
10. Jurisdiction over cyber torts under the Brussels I Bis Regulation

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I. INTRODUCTION

In the first edition of this book dating back to 2014,¹ a preliminary attempt was made to decipher the principles deriving from the four initial judgments of the Court of Justice of the European Union (CJEU) that had been issued by that time concerning the jurisdiction for cyber torts under Article 7(2) of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Bis Regulation).² The four cases were, respectively, *eDate Advertising and Martinez*³ (online infringement of personality rights), *Wintersteiger*⁴ (online infringement of trade marks), *Football Dataco*⁵ (online use of databases) and *Pinckney*⁶ (online infringement of copyrights). Although not all these cases directly concerned Article 7(2) of Brussels I Bis Regulation, their combination provided the first elements of a new jurisdictional framework in the making for jurisdiction over cyber torts, while also leaving open a number of questions and grey areas.

Since then, the CJEU has issued a flurry of new cases relating to various kinds of cyber torts, fine-tuning the existing framework, filling some gaps and, arguably, amending or at least qualifying some solutions which were thought to be established.

Over that period of time, the Court has made clear that all cyber torts are not to be treated as a single category under Article 7(2); even if they all happen online, several kinds of tort lead to distinct interpretations of Article 7(2), which reflect various rationales. At the same time, some common features are apparent. Chief amongst them is the establishment of a fundamental distinction between two main categories of cyber torts, namely ‘civil’ torts (focusing on personality rights) and ‘commercial’ torts (focusing on IP rights).

The objective of this contribution is to describe, analyse and assess the interpretation of Article 7(2) in the online context, based on the study of the most relevant judgments that the CJEU has handed down since *Pinckney* (that is, the last case that was considered in the first

¹ See S. Brachotte and A. Nuyts (2014), ‘Jurisdiction over cyber torts under the Brussels I Regulation’ in A. Savin and J. Trzaskowski (eds), *Research Handbook on EU Internet Law*, Cheltenham: Edward Elgar Publishing, pp. 231–253.

² This provision has replaced 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 (Brussels I Regulation), as from 10 January 2015. The wording of both Article 5(3) of Brussels I Regulation and Article 7(2) of Brussels I Bis Regulation (see below) is the same and the CJEU case law over cyber torts concerning Article 5(3) remains relevant to applying Article 7(2).

³ Joined Cases C-509/09 *eDate Advertising GmbH v X* and C-161/10 *Olivier Martinez and Robert Martinez v MNG Limited* [2011] I-10269.

⁴ Case C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220.

⁵ Case C-173/11 *Football Dataco and Others*, ECLI:EU:C:2012:115.

⁶ Case C-170/12 *Pinckney*, ECLI:EU:C:2013:635.

edition of the book).⁷ As mentioned above, these decisions can be classified into two categories, depending on whether a civil or a commercial matter is involved in the tort concerned, while it must also be acknowledged that the precise interpretation of Article 7(2) depends on the specific commercial or civil issue at stake, and that sometimes this is not related to the question of the online or offline context.

The main new cases that will be considered include, for civil cyber torts, *Bolagsupplysningen*,⁸ *Mittelbayerischer Verlag*⁹ and *Gtflix Tv*,¹⁰ and for commercial cyber torts, *Hi Hotel*,¹¹ *Hejduk*,¹² *Coty Germany*,¹³ *Concurrence*¹⁴ and *AMS Neve*,¹⁵ which relate to intellectual property rights, unfair competition, as well as selective distribution.

This contribution will be structured as follows. A brief review of the foundation elements arising from the initial CJEU cases will be provided, with a reminder of their weaknesses (II). The new elements arising from the more recent cases will then be articulated (III), followed by an attempt to describe the current jurisdictional framework for cyber torts (IV).

As will be shown, the CJEU has further developed and clarified this jurisdictional framework while opening the door to some future changes, in a way that seems most suitable in some respects, notably through the limitation of the ‘mere accessibility’ criterion, given that the latter may not satisfy the requirement of legal certainty on the side of the defendant. Yet, it will be argued that this case law does not always do justice to the well-established jurisdictional principles of European private international law, especially to the extent that it sometimes reflects considerations of substantive law, distinct from the jurisdictional objective of the sound administration of justice, which requires both fulfilling the proximity, or close-connections, purpose, and avoiding the multiplication of fora to ensure a certain level of legal certainty.

II. THE EARLY BUILDING BLOCKS OF THE JURISDICTIONAL FRAMEWORK

Article 7(2) provides that, in matters relating to tort, delict or quasi-delict, ‘the courts for the place where the harmful event occurred or may occur’ have jurisdiction. This rule offers to claimants an alternative forum to the defendant’s domicile (Article 4 of Brussels I Bis

⁷ The examination of some CJEU cases is partly based on the yearly review of case law in the field of private international law from the second author of the present contribution, published in the *Journal de droit européen (JDE)* (see more specifically: A. Nuyts (2022), ‘Droit international privé européen’, *JDE*, pp. 77–93; A. Nuyts (2021), ‘Droit international privé européen’, *JDE*, pp. 74–95; A. Nuyts (2018), ‘Droit international privé européen’, *JDE*, pp. 402–410; A. Nuyts (2017), ‘Droit international privé européen’, *JDE*, pp. 405–415; A. Nuyts and H. Boularbah (2016), ‘Droit international privé européen’, *JDE*, pp. 30–40; A. Nuyts and H. Boularbah (2014), ‘Droit international privé européen’, *JDE*, pp. 421–429).

⁸ Case C-194/16 *Bolagsupplysningen*, EU:C:2017:766.

⁹ Case C-800/19 *Mittelbayerischer Verlag*, ECLI:EU:C:2021:489.

¹⁰ Case C-251/20 *Gtflix Tv*, not yet published.

¹¹ Case C-387/12 *Hi Hotel*, ECLI:EU:C:2014:215.

¹² Case C-441/13 *Hejduk*, ECLI:EU:C:2015:28.

¹³ Case C-360/12 *Coty Germany*, ECLI:EU:C:2014:911.

¹⁴ Case C-618/15 *Concurrence v Samsung*, ECLI:EU:C:2016:976.

