courts of the Member State where there is the closest link to the claimant's centre of interests, and which have the best knowledge of that claimant's situation. Therefore, they will be the best placed to assess the overall impact of the entirety of the harm caused.

(b) *Locating the centre of interests*

99. The remaining key question is how then should the *centre of interests* be determined for natural as well as legal persons?

100. The determination of that place will be by its nature case-dependent, focusing on *two elements* in particular: the factual and social situation of the claimant viewed *in the context of* the nature of the particular statement. The first element looks at the specific situation of the claimant. The second one looks at how that situation could or could not have been affected by the contentious statement.

101. That dual assessment will necessarily have to be conducted in relation to *each concrete* claim. By definition, such an assessment cannot be carried out *in abstracto*, independently of the type and nature of the specific claim in question. (63) It will aim at giving jurisdiction to the court that will be situated at the centre of gravity of the specific dispute. That court will thus have the fullest knowledge of the claimant's situation as well as of the effects that can reasonably arise within that specific Member State and potentially beyond.

102. When seeking to generally foresee where the impact of a defamatory statement is likely to be felt by *natural persons*, the Court stated in *eDate* that the claimant's centre of interests corresponds to the Member State of habitual residence. It held that that can also be another Member State with which a particularly close link can be established through other factors such as the pursuit of a professional activity. (64) Depending on the specific situation of a given claimant, it could thus also be another place, such as the place where the claimant has his circle of friends, family and so on.

103. The criterion of habitual residence can certainly serve as a good starting point for the factual assessment in relation to the centre of interests of natural persons. However, that starting point needs to be verified in the light of the concrete statement in question, since naturally certain information may not have the same effect on one's professional and personal life, which may not be confined to one Member State.

104. As far as the centre of interests for *legal persons* is concerned, there the harm is typically likely to occur in relation to their professional activity. In the case of a profit-making legal person, that is, a company, the jurisdiction is likely to correspond to the Member State where it attains the highest turnover. In the case of non-profit organisations, it is likely to be the place where most of its 'clients' (in the broadest sense of the word) are located. In both cases, such a Member State is likely to be the one where the damage to reputation and therefore to its professional existence is going to be felt the most.

105. The referring court wonders whether the location of the centre of interests of a legal person should take into account where that person is established. (65) That suggestion appears to be inspired by an analogy to the place of residence for natural persons referred to by the Court in *eDate*.

106. When looking for parallels as to where the place of establishment plays a role in attribution of international jurisdiction, the analogy (or, indeed, rather a contrast) could be drawn with the concept of the 'centre of main interests' (COMI), which is indeed the core element of the jurisdictional rules provided for in the Insolvency Regulation. (66)

107. In the context of that regulation, the COMI corresponds to the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. In the case of a legal person, the COMI is presumed to correspond to the registered office. In the case of an individual, it is his principal place of business (if that individual exercises an independent economic activity) or his habitual residence (in all cases in the absence of proof to the contrary and subject to the condition that the registered office, the principal place of business or habitual residence has not been moved to another Member State within the 3-month or 6-month period prior to the request for the opening of insolvency proceedings).

108. The COMI of the debtor then determines the international jurisdiction of the court to commence the so-called main insolvency proceedings. The COMI is thus defined by reference to the debtor who, in the context of insolvency proceedings, is equivalent to the respondent.

109. Therefore, the fact that the registered office is taken as the starting point to determine the COMI of a legal person (and therefore that the court is competent to commence so-called 'main' insolvency proceedings) does not represent any major departure from the classical default jurisdictional rule as enshrined in Article 4 of Regulation No 1215/2012.

110. By contrast, the centre of interests developed in *eDate* refers to the claimant. As the Commission in principle pointed out, in that respect, it reverses the main logic on which the jurisdictional rules rely. This is because it provides the claimant with his *forum actoris*, (67)otherwise reserved in the regulation for 'weaker parties'. (68)

111. Therefore, in the context of deciding on the centre of interests for Article 7(2) of Regulation No 1215/2012, the place of establishment or domicile of a legal person may be taken into account as one of the factual elements. It is, however, certainly not the decisive one.

