

DEFAMATION ON SOCIAL MEDIA – CHALLENGES OF PRIVATE INTERNATIONAL LAW / Sandra Sakolciová

Sandra Sakolciová
Comenius University in Bratislava,
Faculty of Law
Šafárikovo nám. 6,
Bratislava, Slovakia.
sandra.sakolciov@flaw.uniba.sk.
ORCID: 0000-0003-1693-7976

Abstract: *There is no doubt that social media have become a very important part of many people's everyday life. The consequences of their usage is an increased engagement in defamation, most likely due to the aspect of anonymity present in the online environment. Such cross-border (or more precisely border-less) defamation raises difficult challenges in terms of jurisdiction and applicable law. These challenges, which will be analysed in more detail in the article, remain unresolved up until today. Moreover, negative effects occur not only within private international law itself, but status quo significantly influences the exercise of basic human rights, too. Besides analysing the existing EU legal framework and applicable case-law, the article also looks into the possible alternatives.*

Key words: *Defamation; private international law; human rights; EU law; freedom of expression; social media; Brussels I bis; Rome II*

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1. INTRODUCTION

Private international law is a set of rules which the national courts apply in order to determine whether they have jurisdiction to decide a case containing a foreign element and if so, to determine the national substantive law which should be applied. Even though private international law forms a part of national law, the ongoing “Europeanisation” of this branch makes it subject to regulations of the European Union. Very important unification activities are conducted also by the Hague Conference on Private International Law (see Lysina, Hatápka, & Ďuriš, 2016). In cases of defamation on social media, the questions of who will decide the case and according to which law are very important and challenging, because internet has no borders. Even though social media is not a new phenomenon and defamation that occurs there has been considered as raising some of the most difficult issues in private international law (Mills, 2015, p. 1), the existing situation has not changed for many years now. This article explains the impact of social media use on defamation, analyses the relevant legal rules existing within the European Union, examines the problematic issues concerning jurisdiction and applicable law in online defamation and presents possible alternatives. The legal concerns will be explained on illustrational cases.

2. THE IMPACT OF SOCIAL MEDIA ON DEFAMATION

Social media is considered by people who use it as a source of fun and relax, as a „newspaper“ which they read to gain the newest information from their country and from the world, and definitely as a tool to communicate with their relatives or with anyone who uses the same social media platform. They are very popular both in terms of number of users and the average time the users spend there. Facebook alone has almost 2.5 billion users. In other words, if Facebook was a country, it would be the biggest in the world. As regards the time spent on social media platforms, the average in 2018 was 144 minutes per day which shows a 62.5% increase since 2012. It is estimated that people spend almost 7 years of their life time on social media. Paradoxically, not even 2 years are spent by socializing in the real “offline” world according to the statistics (BroadbandSearch, 2020). This means, that the opportunity to engage in (online) defamation is simply increased by the existence and frequent use of social media which make it so easy to write anything and send it to the world basically just by a click on a mouse.

It is crucial to point out how defamation changed with the time and technology. In the era of traditional media, such as newspapers, the published content was a product of thoughtful reflection (e. g. by professional journalists) which was usually subject to revision at more levels. On the other hand, the content on social media is mostly created in spontaneous and informal way by anyone who has connection to the internet. People do not need to study journalism or apply for a position in a radio or a TV to publish information across the world. The fact is that not only professional newspaper articles, but also the content we - basic users - publish on the internet deserves protection under the right of freedom of expression. This is, however, not how it is perceived by most of the social media users - it is rather just a simple “chatting” or “commenting”. On the internet, people feel liberated to speak their minds as they please. Complex questions, such as when and where the publication is made and by whom it is deemed to be understood are not thought about at all (George, 2014, p. 136). As a result, defamation can be much more severe on the internet where the content is likely to reach a large number of recipients. Moreover, the dark side of the anonymity and impersonality of the online environment encourages people to write also hurtful, exaggerated or defamatory things about other people. As Patrick George in his article about social media accurately expressed – things that are nowadays said publicly on the internet, especially on social media, had probably lurked in the past in private conversations or went unsaid in peoples’ private thoughts. All the hatred, trolling and defamation which happen so often now on social media are considered to be the antisocial phenomenon of these times (2014, p. 137).