¹⁵ Case C-172/18 *AMS Neve e.a.*, EU:C:2019:674.

Regulation), for better efficiency of proceedings and administration of justice, given that the place where the harmful event occurred is deemed to have a particularly close connection with the dispute.¹⁶

The rule contained in Article 7(2) of Brussels I Bis Regulation was first interpreted by the CJEU (or more precisely by its predecessor, the Court of Justice of the European Communities) in *Bier* (1976), which involved environmental damage caused by negligence. As is well known, the Court ruled in that case that Article 7(2) allows claimants to bring an action before the courts of the place where the event giving rise to the damage occurred or where the damage occurred, i.e. where the event giving rise to the damage produced its harmful effects upon the victim.¹⁷ One of the reasons for that duplication of jurisdiction is that the place of the harmful event often coincides with the place of the defendant's domicile (Article 4), so having that location as the sole connecting factor under Article 7(2) would make this provision ineffective.¹⁸

The other foundation case is *Shevill*¹⁹ (1995), which concerned an allegation of defamation committed via the distribution of a newspaper. In this context, CJEU ruled that the victim could bring an action for damage to her reputation against the publisher either before the court of the place where the publisher of the defamatory publication was established (place where the event giving rise to the damage occurred), or before the courts of each Member State where the publication was distributed and where the victim claimed to have suffered injury to her reputation (place where the damage occurred).²⁰

Furthermore, in this case, the CJEU limited the scope of the *forum damni*, by specifying that the courts of the Member State where the damage occurred could only adjudicate the claim in respect of the portion of the damage that had occurred in that State (in contrast with the courts of the Member State where the event giving rise to the damage occurred, which are to adjudicate the whole dispute).²¹ This restriction is based on the consideration that the courts of the place where the damage occurred are best placed to assess the libel committed *in that State* (and not elsewhere) and to determine the extent of the corresponding damage.²²

When the alleged tort involves activities that take place online, between 2011 and 2013, the CJEU rendered a series of decisions to tailor this classic interpretation to the specificities of the Internet, namely *eDate Advertising and Martinez*,²³ *Wintersteiger*,²⁴ *Football Dataco*²⁵ (which concerned Article 7(2) of Brussels I Bis Regulation in an ancillary way and targeted

¹⁶ Case C-189/08 *Zuid Chemie* [2009] ECR I-6917, para. 24 (and the case law cited).

¹⁷ Case C-21/76 *Handelskwekerij Bier v Mines de Potasse d'Alsace* [1976] ECR 1735.

¹⁸ *Ibid.*, para. 20.

¹⁹ Case C-68/93 *Shevill and Others v Presse Alliance* [1995] ERC 1-415.

²⁰ *Ibid.*, para. 33.

²¹ This restriction does not apply when the place where the damage occurred coincides with the place of the defendant's domicile (in such case, the competent courts have jurisdiction over the entire case by virtue of Article 4 of Brussels I Bis Regulation).

²² Case C-68/93 *Shevill and Others v Presse Alliance* [1995] ERC 1-415, para. 32.

²³ Joined Cases C-509/09 *eDate Advertising GmbH v X* and C-161/10 *Olivier Martinez and Robert Martinez v MNG Limited* [2011] I-10269.

²⁴ Case C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220.

²⁵ Case C-173/11 *Football Dataco and Others*, ECLI:EU:C:2012:115.

the interpretation of the Database Directive²⁶ instead) and *Pinckney*.²⁷ In doing so, the Court has treated different kinds of online torts distinctively.

Thus, when the dispute involves the infringement of *personality rights* (*eDate* case law as confirmed in *Pinckney*), the claimant can bring proceedings before: (1) the courts of the Member State where the defendant is established (in respect of all damages); (2) the courts of the Member State where the claimant's centre of interests is situated (in respect of all damages); and (3) the courts of the Member State where the infringing content placed online is accessible (in respect of domestic damages only). Hence, as far as personality rights are concerned, the CJEU associated a third forum with Article 7(2), namely the Member State's courts of the place of the centre of interests of the alleged victim of the infringement. This new forum constitutes a duplication of the place where the harmful event occurred and thus concerns all damages.

In addition, it seems from this case law that, in the context of online infringement of personality rights, the place where the damage occurred covers all the places where the infringement content was merely accessible. In the first version of this article, we noted that this is at odds with the CJEU case law about the infringement of personality rights in newspapers. *Shevill* requires that the newspaper be *distributed* (and not merely accessible) in a given Member State to ground the jurisdiction of the courts of that State regarding the local damage (place where the damage occurred). In addition, the extension of the use of the accessibility criterion goes against the goal of avoiding the multiplication of fora required by the sound administration of justice.

When the dispute involves the infringement of intellectual property rights, the legal protection of which is subject to national registration (such as a national trade mark), the claimant can bring proceedings before the courts of: (1) the Member State where the defendant is established (in respect of the whole damage), at least if the defendant is an advertiser, and possibly also when the defendant is an intermediary such as a service provider; (2) the Member State where the infringed right is registered (in respect of the local damage) (*Wintersteiger*).

In the first edition of this chapter, we argued that point (2) should be adapted to require the fulfilment of other connecting factors, in addition to the registration of the intellectual right concerned, in view of both *Football Dataco* and the Opinion of the Advocate General in *Pinckney*.

On the one hand, in *Football Dataco*,²⁸ the CJEU interpreted Article 7 of the Database Directive, which requires Member States to give the maker of a database a *sui generis* right to prevent anyone from re-utilizing the contents of the database. The question was therefore about substantive rights under European law, and the Court was not requested to interpret Article 7(2).²⁹ Yet, the Court noted that localizing the act of re-utilization is 'liable to have an influence on the question of jurisdiction'.³⁰ In this respect, the Court noted that when the

²⁶ Directive 96/9/EC on the Legal Protection of Databases.

²⁷ Case C-170/12 *Pinckney*, ECLI:EU:C:2013:635.

²⁸ Case C-173/11 *Football Dataco and Others*, ECLI:EU:C:2012:115.