112. As already noted, the location of the centre of interests is factual and contextual, aiming at identifying the place where the reputational harm caused to a legal person is felt the most. That will correspond to the domicile of the legal person only if its main professional activities are also located in that Member State. If, however, no professional activities are conducted in that Member State and if the claimant does not produce any turnover there, it cannot lead to the determination of the centre of interests as being there.

113. Thus, to determine the centre of interests of legal persons, the relevant factors are likely to be the main commercial or other professional activities, which in turn will be most accurately determined by reference to turnover or number of customers or other professional contacts. The seat may be taken into account, as one of the factual elements, but not in isolation. Unlike natural persons, it is not rare for legal entities to establish registered offices without there being any substantive link to the territory.

114. Taking residence as the relevant criterion seems to be fully justified for claimants who are natural persons and whose reputation has been affected, without any particular link to their business activity. The Member State of such a person's residence is indeed likely to be the place where his social and professional structure exists.

115. Beyond that scenario, one cannot exclude either that a natural person may also have established habitual residence in a Member State, whereas his genuine life (professional, personal, or even both) may be in another Member State.

116. That brings me to the following final remark: it ought to be clearly acknowledged that for both natural as well as legal persons, there might be more than one centre of interests in respect of a specific claim. All (factual and contextual) assessments having been made, there might simply be more centres of interests with regard to a particular claim.

117. In such a case, it will be for the claimant to make a choice and to seise the courts of one of those Member States. However, since jurisdiction based on the centre of interests is a 'full' jurisdiction, by exercising that choice, the mechanism of *lis pendens* will be triggered, excluding the possibility to sue elsewhere while the first action is pending.

(c) *Interim conclusion*

118. In the light of the above I propose that the Court respond as follows to the second and third preliminary questions: Article 7(2) of Regulation No 1215/2012 is to be interpreted as meaning that a legal person alleging that its personality rights have been infringed by the publication of information on the internet can, in respect of the entirety of the harm sustained, bring proceedings before the courts of the Member State in which the centre of interests of that legal person is located.

A legal person's centre of interests is located in the Member State where that person carries out its main professional activities provided that the allegedly harmful information is capable of affecting its professional situation.

C. **Jurisdiction for an injunction ordering the rectification and removal of allegedly harmful information**

119. In the final part of this Opinion I will turn to the issue raised by the first preliminary question: if the *Shevill* 'mosaic' approach to international jurisdiction for territorially limited damage is maintained, does it confer on the national court the competence to issue a cross-border injunction, such as the one requested in the main proceedings? In other words, if the competence of the Estonian courts is *limited* to the harm caused to the Appellant on Estonian territory, can they issue an injunction ordering the Respondent in Sweden to correct and delete the harmful information in its *entirety*?

120. As a preliminary point, it ought to be noted that it is not entirely clear whether the remedy sought by the Appellant constitutes an *interim measure* or an *injunction* issued as

a part of the decision on merits. While the first one aims at a provisional solution pending the outcome of the proceedings on merits, the latter is a part of the final decision on merits.

121. That distinction has consequences for the test to be conducted to determine international jurisdiction (69) as well as for the recognition and enforcement regime. (70)

122. However, as clarified at the hearing, it appears that the requested injunction is sought as a part of the decision on the merits. I will therefore assume that to be the case.

123. If the Court were to follow my suggestion made in respect of the second and third preliminary questions, the reply to the first preliminary question becomes redundant. As there would be no further *Shevill*-styled territorial limitation of the jurisdiction in respect of the damages claimed, there would also be no issue of dissonance between the scope of the jurisdiction and the remedies sought. In other words, the court determined to be competent for the full claim concerning damages will also have jurisdiction to employ the full scale of individual remedies open to it under national law, including injunctions.