3. JURISDICTION AND APPLICABLE LAW UNDER THE EU LAW

This part of the article analyses existing rules of the EU private international law concerning defamation and privacy rights including the relevant jurisprudence of the Court of Justice of the European Union (hereinafter referred to as the “CJEU”). It deals with two relevant regulations, namely Brussels I bis Regulation¹ (Jurisdiction) and Rome II Regulation² (Applicable law), and provides an important insight into their interpretation

¹ 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.

² Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

by the CJEU in the context of *offline* defamation (*Bier, Shevill*) and its later adaption to *online* defamation (*eDate Advertising, Bolagsupplysningen OÜ*).

a) Jurisdiction

In order to determine jurisdiction in civil and commercial matters (including defamation and privacy rights), the Member States of the European Union, except Denmark,³ have to apply the rules contained in the Brussels I bis Regulation. However, if the defendant is not domiciled in the EU Member State, the jurisdiction of the courts shall be determined by national law of the respective Member State (Article 6 of the Brussels I bis Regulation).⁴ The exceptions are contained in the Brussels I bis Regulation itself, namely in the Article 25 (when the parties have agreed that courts of a Member State shall have the jurisdiction – prorogation of jurisdiction), Article 18 (consumer contracts with professionals domiciled in a third state) and Article 20 (individual employment contracts, if the employer has some form of establishment in a Member State).

The general rule which determines jurisdiction in the matters of violation of privacy and personality rights is Article 4 (1) which stipulates that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State. According to Article 7 (2) of the Brussels I bis Regulation, a person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for *the place where the harmful event occurred or may occur*. In the case *Bier*,⁵ the CJEU ruled on what should be understood under this phrase;⁶ the place where the harmful event occurred could be both i) the place of event giving rise to the damage (*Handlungsort*) as well as ii) the place where the damage occurred⁷ (*Erfolgsort*).⁸ It is therefore up to the plaintiff, who has an option to commence proceedings at one of the aforementioned places (principle of ubiquity). Professors Vick and MacPherson see a negative aspect of this decision. In their opinion, the approach taken by the CJEU, which gives the plaintiffs a choice to decide where to sue, gives rise to forum-shopping (1997, p. 973).

The established principles were applied in the defamation context in a very important judgment in the case *Shevill*.⁹ The case was about Ms. Shevill, an English student working temporarily in Paris, who claimed to have been defamed by the French newspaper called *France-Soir*, which printed an article accusing her of drug trafficking and money laundering. She brought a defamation suit before the British courts. *France-Soir* was mainly distributed in France – it is estimated that more than 237 000 copies were sold, whereas only 230 copies were distributed in England and Wales (only 5 in Yorkshire where Ms. Shevill resided). The newspaper therefore challenged the English

³ In 2007, the European Community signed a treaty with Denmark, Switzerland and Norway, the new Lugano Convention, which is substantially the same as the 2001 Brussels I Regulation.

⁴ In the Slovak Republic, international agreements will prevail over the national rules (Article 2 of the Act No. 97/1963 Coll. on Private International Law and the Rules of Procedure Relating Thereto).

⁵ CJEU, judgement of 30 November 1976, *Handelskwekerij G. J. Bier BV v. Mines de Potasse d'Alsace SA*, C-21/76 (hereinafter referred to as "*Bier*").

⁶ At the time the *Bier* case was decided, Brussels Convention of 27 September 1968 was in force and the Court interpreted the meaning of Article 5 (3), which has the same wording as the Article 5 (3) of Brussels I Regulation and the Article 7 (2) of the Brussels I bis Regulation, which is currently in force. Since the wording of the mentioned articles is the same, the case-law of the CJEU is still applicable and for the purposes of clarity it will be only referred to the Article 7 (2) of the Brussels I bis Regulation.

⁷ See *Bier*, par. 19.