²⁹ Even though the jurisdiction of the English courts had been disputed by the defendant before the English court.

³⁰ Case C-173/11 *Football Dataco and Others*, ECLI:EU:C:2012:115, para. 30.

webserver is located in one Member State, an act of re-utilization can be situated in another Member State where the person re-utilizing the database intends to *target* the public.³¹

On the other hand, in *Pinckney*,³² Advocate General Jääskinen advised the CJEU that, when applied to copyright disputes, the mere accessibility of a website comprising litigious content in a given Member State should not be sufficient for the courts of that Member State to have international jurisdiction. Instead, it must be proven that the website is *directed* towards that Member State.³³ His opinion was however not followed by the CJEU, who decided that when the dispute involves the infringement of copyrights and where the damage resulting therefrom occurs in a Member State other than that in which the defendant reproduced the author's work onto hardware support that is then sold via an Internet site, which is also accessible within the jurisdiction of the court seized, that Member State has jurisdiction over the case as far as domestic damage is concerned.

Furthermore, in 2014 we argued that the definition of the *forum damni* elaborated in *Wintersteiger* appears questionable, as it is based on considerations pertaining to substantive law. While it seems entirely accurate to decide that the place of damage must coincide with the place where the trade mark is registered when assessing the substance of the dispute, it is unfitting to infer therefrom that the courts of that Member State *ipso facto* have jurisdiction over all tort cases relating to this trade mark. That international jurisdiction and the merits of the case are based on distinct considerations is a well-established principle in EU law.³⁴ Consequently, the existence of a jurisdictional basis under Article 7(2) should not depend on the protection of the right in trade marks, patents or copyrights relied upon by the plaintiff. Instead, it should depend on the proximity between the forum and the factual elements of the dispute. In trade marks, this place is located where the sign is used in support of the marketing or offering of the products, and not where it is registered.³⁵

III. THE FINE-TUNING OF THE JURISDICTIONAL FRAMEWORK

In the post-*Pinckney* cases, the CJEU has further developed and clarified the jurisdictional framework for jurisdiction over cyber torts, while opening the door to future changes. In doing so, the Court has built on the distinction between two categories of torts, the first one concerning civil matters (A) and the second pertaining to commercial matters (B). The first category was fine-tuned in the *Bolagsupplysningen* case as well as the recent *Mittelbayerischer Verlag* and *Gtflifx Tv* cases, which all pertain to personality rights. The second category was fine-tuned

³¹ Ibid, para. 47.

³² Case C-170/12 *Pinckney*, ECLI:EU:C:2013:635.

³³ Case C-170/12 *Pinckney*, ECLI:EU:C:2013:635 (Opinion of Advocate General Jääskinen), para. 73.

³⁴ Case C-364/93 *Marinari v Lloyd's Bank* [1995] ECR I-6511, para. 18.

³⁵ It should then be determined whether the courts of the Member States where the infringing material is marketed, advertised or used have jurisdiction over the whole dispute or only with respect to domestic damage. This question does not arise if the place where the damage occurred is said to be located in the Member State where the national trade mark is registered, as all damages are deemed to be located in that Member State in this case.

in *Hi Hotel*, *Hejduk*, *Coty Germany*, *Concurrence* and *AMS Neve*, which concern various intellectual property rights, as well as selective distribution and unfair competition.

As will be highlighted, the approach adopted by the Court in relation to these various torts remains distinct, perhaps not enough to still speak of ‘pointillism of solutions’ (*pointillisme des solutions*),³⁶ but sufficiently to deny the existence of any unitary approach. This being said, some general trends can be identified that are valid for both civil and commercial cyber torts, especially a limitation of the ‘accessibility’ criterion.³⁷ In addition, in commercial matters, considerations of substantive law, as well as the alignment of the interpretation of Article 7(2) both in online and offline contexts, have gained ground.

A. Civil Torts: Elaborating on eDate in the Field of Personality Rights

The basic principles concerning the jurisdiction of EU Member States courts over the online infringement of personality rights were enshrined in *eDate*,³⁸ which has been reviewed above. As explained, the claimant can bring proceedings before three different courts, namely (1) those of the Member State where the person whose liability is engaged is established (in respect of all damages) (the ‘establishment’ criterion); (2) those of the Member State where the alleged victim’s centre of interests is situated (in respect of all damages) (the ‘centre of interests’ criterion); and (3) those of the Member State where the infringing content placed online is accessible (in respect of local damages only) (the ‘accessibility’ criterion).

Between 2017 and 2021, the CJEU has further shaped the jurisdictional criteria (2) and (3) via three decisions, rendered respectively in the *Bolagsupplysningen* case (a), the *Mittelbayerischer Verlag* case (b) and the *Gtflix Tv* case (c). Through these cases, the Court has enlarged the application of the centre of interests criterion to legal persons and maintained the accessibility criterion, while limiting its scope. The three judgments are explained and analysed below.

1. *Bolagsupplysningen*: the ubiquity of an action for injunction, the legal persons’ centre of interests and immaterial damage

In the *Bolagsupplysningen* judgment rendered in 2017,³⁹ the CJEU provided important clarifications in relation to the jurisdictional grounds of the victim’s centre of interests and of website accessibility.

Firstly, concerning the accessibility criterion, the Court ruled that it is not possible to file a claim for the rectification or deletion of information online before the court of the place of accessibility of the allegedly infringing content. Such a claim, in the opinion of the CJEU, is one and indivisible and can therefore only be brought before a court that has jurisdiction

³⁶ According to Laurence Usunier’s expression (see L. Usunier (2014), ‘Affaire C-170/12, ECLI:EU:C:2013:635 – note’, *Rev. crit DIP*, pp. 189–206, at 196).

³⁷ In this respect, see T. Azzi (2020), ‘Compétence juridictionnelle en matière de cyber-délits: l’incontestable déclin du Critère de l’accessibilité (À propos de plusieurs arrêts récents)’, *Rev. crit. DIP* pp. 695–710.

³⁸ Joined Cases C-509/09 *eDate Advertising GmbH v X* and C-161/10 *Olivier Martinez and Robert Martinez v MNG Limited* [2011] I-10269.