124. If the Court, however, were to consider it appropriate to maintain the *Shevill* 'mosaic' approach, the first preliminary question posed by the referring court remains highly relevant. In order to fully assist the Court, I shall, in the remainder of this Opinion, outline a concise answer to that question.

125. The *Shevill* 'mosaic' approach raises the question as to how to adapt the territorially limited jurisdiction over the damages claim to the unitary and by its nature indivisible remedy requested. Would it be possible to limit the competent court in respect of *types of* remedies that it may issue once its international competence to hear a tortious claim has been established? Or if not, would it be possible to limit, somewhat, the scope or *extent of* such a remedy?

126. I fail to see any possibility or legal basis for doing so. If it were, hypothetically speaking, established that the Appellant's claim is well founded and the Estonian courts have international jurisdiction for the harm caused to the Appellant in Estonia, I am of the view that that court will also be competent to issue the requested remedy, provided that such a remedy exists under national law. This is so because of the unitary nature of the source of the alleged harm in the present case. There is just one website. It simply cannot be rectified or deleted only 'in proportion' to the harm suffered in a given territory.

127. To better explain that point, one may take the example of a neighbourhood dispute. Imagine that the waste water tank of my neighbour leaks. The waste water from that tank affects a number of residents in the village. The waste water also seeps into my garden, infecting and hence destroying my beloved bio-vegetables that I have painstakingly, yet rather successfully, cultivated. If I or any of the other affected neighbours is obliged ultimately go to court, because discussions with the neighbour lead nowhere, we are naturally likely to request that the neighbour be ordered to fix his waste water tank and to stop the leakage. That will then happen however, by definition, to the benefit of

everybody. It is difficult to envisage that the neighbour would be obliged to stop the leakage only to whatever percentage mathematically corresponds to the portion that the damage caused to my bio-vegetables represents in the overall damage caused to all the residents of my village.

128. In the context of the present case, if it were established that the Appellant may bring its claim before the Estonian courts with regard to the damage that has occurred in Estonia, the question would become: would and could the partial competence of these courts also be reflected at the level of partial competence to issue an injunction? Could the Respondent reasonably be asked to correct a *proportional* part of the allegedly harmful information and comments? If yes, how would that part be determined? Would the respondent be asked to delete only a proportionate segment of the information? Or just a portion of the comments?

129. Such rather absurd considerations clearly point to just one possible answer: provided that a court of a Member State is competent to hear an extra-contractual/tortious action for damages, it should also be entitled to rule on the issue of all the remedies that are available under national law. (71) That, however, leads to a different kind of problem: if all the 28 potentially competent courts were also competent to issue injunctions, then multiple orders worded in different ways are likely to be issued and addressed to the defendant concerning the same conduct that he will have to undertake or refrain from.

130. As is apparent from the discussion in Section B of this Opinion, it is these and other practical issues which lead to my recommendation to the Court to limit the international jurisdiction over internet-related tortious claims to two heads of special jurisdiction. The national courts competent under those two heads of jurisdiction would then have full jurisdiction for both determination and award of damages as well as any other remedies available to it under national law, including injunctions.

V. **Conclusion**

131. In the light of the above, I propose that the Court respond to the second and third preliminary questions referred by the Riigikohus (Supreme Court, Estonia) as follows:

– Article 7(2) of 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 (recast), is to be interpreted as meaning that a legal person alleging that its personality rights have been infringed by the publication of information on the internet can, in respect of the entirety of the harm sustained, bring proceedings before the courts of the Member State in which its centre of interests is located.

– A legal person's centre of interests is located in the Member State where that person conducts its main professional activities provided that the allegedly harmful information is capable of affecting its professional activities in that Member State.

1 Original language: English.

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

3 Judgment of 25 October 2011, eDate Advertising and Others (C-509/09 and C-161/10, EU:C:2011:685).

4 Regulation 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 (recast) (OJ 2012 L 351, p. 1).

5 Judgment of 25 October 2011, eDate Advertising and Others (C-509/09 and C-161/10, EU:C:2011:685).

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

7 For a recent statement, see for example, judgment of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28, paragraph 17 and the case-law cited).