⁸ The German phrases „*Handlungsort*“ and „*Erfolgsort*“ are used in the article due to their precision and clarity.

⁹ CJEU, judgement of 7 March 1995, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA*, C-68/93 (hereinafter referred to as "*Shevill*").

courts' jurisdiction on the grounds that the "place where the harmful event occurred" was in France and no harmful event had occurred in England.¹⁰ The CJEU ruled that the plaintiff may (i) either bring proceedings before the court of the place where the publisher is established and seek recovery of the damages suffered worldwide or ii) enjoy the benefit of suing locally, but having to restrict the claim to the damages sustained within that forum (so called "mosaic principle"). The first possibility relates to the criterion of *Handlungsort* which is the place where the publisher of the newspaper in question is established since "that is the place where the harmful event originated and from which the libel was issued and put into circulation."¹¹ The second possibility was to sue according to *Erfolgort*, i. e. the place where the publication is distributed if the victim is known in those places since that is the place where "the injury caused by defamatory publication to the honour, reputation and good name of a natural or legal person occurs."¹² It follows that the courts of each Member State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his or her reputation have jurisdiction to rule on the injury caused in that state to the victim's reputation.¹³ According to this analysis, Ms. Shevill - the plaintiff and the alleged victim of defamation, could sue in France and claim any and all damages suffered anywhere in the European Union or she could decide to lodge her suit in England, but only claim damages which were caused in England (Warshaw, 2006, p. 280).

There are different perceptions of the *Shevill* judgment. On one hand, there are opinions, that it favours plaintiffs, because it provides them with a possibility to strategically choose the forum, since the courts can basically always exercise jurisdiction as long as the person was harmed "in some way" in the given forum. Even though a plaintiff may seek limited damages in a place different than the place of where the publisher is established, it is often rendered irrelevant because by merely establishing jurisdiction, a plaintiff has raised considerable leverage for a settlement. The judgment does not provide any barrier to claim defamation in a forum, which has a minimum connection with the publisher, what may have a chilling effect on freedom of expression (Warshaw, 2006, pp. 281–282). On the other side, there are scholars who consider *Shevill* as striking a fair balance between interests of a publisher and an alleged victim (Kuipers, 2015). By distribution of the publication in a specific Member State, a publisher may reasonably foresee the jurisdiction of the courts of that Member State.

The *Shevill* case concerned "offline" defamation and interpretation of the Article 7 (2) of the Brussels I bis Regulation in the context of traditional media (newspaper) which is distributed physically to designated states. The question that arises in the matter of "online" defamation is whether this approach is suitable also for new media where the form of content "distribution" differs. Guidance is given in the two aforementioned judgments of the CJEU, namely *eDate Advertising*¹⁴ and *Bolagsupplysningen OÜ*.¹⁵

The *eDate Advertising* case was in fact two cases which the CJEU dealt with jointly. The first case *eDate Advertising GmbH v X* was about an alleged violation of privacy rights of a German citizen (referred to as "X") by a content published on an internet portal operated by a company based in Austria. The second one, *Oliver Martinez and*

¹⁰ See *Shevill*, par. 3-15.

¹¹ *Ibid.*, par. 33.

¹² *Ibid.*, par. 29.

¹³ *Ibid.*, par. 30.

¹⁴ CJEU, judgement of 25 October 2011, *eDate Advertising GmbH v. X* and *Olivier Martinez and Robert Martinez v Soci t  MGN LIMITED*, joined cases C-509/09 and C-161/10 (hereinafter referred to as "eDate Advertising").

¹⁵ CJEU, judgement of 17 October 2017, *Bolagsupplysningen O  and Ingrid Ilsjan v Svensk Handel AB*, C-194/16 (hereinafter referred to as "Bolagsupplysningen O ").