³⁹ Case C-194/16 *Bolagsupplysningen*, EU:C:2017:766.

over all damages (that is, a court that is granted jurisdiction based on the other two grounds identified above).⁴⁰

Thus, the courts of the place of accessibility of the contentious data have jurisdiction to grant compensation for the (local) damage caused, but they cannot entertain an application for injunctive relief, because the latter is indivisible: rectification or removal of online information must take place generally across the Internet, and cannot be limited to a certain territory.

Pursuant to the CJEU's rationale, this solution is justified by the ubiquitous nature of contents posted on a website.⁴¹ Yet, the idea that rectification or deletion of inaccurate data would necessarily have an online effect on a worldwide, or even merely on a European, scale, no longer fits the way the Internet works today. The rectification or deletion of data placed online can, as a matter of fact, be done solely on a national basis, thanks to geolocation and geo-blocking techniques, which have the effect of compartmentalizing Internet access.

The justification for the solution adopted by the CJEU can possibly be found elsewhere, namely in the concern precisely to avoid the use of geo-blocking techniques, which undermine the objective of erasing internal borders in the internal market.⁴² Allowing the court of a Member State to exercise jurisdiction on a basis corresponding to the territory of that State alone would be quite paradoxical at a time when the Union is trying to avoid geo-blocking, as evidenced by Regulation 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment.

Secondly, in *Bolagsupplysningen*, the CJEU specified that the criterion of the victim's centre of interests applies both when the victim is a natural person (as was the case in *eDate*) and when the victim is a legal person. In this regard, the Court explicitly rejected the idea that this criterion is intended to protect the victim as claimant. According to the Court, this forum is justified solely by considerations of the proper administration of justice.⁴³

In the case of a legal person, the centre of interests must reflect the place where its reputation is most established, which corresponds to the place where the legal person carries out most of its economic activity.⁴⁴ Consequently, in the event that a legal person carries out the major part of its activities in a Member State other than that of its statutory seat, it is in the first of these Member States that the centre of interests is located, as the courts of that State are deemed to be better placed to assess the existence and extent of the alleged infringement.⁴⁵ Hence, the

⁴⁰ Case C-194/16 *Bolagsupplysningen*, EU:C:2017:766, para. 48.

⁴¹ Ibid.

⁴² See S. Corneloup and H. Muir Watt, 'Le for du droit à l'oubli' (2018), *Rev. crit. DIP* pp. 290–306.

⁴³ Ibid, para. 38. While this rationale seems to be in line with the usual principles attached to the determination of international jurisdiction in European private international law, one may wonder whether the latter could not evolve to give more weight to considerations of substantive justice, as several authors have recently suggested (see notably T. John, R. Gulati and B. Köhler (eds) (2020), *The Elgar Companion to The Hague Conference on Private International Law*, Cheltenham: Edward Elgar Publishing; R. Michaels, V. Ruiz Abou-Nigm and H. Van Loon (eds) (2021), *The Private Side of Transforming our World: UN Sustainable Development Goals 2030 and the Role of Private International Law*, Cambridge: Intersentia 2021). Then, a distinction could be drawn depending on whether an individual or a legal person is the alleged victim of defamation. In this regard, the individual could be considered as a weak party, just like consumers, insured persons and employees under Articles 10 to 23 of Brussels I Bis Regulation. Arguably, though, such a shift of gears would require a change in the wording of Article 7(2).

⁴⁴ Case C-194/16 *Bolagsupplysningen*, EU:C:2017:766, para. 41.

⁴⁵ Ibid, para. 42.

CJEU adopted a conception of the centre of interests of a legal person that is arguably close to the notion of principal place of business, while rejecting the criterion of the statutory seat and, presumably, that of the place of incorporation or of central administration.⁴⁶

Thirdly, the CJEU clarified that the forum of the centre of interests of the victim is available without the need to distinguish between the material or immaterial nature of the damage allegedly suffered.⁴⁷ The reason for this broad interpretation lies in the fact that this forum is best able to assess the real impact of a publication on the Internet and its harmful nature, both in its material and immaterial aspects.⁴⁸

2. *Mittelbayerischer Verlag*: the identification of the victim of the online contents

In 2021, the CJEU handed down another important decision about jurisdiction over the online infringement of personality rights, in *Mittelbayerischer Verlag*.⁴⁹

In that case, the question was whether the alleged victim can bring proceedings before the centre of his/her interests for civil cyber tort when the victim is not referred to in the content posted online. In the dispute at stake, a Polish national, who had survived the Auschwitz extermination camp, considered that the publication on a website, by a company established in Germany, of an article using the expression ‘*Polish* extermination camp’ to refer to a Nazi camp undermined his national identity and dignity.

Since the website was accessible in Poland, the person claiming to be injured could arguably have brought the action for damages based on the accessibility criterion (ground (3)). However, if the action had been brought on that basis, the jurisdiction of the Polish courts would have been limited to the sole damage caused within the Polish territory. This is probably the reason why the claimant brought the action in Poland on the basis of the centre of interests criterion, which enables the court to rule on all damages.⁵⁰ Yet, the CJEU ruled that this criterion cannot ground the legal action when the content posted online does not include ‘objective and verifiable elements which make it possible, to identify, directly or indirectly, [the victim] as an individual’.⁵¹ In this regard, the Court explained that:

[t]he mere fact that a person belongs to a vast identifiable group [, such as the Polish People, is not sufficient] to enable [the] objectives of foreseeability of the rules of jurisdiction and legal certainty to be achieved, since the centres of interests of the members of such a group may potentially be located in any Member State of the European Union.⁵²

It should be noted that the condition that the victim is sufficiently identified does not go as far as requiring that the content put online specifically refers to the victim by name (as the Commission had suggested in its observations to the Court). It suffices that the person be identified or identifiable by objective and verifiable elements. The exclusion of a simple reference to a ‘vast group’ suggests that the identification of a more restricted group to which the victim

⁴⁶ Cf. Article 63 of Brussels I Bis Regulation.

⁴⁷ Case C-194/16 *Bolagsupplysningen*, EU:C:2017:766, para. 36.