8 That has been established in the judgment of 30 November 1976, Bier (21/76, EU:C:1976:166, paragraph 11). See also judgments of 7 March 1995, *Shevill and Others* (C-68/93, EU:C:1995:61, paragraph 19 and the case-law cited); of 25 October 2011, eDate Advertising and Others (C-509/09 and C-161/10, EU:C:2011:685, paragraph 40 and the case-law cited); of 3 October 2013, *Pinckney* (C-170/12, EU:C:2013:635 paragraph 27 and the case-law cited); of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28, paragraph 19 and the case-law cited); and of 21 December 2016, *Concurrence* (C-618/15, EU:C:2016:976, paragraph 26 and the case-law cited). See also recital 16 of Regulation No 1215/2012.

9 The wording of Article 7(2) is identical to 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). It is also quasi-identical to Article 5(3) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36).

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10 Judgment of 30 November 1976, Bier (21/76, EU:C:1976:166, paragraph 19).

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11 For a recent statement, see for example, judgment of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28, paragraph 18 and the case-law cited).

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12 That also corresponds to the general rule of the seat of the defendant. See judgment of 7 March 1995, *Shevill and Others* (C-68/93, EU:C:1995:61, paragraph 26).

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13 Judgment of 7 March 1995, *Shevill and Others* (C-68/93, EU:C:1995:61, paragraphs 30 to 31).

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14 See, for example, Mankowski, P., Kommentar zu Art. 5 EuGVVO, in EWiR 2011, pp. 743 to 744. The solution adopted in *Shevill* is generally perceived as having been designed to reflect the fact that *in casu*, a vast majority of the print was distributed in France while only a small portion thereof was circulated in England, where the persons affected by the published information resided. See, for example, Briggs, A., 'The Brussels Convention', *Yearbook of European Law*, 1995, Vol. 15, issue 1, pp. 487 to 514.

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15 Judgment of 25 October 2011, eDate Advertising and Others (C-509/09 and C-161/10, EU:C:2011:685, paragraphs 51 and 52).

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16 Judgment of 25 October 2011, *eDate Advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraph 49).

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17 Ibid., paragraph 47.

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18 For a critical assessment in the legal literature, pointing out the shift to *forum actoris* and lack of foreseeability, and risk of forum shopping of such an approach, see, for example, Bollée, S., and Haftel, B., 'Les nouveaux (dés)équilibres de la compétence internationale en matière de cyberdélits après l'arrêt eDate Advertising et Martinez', *Recueil Le Dalloz,* 2012, No 20, pp. 1285 to 1293; Kuipers, J.-J., 'Joined Cases C-509/09 & 161/10, eDate Advertising v. X and Olivier Martinez and Robert Martinez v. MGN Limited, Judgment of the Court of Justice (Grand Chamber) of 25 October 2011', *Common Market Law Review*, 2012, pp. 1211 to 1231; Thiede, T., 'Bier, Shevill und eDate — Aegrescit medendo?', *Zeitschrift für das Privatrecht der Europäischen Union*, 4/2012, pp. 219 to 222.

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19 Who noted, inter alia, that fundamental rights to privacy and freedom of information, enshrined in Articles 7 and 11 of the Charter of Fundamental Rights of the European Union ('the Charter') 'refer to the special protection which information warrants in a democratic society, in addition to emphasising the importance of privacy, which also encompasses the right to one's own image', Opinion of Advocate General Cruz Villalón in Joined Cases eDate Advertising and Others (C-509/09 and C-161/10, EU:C:2011:192, point 52).

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20 Enshrined in Article 10 ECHR. Judgment of the ECtHR of 26 April 1979, Sunday Times v. United Kingdom (CE:ECHR:1979:0426JUD000653874).