Robert Martinez v Société MGN Ltd, involved alleged violation of privacy rights by publishing information and photos on a website operated by the English company. The legal question that the CJEU had to deal with was how “the place where the harmful event occurred or may occur”, as stipulated in the Brussels I bis Regulation, should be interpreted, if the case concerns a violation of personality rights on the internet. The CJEU ruled as follows:

„...in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seized.”¹⁶

By this ruling, another head of jurisdiction, where the plaintiff could claim the entirety of damages for the harm suffered, has been added (Jütte, 2017). The CJEU explained how “centre of interests” shall be understood and ruled that *„the place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.”*¹⁷ According to some authors (See Mills, 2015, p. 19), this definition is too vague and is likely to negatively influence publishers of online material.

The question of whether special problems arising with online defamation would justify a special jurisdictional rule seems to have been decided by the CJEU, which actually developed a special rule in its jurisprudence. CJEU appears to have introduced a *forum actoris* while it has always consistently held that such a forum is incompatible with the structure of Brussels I bis (Kuipers, 2015).

The previous cases involved natural persons, but the Court of Justice of the European Union clarified the situation as regards legal persons and their defamation in the online environment in the case *Bolagsupplysningen OÜ*, decided in October 2017. It involves an alleged violation of privacy rights on the internet and interpretation of the Article 7 (2) of the Brussels I bis Regulation. The main difference was that the injured party was a legal person that claimed not only damages but also rectification and removal of comments. The CJEU confirmed that the principles from *eDate Advertising* apply also to legal entities and ruled that: *“...a legal person claiming that its personality rights have been infringed by the publication of incorrect information concerning it on the internet and by a failure to remove comments relating to that person can bring an action for rectification of that information, removal of those comments and compensation in respect of all the damage sustained before the courts of the Member State in which its centre of interests is located...”*¹⁸ It further dealt with a question of where the centre of interests of such an entity is located, because the company had its registered seat in Estonia, but conducted most of their business in Sweden. According to the CJEU, centre of interests of a legal person reflects *“the place where its commercial reputation is most*

¹⁶ *eDate Advertising*, par. 52.

¹⁷ *eDate Advertising*, par. 49.

¹⁸ *Bolagsupplysningen OÜ*, par. 22.

firmly established and must, therefore, be determined by reference to the place where it carries out the main part of its economic activities."¹⁹

b) Applicable law

The Rome II Regulation on the law applicable to non-contractual obligations²⁰ which came into force on 11 January 2009, expressly states that it does not apply to the issues of defamation, as well as of privacy rights. The relevant Article 1 (2) g) of the Rome II Regulation stipulates that "*non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation are excluded from its scope.*" However, this exclusion was intended to be temporary, because the regulation contains a review clause in Article 30 (2) which required the Commission to carry out a study on choice of law in the context of defamation and privacy rights by the end of 2008.²¹ Accordingly, the Commission issued a comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality (European Commission, 2009). This study revealed that in the majority of the Member States, the infringement of personality rights is governed by the general conflict of law rules on the law applicable to non-contractual obligations (only five EU states adopted a special conflict of law rule dealing with defamation) and the mostly used criterion is *lex loci delicti commissi*. However, the criterion of law of the place where "the delict was committed" is not interpreted uniformly by national courts (2009, p. 6).

The Slovak Republic is among the countries where infringement of personality rights is governed by the general conflict of law rules relating to non-contractual obligations, namely by Article 15 of the Act No. 97/1963 Coll. on Private International Law and the Rules of Procedure Relating Thereto. According to this article, the pertinent court has right to determine that applicable law is either the law of the state where i) the damage occurred (*lex loci damni infecti*) or of the state where ii) the event giving rise to the claim for damages occurred (*lex loci delicti commissi*). This provision expressly stipulates applicable law and shall not be understood as a choice of law (Lysina, Štefanková, Ďuriš, & Števíček, 2012). To our knowledge, there is no case-law providing relevant interpretation of the specified criteria in the internet context.

Based on results of the survey presented by the Commission, correspondents (over 10 000 professionals) were divided in their opinion as to which conflict rule should be used. The majority was in favour of allowing the damaged party to choose, based on the criterion of *locus damni*. Unsurprisingly, press and media associations were clearly in favour of using the criterion of the place in which the publisher is established (2009, p. 7).