⁴⁸ *Ibid*, para. 38.

⁴⁹ Case C-800/19 *Mittelbayerischer Verlag*, ECLI:EU:C:2021:489.

⁵⁰ This point was made by the Court itself (Case C-800/19 *Mittelbayerischer Verlag*, ECLI:EU:C:2021:489, para. 24).

⁵¹ Case C-800/19 *Mittelbayerischer Verlag*, ECLI:EU:C:2021:489, para. 46.

⁵² *Ibid*, para. 43.

would be a part (for example, a family or a group of companies to which the claimant belongs), could satisfy the condition.⁵³

Overall, *Mittelbayerischer Verlag* is a welcome confirmation of the fact that, in order to establish jurisdiction under Article 7(2), there must be a close link between the forum and the dispute that is objectively determined and verifiable. International jurisdiction is based on considerations different from those of substantive law. To justify the jurisdiction of a court based on the location of the harmful event, there must therefore be a relevant connection, *from a jurisdictional point of view*, between the behaviour of the person whose liability is engaged, and the harm alleged by the victim located in the forum. Here, this link is the sufficient identification of the victim in the content published online by the person whose accountability is engaged. As the Court pointed out, in the absence of such an objective and verifiable link between the acts (or abstentions) of that person and the forum, jurisdiction ceases to be foreseeable for that person.⁵⁴

It is to be regretted that the Court has not always demonstrated the same orthodoxy concerning other types of offence, in particular in the context of online infringement of trade marks (*Wintersteiger*), as shown above. Yet, as will be seen in the next section (B) addressing commercial cyber torts, in this matter as well, the more recent case law suggests a greater attention from the Court to the requirement of an objectively verifiable connection between the dispute and the forum. Before that, another recent case relating to civil cyber torts must be considered.

3. *Gtflix Tv*: the combination of an action for injunction and an action for damages

In 2021, the CJEU also issued the *Gtflix Tv* case,⁵⁵ which clarifies *Bolagsupplysningen* concerning the accessibility criterion, and specifically the exclusion of actions for injunction from its jurisdictional scope. The issue in that case was whether the Court was going to maintain the third criterion of jurisdiction for civil cyber torts, namely that of the place of accessibility of the website, when the victim is seeking to obtain *both* the rectification/withdrawal of data on the Internet *and* the compensation for the (local) damage associated therewith.

The referring court asked the CJEU whether, in view of *Bolagsupplysningen*, the courts of the place of accessibility of the site could hear the claim for compensation for the damage caused by the content posted online (namely, in this case, disparaging remarks) when the modification or removal of this content was also requested by the claimant. The referring court was of the opinion that the answer should be positive, given the link of ‘necessary dependence’ between the request for deletion of content posted online and the demand for compensation for the damage resulting from the posting.⁵⁶

The Court did not follow this interpretation. In the CJEU’s view, there is ‘no legal necessity’ for the two questions – the claim for compensation for the damage caused by the content posted online and the modification or removal of this content – to be examined jointly by

⁵³ It should also be recalled that in *Bolagsupplysningen*, the Court decided that the forum of the centre of the victim’s interests could be invoked by legal persons. In this case, for the action to be brought in this forum, the content placed online must make it possible to directly or indirectly identify the legal person in question.

⁵⁴ Case C-800/19 *Mittelbayerischer Verlag*, ECLI:EU:C:2021:489, para. 38.

⁵⁵ Case C-251/20 *Gtflix Tv*, not yet published.

⁵⁶ *Ibid.*, para. 34.

a single court.⁵⁷ The claimant can always submit a claim for compensation for the damage in the Member State of the place of accessibility of the website. And this request ‘is subject only to the condition that the infringing content is accessible or has been accessible in this territory’.⁵⁸ But such jurisdiction is limited to the ‘claim for compensation’ (for local damage only, in line with the previous case law), to the exclusion of the request for rectification and deletion of the contentious content.

This decision is arguably coherent with *Bolagsupplysningen*. However, this does not detract from the force of the referring court’s point about the possible incompatibility between a judgment issued by the court of a Member State A about the rectification and modification of the contentious content (place of establishment of the defendant or place of the centre of interests of the victim), on the one hand, and a judgment issued by the court of a Member State B concerning the local damage stemming therefrom (place of accessibility of the content), on the other.

Could this problem be avoided by relying on the rules of jurisdiction for the consolidation of cases under Article 8 of Brussels I Bis Regulation? The provision only allows the consolidation of cases in four (limited) types of related cases, which do not cover the issue at stake here.⁵⁹ *De lege ferenda*, one way to remedy this issue would be to add a category of cases in Article 8. Then, however, it should be provided that other legal actions related to other local damages be joined to the action concerning both local damages and the rectification or deletion of the contentious content, too. Otherwise, incompatibilities between several judgments rendered in several Member States where a local damage is claimed could potentially arise.

B. Commercial Torts

In the field of commercial torts, the CJEU has applied Article 7(2) to online disputes about (a) copyrights, (b) selective distribution and (c) unfair competition. It has also opened the door, in a case concerning an EU trade mark, to a potential overturning of the *Wintersteiger* case law (d).

1. Copyrights (and some other IP rights): the ‘protection-connection’ criterion

As far as copyrights are concerned, the Court has insisted that to grant jurisdiction, it is first necessary to establish that the right invoked by the claimant is protected under the law of the Member State of the forum.⁶⁰ In that respect, it must be demonstrated, very concretely, that the

⁵⁷ Ibid, para. 36.

⁵⁸ Ibid, para. 41.

⁵⁹ Article 8 provides as follows: ‘A person domiciled in a Member State may also be sued: (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings; (2) as a third party in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case; (3) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending; (4) in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.’

⁶⁰ Case C-170/12 *Pinckney*, ECLI:EU:C:2013:635, paras 32–33.

conditions for the protection provided for by this law are met, *with regard to the connection of the situation with the territory of the forum*.

This approach appears to involve, once again, some form of confusion between the question of the location of the damage (jurisdiction) and that of its existence (substantive law), as was already the case in *Wintersteiger*. Yet, the question of the location of the infringement is necessarily prior to and distinct from that of its existence.