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21 Anchored in Article 8 ECHR. The ECtHR extended the concept of 'home' to company offices. Judgment of the ECtHR of 16 April 2002, *Société Colas Est and Others v. France* (CE:ECHR:2002:0416JUD003797197, §§ 40 to 42).

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22 Provided for in Article 6(1) ECHR. Judgment of the ECtHR of 20 September 2011, Oao Neftyanaya Kompaniya Yukos v. Russia (CE:ECHR:2011:0920JUD001490204, §§ 536 to 551). It was noted that there was no reason to treat legal persons differently because respect of the right to a fair trial is a precondition for the possibility to enforce respective substantive rights. See Oliver, P., 'Companies and their Fundamental Rights: a comparative perspective', *International and Comparative Law Quarterly,* 2015, Vol. 64, issue 3, p. 678.

23 See judgment of the ECtHR of 16 December 1992, *Niemietz v. Germany* (CE:ECHR:1992:1216JUD001371088), in which the ECtHR held that a police search in the offices of a self-employed lawyer where the latter lived constituted an interference with his 'home'. However, the ECtHR added that the States' entitlement to interfere under Article 8(2) ECHR may be more reaching 'where professional or business activities or premises were involved than would otherwise be the case' (§ 31).

24 Enshrined in Article 17 of the Charter. See, for example, judgment of 11 June 2015, Berlington Hungary and Others (C-98/14, EU:C:2015:386, paragraphs 89 to 91 and the case-law cited).

25 Provided for in Article 16 of the Charter. See judgment of 21 December 2016, AGET Iraklis (C-201/15, EU:C:2016:972, paragraphs 66 to 69 and the case-law cited).

26 Enshrined in Article 47 of the Charter. See, for example, judgment of 16 May 2017, Berlioz Investment Fund (C-682/15, EU:C:2017:373, paragraph 48).

27 Provided for in Article 47 of the Charter. Judgment of 22 December 2010, DEB (C-279/09, EU:C:2010:811, paragraphs 44 to 59).

28 Anchored in Article 48 of the Charter. See, for example, judgments of 26 November 2013, Groupe Gascogne v*Commission* (C-58/12 P, EU:C:2013:770, paragraph 29 et seq.), and of 14 September 2010, Akzo Nobel Chemicals and Akcros Chemicals v Commission (C-550/07 P, EU:C:2010:512, paragraph 92).

29 One of those being the judgment of 22 December 2010, DEB (C-279/09, EU:C:2010:811), where the Court confirmed that legal aid is also available to legal persons. In doing so (paragraph 38), the Court relied on a linguistic argument (the term 'person' in the provision concerned did not exclude legal persons), coupled with systemic considerations (the position of the relevant chapter within the Charter).

30 Further see for example Oliver, P., 'Companies and their Fundamental Rights: a comparative perspective', *International and Comparative Law Quarterly*, 2015, Vol. 64, issue 3, pp. 661 to 696.

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31 It might be added that similar discussions and potential extensions of fundamental rights protection to legal persons are not limited to both European systems. For examples from the other side of the Atlantic see, for instance, *Citizens United v. Federal Election Commission* 558 U.S. 310 (2010), dealing with the freedom of political speech of legal persons, and, more recently, *Burwell v. Hobby Lobby Stores* 573 U.S. _(2014), where the U.S. Supreme Court acknowledged that closely held for profit corporations can hold religious beliefs.

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32 Judgment of the ECtHR of 21 September 1990, Fayed v. United Kingdom (CE:ECHR:1994:0921JUD001710190).

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33 Ibid., §75. See also judgments of the ECtHR of 15 May 2005, Steel and Morris v. United Kingdom (CE:ECHR:2005:0215JUD006841601, § 94), and of 20 November 1989, *Markt intern Verlag GmbH and Klaus Beermann v. Germany* (CE:ECHR:1989:1120JUD001057283, §§ 33 to 38).

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34 Judgment of the ECtHR of 15 May 2005, Steel and Morris v. United Kingdom (CE:ECHR:2005:0215JUD006841601, § 94).