Even though it is clear that reaching a consensus among the various existing interests is difficult, it is not plausible to leave the situation as it is now. The vast majority of professionals, namely 85% of the respondents are in favour of harmonization of the law applicable to defamation and therefore consider it necessary for the European Commission to do something on this issue (2009, p. 8).

¹⁹ Ibid., par. 41.

²⁰ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

²¹ Art. 30 (2) of the Rome II Regulation: „Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.”

4. PRACTICAL EXAMPLES AND LIABILITY OF SOCIAL MEDIA

At this point, the analysed rules and principles will be applied in two illustrational cases. The first case considers a typical clash between freedom of expression and privacy rights in traditional media: *A famous Czech newspaper accused a well-known Slovak lawyer of plagiarism. The Slovak lawyer has office in Prague and practises mainly in the Czech Republic. Surprised and ashamed by the article, he files a suit in the Czech Republic to obtain damages suffered to his reputation which resulted in loss of clients.* This is obviously a case of "offline" defamation. The Czech courts would confirm their jurisdiction based on EU law, as there is no doubt that Czech Republic is the place where the harmful event originated and from which the libel was issued and put into circulation (*Handlungsort*).²² There is also no doubt that the damage occurred in the territory of the Czech Republic, where the Slovak lawyer has practised law and had a certain reputation which suffered due to the published article (*Erfolgsort*). If the Slovak lawyer wished to sue in Slovakia, he could take advantage of the principles established in the *Shevill* case and sue locally. He would, however, have to restrict the claim to the damages sustained in Slovakia which would probably occur due to the proximity of both countries but their extent would be likely lower than in the Czech Republic where he has the office and majority of clients. Nevertheless, it was reasonable to sue before the Czech courts, as he could claim all the damages including damages suffered in Slovakia. The Czech courts would determine the law applicable to the dispute according to the Czech private international rules, since defamation is excluded from the scope of the Rome II Regulation.²³

The second illustrational case reads as follows: *There is a group on Facebook, which is dedicated to private international law. This group has hundreds of members from all over the world, especially professors and other legal scholars as well as practitioners interested in discussing topics of private international law and sharing relevant information and opinions. One day, an Austrian professor shares an article accusing a French professor (a group member living already for 2 years in Hungary) of plagiarism. Lots of comments appear under the article throughout the week, some of them include further accusations and insults. The French professor, surprised and ashamed by the article and the comments, wants to file a suit in his home country to obtain damages suffered to his reputation.* Assessing jurisdiction in this case is more challenging as in the first one. At first, we need to know who the French professor is going to sue. There are three most probable possibilities, namely 1) the Austrian professor for publishing the article, 2) the users for publishing their defamatory comments and/or 3) Facebook for not deleting the defamatory content.

In the first two options, the French professor could choose between the place in which the publisher of the content (Facebook) is established and the place in which the centre of his interests is based (Hungary).²⁴ If he did not want to sue in any of these countries, but in his country of origin (France), he could choose to use the advantage of the jurisdictional rule established in *eDate Advertising* and sue in the state, where the online content is or was accessible (but restrict his claim to damages accordingly). The fact that the French professor can lodge his claim in any country where the content was

²² See *Shevill*, par. 33.

²³ The courts would firstly check if there is any international agreement before applying the national rules. There is a bilateral agreement between both countries, namely the Treaty between the Slovak Republic and the Czech Republic on Legal Aid provided by Judicial Bodies and on Settlements of Certain Legal Relations in Civil and Criminal Matters from 29.10.1992. This treaty, however, does cover the present matter.