Interestingly, the CJEU case law in this field does not appear to provide for a difference of regime between cyber torts and ‘classic’, offline torts.⁶¹ Hence, in *Hi Hotel*, in an offline context, the Court ruled that the action based on the alleged violation of copyrights may be brought in the Member State where the copyright is protected, provided that the alleged damage is likely to materialize in the forum, which may result from the possibility of obtaining the reproduction of the work in a bookstore located in the forum.⁶² It thus seems that, in the matter of copyright, the court of a Member State has jurisdiction over the local damage, only if it is possible to obtain a reproduction of the work in that Member State.

Later, in *Hejduk*, the CJEU implemented this principle in the context of an allegation of infringement of copyrights and related rights by the posting on a website of photographs without the consent of their author. The Court recalled that jurisdiction with respect to the place of occurrence of the damage stems from the accessibility of the work in question, including via a website, in so far as the right concerned is protected in the Member State in question.⁶³ The Court further specified that it is not required that the website be directed to the Member State of the court seized.⁶⁴

2. Selective distribution: an extension of the ‘protection-connection’ criterion

In the later *Concurrence* case,⁶⁵ the Court was requested to address the question of liability for breach of the prohibition of sale outside a selective distribution network. The circumstances of the case are quite complex, but the central question was quite simple: can the authorized distributor for the sale of certain products in the territory of a Member State (here, France) bring an action directed against a competitor established in another Member State (in this case, Amazon Services Europe established in Luxembourg), which offers the products in question

⁶¹ It is remarkable that, according to Bernhard Kosh, this corresponds to a general tendency in EU law, including EU tort law (see B. Kosh (2014), ‘Cyber torts: something virtually new’, *JETL* 5(2), pp. 133–164). Cf. *AMS Neve* and *Coty Germany*, as far as they concern international jurisdiction over the infringement and validity of Community trade marks, pursuant to Article 95.7 of Regulation 207/2009 (see further below).

⁶² Case C-387/12 *Hi Hotel*, ECLI:EU:C:2014:215, para. 35.

⁶³ Case C-441/13 *Hejduk*, ECLI:EU:C:2015:28, paras 29 and 34.

⁶⁴ *Ibid.*, para. 32. In addition, what is less frequent, in *Hejduk*, the CJEU gave some indications on the jurisdiction in respect of the place of the event giving rise to the damage in the context of the Internet. It ruled that the causal event should be considered as the triggering of the technical process of displaying the photographs on the website, so that the causal event lies in the behaviour of the owner of this site. In accordance with a well-established approach, the Court then decided that the acts or omissions in question, as thus identified, must be deemed to be located at the place of establishment of the person to whom the said acts or omissions are attributed, rather than where these acts or omissions are actually located. Thus, with regard to the posting of photographs, jurisdiction is attributed to the courts of the Member State where the head office of the person who took and executed the decision to post photographs on the website is located (*ibid.*, para. 24).

⁶⁵ Case C-618/15 *Concurrence v Samsung*, ECLI:EU:C:2016:976.

on the Internet through websites directed to various countries (Amazon.de, Amazon.co.uk, Amazon.es, Amazon.it and Amazon.fr), before the courts of that State (France)? In fact, the authorized distributor (Concurrence) was seeking to obtain an injunction to order the competitor (Amazon) to remove the products in question from these websites, before the French courts. The question was to know whether the place of the damage was located in France, for the purpose of the application of Article 7(2).

The Court applied its copyrights-related analysis. As a preliminary matter, this analysis requires establishing that the right at stake is protected in the Member State of the forum (France). Then, an additional connection with the forum must be demonstrated, which varies depending on the nature of the right concerned and the circumstances of the case. In *Concurrence*, the Court considered that in the event of the violation, via websites, of the conditions of a selective distribution network, the damage that a distributor can claim is the reduction in the volume of its sales as a result of those made in violation of network terms and consequent loss of profits.⁶⁶ In this respect, the CJEU stated that it is immaterial that the websites in question operate in States other than the forum, although this is subject to the condition that the acts committed in these Member States have led to or risk causing the damage alleged within the forum.⁶⁷

This last condition imposed by the Court is absolutely essential (and it is quite unfortunately absent from the operative part of the judgment, which can lead to confusion on this point). This condition means that it is not sufficient, in order to establish jurisdiction, for a person to claim having suffered damage in the forum due to a reduction in sales in the Member State in question. It is also necessary to demonstrate that this alleged harm has been caused (or is likely to have been caused) by the activities that took place on websites operating in other States. This element is the connecting link that is necessary, *from a jurisdictional perspective*, to allow a claim to be brought in the relevant Member State.

In the case in question, Amazon claimed that its websites operating outside of France did not target the French public, and that it was necessary to check whether the websites in question allowed the shipping of the products offered for sale in France. The CJEU seems to have endorsed this approach, as it required the referring court to verify whether the acts committed on the websites had caused or were likely to cause the damage alleged in the forum.⁶⁸ The Court thus appears to have validated the approach consisting in verifying the link between the activities carried out on the websites in question and the forum.

3. **Unfair competition: a generalization of the protection-connection criterion**

The CJEU has extended its case law about copyrights (both online and offline), examined above, to unfair competition. In the 2014 *Coty Germany* case,⁶⁹ the Court was confronted by an issue of unfair competition by unlawful comparative advertising or unfair imitation of a sign protected by a Community trade mark. It ruled that, pursuant to Article 7(2), the claimant could bring proceedings before the court of the Member State where the right asserted by the plaintiff is protected, in so far as the damage materializes or is likely to materialize in this forum because of the violation of this right (place of damage). In that case, it was

⁶⁶ Ibid, para. 33.

⁶⁷ Ibid, para. 34.

⁶⁸ Ibid, para. 30.