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35 See the recent judgment of the ECtHR of 2 February 2016, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, (CE:ECHR:2016:0202JUD002294713, § 66).

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36 By way of retrospective, it is worth pointing out that in *Shevill*, three out of four claimants were actually *legal* persons. That fact, however, did not lead to any doubts as to the applicability of the same rules of international jurisdiction. The same fact might be nonetheless also seen as an indirect evidence of how much the EU law discourse has changed and refocused in the past decade. A sceptic might add that this is not necessarily always for the better in the sense of the fundamental rights discourse providing any better

or sharper analytical tools for interpreting, for example, rules on international jurisdiction.

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37 See, for example, Bundesgerichtshof (German Federal Supreme Court), judgment of 18 May 1971 – VI ZR 220/69, NJW 1971, 1665; judgment of 8 July 1980 – VI ZR 177/78, NJW 1980, 2807; judgment of 19 April 2005 – X ZR 15/04, NJW 2005, 2766; judgment of 23 September 2014 – VI ZR 358/13, NJW 2015, 489; and also judgment of 28 July 2015 – VI ZR 340/14, NJW 2016, 56. See also Bundesverfassungsgericht (German Federal Constitutional Court), order of 24 May 2006 - 1 BvR 49/00, NJW 2006, 3771.

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38 Koreng, A., Das „Unternehmenspersönlichkeitsrecht“ als Element des gewerblichen Reputationsschutzes, in: GRUR 2010, p. 1065 et seq.

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39 That protection encompasses not only statements that could lead consumers to no longer request an undertaking’s products or services, but also that unauthorised film recordings in company premises may constitute an infringement of the personality rights of an undertaking. See, for exemple, Landgericht Stuttgart (Regional Court Stuttgart), judgment dated 09.10.2014 — 11 O 15/14.

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40 See, for example, Dumoulin, L., ‘Les droits de la personnalité des personnes morales’, *Revue des sociétés*, 2006, issue 1, point 19.

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41 See for example Tesla Motors Ltd v BBC [2013] EWCA Civ 152 or Marathon Mutual Ltd v Waters [2009] EWHC 1931 (QB).

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42 See recital 18 of Regulation No 1215/2012: ‘In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.’ Those rules are contained in Sections 3 to 5 of Chapter II of the same regulation.

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43 See references to case-law quoted above, footnote 8.

44 Recital 15 of Regulation No 1215/2012.

45 For an illustration of the practical difficulties the individual examination of 'rapport de forces' poses in matters relating to insurance under Regulation No 44/2001, see my Opinion in *MMA IARD* (C-340/16, EU:C:2017:396, in particular points 61 to 62).

46 On the level of an abstract principle, I entirely share the desire for jurisdictional criteria that are *technologically neutral*, as eloquently put by Advocate General Cruz Villalón in his Opinion in Joined Cases eDate Advertising and Others (C-509/09 and C-161/10, EU:C:2011:192, points 53 to 54). However, on the level of its practical realisation, as will be discussed in this section, I see difficulties in treating situations that are objectively very different, as the same.

47 Above, point 28 of this Opinion.

48 For similar understanding and comparative inspiration see, for example, *Dow Jones and Company Inc v Gutnick* [2002] HCA 56, paragraph 113 (High Court of Australia). See also the judgment of the German Federal Supreme Court of 2 March 2010 in VI ZR 23/09.

49 Opinion of Advocate General Cruz Villalón in Joined Cases eDate Advertising and Others (C-509/09 and C-161/10, EU:C:2011:192, paragraph 50).

50 In this sense see, for example, Garber, T., 'Die internationale Zuständigkeit für Klagen aufgrund einer Persönlichkeitsrechtsverletzung im Internet', ÖJZ, 2012, p. 108 et seq. For the opposite position see, for example, Mankowski, P., Kommentar zu Art. 5 EuGVVO, in EWiR 2011, pp. 743 to 744.