²⁴ See *eDate Advertising*, par. 52.

accessible could potentially lead to three negative effects. First of all, it can give rise to the threat of harassment suits (Vick & MacPherson, 1997, pp. 985–988). Due to the universal nature of the internet, content posted online can be accessible basically in every country in the world, with some exceptions of countries with a regime which prevents people from accessing internet freely, such as North Korea or China. Therefore, it is not excluded that an alleged victim would file a suit against the publisher in many jurisdictions, not because it would be more practical (the mosaic principle), but because it would negatively influence the publisher. Secondly, it may support the phenomenon called “libel tourism” which is a type of an already mentioned forum shopping. Forum shopping in private international law as a strategy or possibility of the claimant to choose forum is not always considered to be negative (see Lysina, 2017). There are countries, such as the United Kingdom, where it can be beneficial for the plaintiff to claim damages for the harmed reputation because of the strong level of protection. There can be also other advantages which could be motivational to file a suit in a specific country, such as a tendency to award high compensation, small court fees and similar. Plaintiffs may bring multiple lawsuits in different countries and actively seek a jurisdiction where they are most assured of success (Warshaw, 2006, p. 277). Lastly, but in our opinion most importantly, forum shopping can undermine human rights. If publishers (including journalists or academics) know that they can be subject to basically any jurisdiction, it could prevent them from publishing certain information, even though they consider it to be subject of public interest. This can have a chilling effect on freedom of expression and therefore negatively impact not only individuals and enjoyment of their basic rights, but also the society as a whole.²⁵ Moreover, according to Council of Europe, other rights, such as right to a fair trial or right to an effective remedy could be impaired too.²⁶

As regards the third possibility, if the victim (the French professor) would like to sue Facebook for not deleting the comments, he would have to look into its “Terms of Service” which contain an agreement on jurisdiction and applicable law. The wording of the relevant term is as follows: *“If you are a consumer and habitually reside in a Member State of the European Union, the laws of that Member State will apply to any claim, cause of action or dispute that you have against us, which arises out of or relates to these Terms or the Facebook Products (“claim”), and you may resolve your claim in any competent court in that Member State that has jurisdiction over the claim. In all other cases, you agree that the claim must be resolved in a competent court in the Republic of Ireland and that Irish law will govern these Terms and any claim, without regard to conflict of law provisions.”* Accordingly, Hungarian law will apply to the claim and jurisdiction will be determined according to the relevant (above analysed) provisions of the Brussels I bis Regulation. For assessing the liability of Facebook for not removing defamatory comments, Member States of the European Union will have to rely on the Directive on electronic commerce.²⁷ This directive regulates liability of internet service providers, such as social media, for third party content (i. e. content which was published by third persons – the users). More on liability of internet service providers (see Sakolciová, 2019).

This example case is not an extreme situation to prove that there is a specific loophole in the private international law. This, we believe, could be a very common

²⁵ Council of Europe: Recommendation CM/Rec(2016)4 of the Committee of Ministers to Member States on the Protection of Journalism and Safety of Journalists and Other Media Actors, 13 April 2016, p. 33-34.

²⁶ Council of Europe: Study on forms of liability and jurisdictional issues in the application of civil and administrative defamation laws in Council of Europe member states, DGI(2019)04.

²⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’).

situation, as there is a huge number of “interest” groups (such as the private international law Facebook group from the illustrational case) and fan pages with members and followers from all over the world. Defamation on social media poses new challenges for the protection of reputation and for the protection of freedom of expression due to their specific features. It is required that law-makers react promptly and adequately adapt the rules to the current situation.

5. ALTERNATIVES

Creating conflict of law provision that would strike a fair balance between the protection of privacy rights of victims and preserving legal certainty of the publishers as regards their potential liability for publishing illegal content, which is an important factor for protection of freedom of expression, is truly a difficult task. All rules have their advantages and disadvantages. Should it be the place where the damage occurred, the place of establishment of the victim, or the place of establishment of the publisher?