⁶⁹ Case C-360/12 *Coty Germany*, ECLI:EU:C:2014:911.

alleged that a Belgian person had sold, in Belgium, a perfume that was said to be an unfair imitation of another perfume sold by the claimant in Germany. The Court considered that the referring court (in Germany), in order to determine its jurisdiction, had to assess ‘in the light of the evidence at its disposal, the extent to which the sale of the [perfume] which occurred in Belgium, was capable of infringing provisions of the German law against unfair competition and, thereby, of causing damage within the jurisdiction of that court’.⁷⁰

It must be emphasized that, in spite of the fact that a (Community) trade mark was involved, this point of the *Coty Germany* judgment concerns the issue of *unfair competition*, not the counterfeiting nor validity of the (Community) trade mark itself. This last question is governed by Regulation 207/2009 on the Community trade mark, which includes specific jurisdictional rules laid down in Article 97.⁷¹ This issue was discussed in another case, which is analysed in the next section.

4. EU trade marks: a potential overturning of *Wintersteiger*

In the 2019 *AMS Neve* case,⁷² the Court was asked a series of questions concerning an EU (Community) trade mark governed by Regulation 207/2009. The circumstances of the case are quite simple: an action for infringement had been brought in England against a Spanish company offering for sale allegedly counterfeit products on a website intended for English consumers. The CJEU had to determine the relevant connecting factor for locating the infringement in such a context. The infringement action was based on the alleged registration of both a national and a Community trade mark. The Court was not asked to assess jurisdiction over the national trade mark in light of the *Wintersteiger* case law. It was solely requested to

⁷⁰ Ibid, para. 58.

⁷¹ This provision reads as follows:

1. Subject to the provisions of this Regulation as well as to any provisions of Regulation (EC) No 44/2001 applicable by virtue of Article 94, proceedings in respect of the actions and claims referred to in Article 96 [concerning infringement and validity] shall be brought in the courts of the Member State in which the *defendant is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment* [(OPTION 1)].
2. If the defendant is neither domiciled nor has an establishment in any of the Member States, such proceedings shall be brought in the courts of the Member State in which the plaintiff is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment.
3. If neither the defendant nor the plaintiff is so domiciled or has such an establishment, such proceedings shall be brought in the courts of the Member State where the Office has its seat.
4. Notwithstanding the provisions of paragraphs 1, 2 and 3:
 - (a) Article 23 of Regulation (EC) No 44/2001 shall apply if the parties agree that a different Community trade mark court shall have jurisdiction;
 - (b) Article 24 of Regulation (EC) No 44/2001 shall apply if the defendant enters an appearance before a different Community trade mark court.
5. Proceedings in respect of the actions and claims referred to in Article 96 [concerning infringement and validity], with the exception of actions for a declaration of non-infringement of a Community trade mark, may also be brought in the courts of the Member State in which the *act of infringement has been committed or threatened* [... (OPTION 2)]. [emphasis added]

⁷² In this regard, as noted by Tristan Azzi, *Coty Germany* and *AMS Neve* specifically concern Article 97.5, but the first one, rendered in an offline context, gives priority to the place of materialization of the damage and the second one grants prominence to the place of the causal event (see T. Azzi (2020), ‘Compétence juridictionnelle en matière de cyber-délits: l’incontestable déclin du Critère de l’accessibilité (À propos de plusieurs arrêts récents)’, *Rev. crit. DIP*, pp. 695–710, at 700–701).

rule on the question of jurisdiction concerning the Community trade mark with regard to the specific jurisdictional ground provided for in Regulation 207/2009, namely Article 97.5 which grants jurisdiction to the courts of the Member State ‘in which the act of infringement has been committed or threatened’.⁷³

The Court placed this question in a more general context, by considering the interactions between Regulation 207/2009 and the general instruments of European private international law including the case law on these instruments.

The main striking point which arises from *AMS Neve* is that jurisdiction is granted to the courts of the Member State ‘within which the consumers or traders to whom [...] advertising and [...] offers for sale are *directed* are located, notwithstanding that [the defendant] took decisions and steps in another Member State to bring about [the] electronic display’.⁷⁴ In other words, the CJEU retained the criterion of the place of destination of the content constituting the alleged infringement.

At first sight, this finding contrasts with *Wintersteiger*, where the CJEU decided, in relation to a cyber counterfeiting of a national trade mark, that for the purpose of the application of Article 7(2) of Brussels I Bis Regulation, the place where the harmful event occurred is located, amongst others, at the place of registration of the mark (place of the damage). As noted above, this criterion has been criticized because it reflects an amalgam between the question of the merits of the case and that of jurisdiction: if the registration of a trade mark on a territory is necessary to establish an infringement on this territory, it should not suffice to establish jurisdiction when the alleged facts of infringement have no connection with the territory of the forum. An additional connection with the forum should be required to grant jurisdiction. Then, one could hesitate between the criterion of the accessibility of the website on the territory (minimalist solution) or the criterion of the direction of the website towards this territory (a more demanding solution, mirroring what is called in French the ‘focusing theory’ or *théorie de la focalisation*). *AMS Neve* seems to fit squarely into the latter approach.

Should this be seen as the beginning of the overturning of *Wintersteiger*? The Court’s insistence on the autonomy of the interpretation of Regulation 207/2009, and the fact that this regulation is a *lex specialis* compared to Article 7(2) of Brussels I Bis Regulation,⁷⁵ make this doubtful. However, in *AMS Neve*, the Court also emphasized the requirement of having ‘a degree of consistency’ in the interpretation of both Regulation 207/2009 and the Brussels regime framework, and specifically mentioned the *Wintersteiger* case.⁷⁶

It is therefore not impossible that *AMS Neve* is to play the role of a ‘judgment of transition’⁷⁷ allowing the CJEU to move from the accessibility criterion towards that of target or direction, in order to ground jurisdiction in the field of cyber counterfeiting for the purpose of the application of Article 7(2) of Brussels I Bis Regulation.

⁷³ This is one of the two jurisdictional options provided for in the Regulation when the claim concerns the infringement or validity of a Community trade mark (see above, note 71).

⁷⁴ Case C-172/18 *AMS Neve e.a.*, EU:C:2019:674, para. 65 (emphasis added).

⁷⁵ See *ibid.*, para. 58.

⁷⁶ *Ibid.*, paras 57–58.