51 The academic discussion that unfolded in response to the *eDate* judgment acknowledged, inter alia, difficulties with 'mathematically split[ting] the insults into

territorial parts' as laid out in *Shevill.* SeePichler, P., 'Forum-Shopping für Opfer von Persönlichkeitseingriffen im Internet? Das EuGH-Urteil eDate Advertising gegen X und Martinez gegen MGN (C-509/09 und C-161/10)', MR2011, p. 365 et seq.

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52 That is, actions involving the same cause that are between the same parties but in the courts of different Member States. See Section 9 of Chapter II of Regulation No 1215/2012.

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53 See Article 8 of Regulation No 1215/2012.

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54 See above footnote 8.

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55 See above point 64.

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56 A part of the doctrine suggested that that *forum actoris* already unduly tips the balance in favour of the claimant. See above footnote 18.

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57 Briggs, A., 'The Brussels Convention', *Yearbook of European Law*, 1995, Vol. 15, issue 1, pp. 487 to 514.

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58 See above footnote 8.

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59 Judgment of 7 March 1995, *Shevill and Others* (C-68/93, EU:C:1995:61, paragraph 26) referring to Article 2 of the Brussels Convention, the predecessor of Article 4 of Regulation No 1215/2012.

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60 Thus, who is primarily responsible for the content of the information, leaving aside the potential possibility of obliging the server administrator (if distinct from the publisher) or the internet service provider to disable access to that information.

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61 Also since the publication of online content is often carried out on multiple servers, located in different places or even in different jurisdictions.

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62 For the reasons set out in detail above, points 77 to 90 of this Opinion.

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63 Thus catering for the situations in which the (objective) centre of interests of a claimant is in Member State X, but the nature of the claim is of a very specific nature, relating to a very concrete or unique situation in Member State Y, and is simply not capable of harming the claimant's reputation in Member State X.

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64 Judgment of 25 October 2011, eDate Advertising and Others (C-509/09 and C-161/10, EU:C:2011:685, paragraph 49).

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65 It might be recalled that Article 63(1) of Regulation No 1215/2012 provides that: 'For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business.'

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66 See Article 3(1) of Regulation No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19). See the previous and similar but less nuanced Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, (OJ 2000 L 160, p. 1).

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67 The concern that the claimant in extra-contractual/tortious matters would be provided with *forum actoris* was already voiced in the aftermath of the *Shevill* judgment. See Briggs, A., 'The Brussels Convention', *Yearbook of European Law*, 1995, Vol. 15, issue 1, pp. 487 to 514. It has been further discussed in response to the judgment in *eDate*. See above footnote 18.

68 See above, point 64 of this Opinion.

69 See Article 35 of Regulation No 1215/2012. That provision confirms the (previously existing) possibility for a court to adopt interim measures even if that court does not have the jurisdiction for the merits of the case. The Court held in that context that courts may grant interim injunctions on the condition that there is 'a real connecting link between the subject matter of the measures sought and the territorial jurisdiction of the …court before which those measures are sought'. Judgment of 17 November 1998, Van Uden (C-391/95, EU:C:1998:543, paragraph 40). Article 35 hence constitutes an additional specific head of jurisdiction that exists in parallel to other rules of the same regulation. See in this sense the Opinion of Advocate General Cruz Villalón in Solvay (C-616/10, EU:C:2012:193, point 46).

70 See recital 33 and Article 42(2) of Regulation No 1215/2012. See judgment of 21 May 1980, Denilauler (125/79, EU:C:1980:130, paragraphs 16 to 18).

71 Unless of course it would be stated that the *Shevill*-style 'mosaic' jurisdiction entitled a national court to issue only and exclusively a decision on claims for damages (i.e. pecuniary compensation), but nothing else. However, it would be difficult to see what could be the legal basis for such a dramatic limitation of the competence of national courts, as well as how the national courts could carry out proceedings in which their competences to do so would be effectively stripped away to such an extent.