⁷⁷ E. Treppoz (2019) ‘Chronique Droit européen de la propriété intellectuelle – Contrefaçon sur internet et marque de l’Union: la consécration du critère de l’activité en matière de compétence’, *R.T.D. Eur.*, p. 915.

IV. AN ATTEMPT TO SYNTHESIZE THE CURRENT EU PRINCIPLES OF JURISDICTION OVER CYBER TORTS AND THEIR LIMITS

When considering all the cases that have been handed down by the CJEU so far in the field, an attempt can be made to synthesize the current EU principles of jurisdiction over cyber torts.

The first point is that a fundamental distinction must be made between civil tort, or at least personality rights (which are the sole civil matters that have been addressed by the CJEU case law so far), and commercial torts: IP national rights, selective distribution and unfair competition (that can be trade-mark-related).

Second, when the dispute involves the infringement of personality rights (typically defamation), the claimant can bring proceedings before: (1) the courts of the Member State where the defendant is established (in respect of all damages); (2) the courts of the Member State where the victim's centre of interests is situated (in respect of all damages); and (3) the courts of the Member State where the infringing content placed online is accessible (in respect of domestic damages only) (*eDate*).

In respect of ground (2), the victim's centre of interests, the claimant can be both a natural or a legal person and both material and immaterial damage can be concerned by the claim (*Bolagsupplysningen*). In addition, the criterion of the centre of interests cannot ground the legal action when the contentious content posted online does not include 'objective and verifiable elements which make it possible, to identify, directly or indirectly, [the victim] as an individual' (*Mittelbayerischer Verlag*). In this regard, the mere fact that a person belongs to a vast identifiable group is not sufficient. Conversely, it is not required that the content put online specifically targets the victim; it suffices that the person is identified with a more restricted group (for example a family).

In respect of ground (3), the website accessibility, the CJEU has excluded actions for injunction aimed at modifying or deleting the contentious online content (*Bolagsupplysningen*). This exclusion applies even when the claim seeks both the modification or removal of the online contents and damages. In that case, the court of website accessibility can only entertain the claim for damages (*Gtflix Tv*).

Third, when the dispute involves the infringement of intellectual property rights such as copyrights (*Hi Hotel, Hejduk*), selective distribution (*Concurrence*) or unfair competition (including in the context of the infringement of a trade mark (*Coty Germany*)), the claimant can bring proceedings before the courts of: (1) the Member State where the defendant is established (in respect of the whole damage); or (2) the Member State where the allegedly infringed right is protected under the law of the Member State of the forum (first condition), when it is established that the conditions for the protection provided for by this law are met, with regard to the connection of the situation with the territory of the forum (second condition) (in respect of the local damage).

Hence, ground (2) requires that the right allegedly infringed upon be protected in the forum *and* that there is an additional connection with the forum. This connection varies according to the nature of the right concerned (and depends on the specific circumstances of the case, which requires a case-by-case analysis). If a copyright is at stake, it must be demonstrated that the alleged damage is likely to materialize within the jurisdiction of the court seized. In the context of the Internet, this risk stems from the possibility of obtaining, by means of an Internet site accessible within the jurisdiction of the court seized, a reproduction of a protected work

(*Hejduk*). In an offline context, the risk of materialization of the damage also stems from the possibility of obtaining the reproduction of the work in the jurisdiction of the court seized, for example in a bookstore located in this jurisdiction (*Hi Hotel*).

In the field of selective distribution, the Court considered that in the event of the violation, via some websites, of the conditions of a selective distribution network, the damage that a distributor can claim is the reduction in the volume of its sales as a result of those made in violation of network terms and consequent loss of profits. In this respect, it is immaterial that the websites in question operate in States other than the forum, although this is subject to the condition that the acts committed in these Member States have led to or risk causing the damage alleged within the jurisdiction of the court seized (*Concurrence*). Finally, when the right concerns unfair competition, it is necessary to demonstrate the existence of a relevant link with the Member State, making it possible to establish the violation of the law of this State relating to the repression of unfair competition (*Coty Germany*).

This second ground is what can be called the ‘protection-connection’ criterion, which is applicable not only in online contexts but also in ‘classic’, offline cases (*Hi Hotel*, *Coty Germany*). In this regard and with respect to the fact that it concerns several fields, it would appear that the adoption of this criterion is generalized in commercial matters, except perhaps in the case of intellectual property rights being subject to national registration (see next point).

Fourth, when the dispute involves the infringement of intellectual property rights the legal protection of which is subject to national registration (such as a national trade mark), the claimant can bring proceedings before the courts of: (1) the Member State where the defendant is established (in respect of the whole damage), at least if the defendant is an advertiser, and possibly also when the defendant is an intermediary such as a service provider; or (2) the Member State where the infringed right is registered (in respect of the local damage) (*Wintersteiger*). However, there are some hints in the case law relating to Regulation 2017/2009 on Community trade marks that this last criterion may be revisited and possibly overturned, in favour of another criterion focusing on the place of destination of the online content constituting the alleged infringement (*AMS Neve*).

Overturning *Wintersteiger* to replace the criterion of the place of registration with that of the place of destination of the online content might involve distinguishing trade marks and other registered IP rights from other commercial matters (while one could consider that the criterion of the place of registration corresponds to one of the forms that the generalized protection-connection criterion can take). However, such distinction would be welcome in view of the objectives underlying jurisdictional rules in EU private international law, namely the jurisdictional objective of the sound administration of justice, which requires fulfilling the proximity, or close-connection, purpose, and avoiding the multiplication of fora to ensure a certain level of legal certainty for the defendant.

Conversely, the protection-connection criterion is questionable to the extent that it reflects considerations pertaining to substantive law. It thus entertains a certain confusion between the question of the location of the damage (jurisdiction) and that of its existence (substantive law), while the question of the location of the infringement is necessarily prior to and distinct from that of its existence.

Finally, as highlighted by the *Bolagsupplysningen* case, it seems important that the CJEU decisions involving activities on the Internet consider not only its (questionable) ubiquitous nature, but also the specificities and fast evolution of its regulation, at the national, regional and international scales.