For example, the *place of establishment of the publisher* has the benefit of one single applicable law, aspect of foreseeability (at least to the publisher), but it favours freedom of expression on the cost of victims of defamation. The “*Erfolgsort*” favours plaintiffs and causes that place of injury in a globalised world may be difficult to determine (Kuipers, 2015). Although facially neutral, the connecting factors at least implicitly favour the protection of one fundamental right over the other (Kuipers, 2011, p. 1701). The main advantages of application of the *lex fori* criterion is the time and costs reduction involved in litigation, better quality of judgments, as well as the possibility to take into account public policy concerns of the forum because personality rights, privacy or data protection are based on constitutional values (von Hein, 2016). The disadvantage is that there would be as many potentially applicable laws as there are potentially competent jurisdictions. Moreover, it favours the plaintiff and supports forum shopping. This problem shows the close connection between the applicable law and jurisdiction, especially the special jurisdiction under Article 7 (2) of the Brussels I bis Regulation. According to von Hein and Bizer, this parallel presupposes „*that special jurisdiction is applied in a restrictive way to avoid an excessive application of the lex fori to cases that are merely connected to the state of the forum.*” The authors, however, point out that certain infringements of privacy rights committed via social media may be closely connected to a different legal order than to the one of the forum. In their article, they suggest that applying the law of the common habitual residence of plaintiff and defendant will be usually more appropriate than applying the *lex fori* (2018, pp. 237–238).

There have been many proposals of new rules or amendments of the existing law. For example, the Committee on Legal Affairs of the European Parliament proposed in May 2012 to amend Rome II Regulation by adopting a conflict of law rule concerning privacy rights and defamation. The proposed provisions were formulated as follows:²⁸

Recital 32a

This Regulation does not prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media. In particular, the application of a provision of the law designated by this Regulation which would have the effect of significantly restricting the scope of those constitutional rules may, depending

²⁸ European Parliament resolution of 10 May 2012 with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (2009/2170(INI)).

on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (*ordre public*) of the forum.

Article 5a

Privacy and rights relating to personality

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, including defamation, shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur.

2. However, the law applicable shall be the law of the country in which the defendant is habitually resident, if he or she could not reasonably have foreseen substantial consequences of his or her act occurring in the country designated by paragraph 1.

3. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.

4. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast and regarding the violation of privacy or of rights relating to the personality resulting from the handling of personal data shall be the law of the country in which the publisher, broadcaster or handler has its habitual residence.

The survey conducted by the European Commission showed that “in the absence of a minimum level of harmonisation of Member States’ substantive laws, it will be hard to reach an agreement acceptable to all stakeholders on a single set of conflict-of-law rules.” The recommendation proposed in the study is to adopt a directive which would incorporate i) certain minimal essential aspects (based on the Charter of Fundamental Rights of the European Union and Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms) and ii) a self-limited rule based on the criterion of the place in which the publisher is established. This criterion works in favour of the freedom of expression, however, the minimal material harmonisation will ensure that an adequate standard of protection of right to privacy and reputation will be provided to all media users (European Commission, 2009, p. 8).

Another proposal worth consideration was introduced by Assistant Professor Dr. Jan-Jaap Kuipers. He suggests that a possible alternative would be to use a so called “principle of closest connection.” He suggested that struggle towards absolute predictability should be abandoned and wider margin of appreciation in applying this principle should be given to national courts. The following conflict of law rule should be incorporated into the Rome II Regulation: “The law applicable to a non-contractual obligation arising out of violations of privacy and rights relating to personality, including defamation, shall be the law of the country with which it is most closely connected.” The courts applying the principle of closest connection would consider relevant criteria such as the place of establishment of the publisher, of the victim, the place where the most of the damage materialized, the language of the publication, domain name and similar. Assistant Professor Kuipers compared the use of the criteria to a sliding scale in that if one of the criteria would not play any role in an individual case, the remaining criteria

would gain importance. Accordingly, the Rome II Regulation should be understood as not preferring *in abstracto* one criterion over the other (2011, pp. 1701–1705).

The exclusion of defamation from the scope of EU law may reflect a rejection of the regulation's purely private law perspective or it could reflect a rejection of the idea that harmonised EU rules are appropriate in this matter (Mills, 2015, p. 12) especially due to strong public policy inherent in defamation law. The conflict between freedom of expression and the right to privacy is a very sensitive issue for many states. This subject has even been called "the perfect arena for cultural clashes" (Nielsen, 2019, p. 37). Indeed, it is often difficult and politically sensitive to apply law of a foreign country with different traditions and as the current situation shows, it is also difficult to reach a compromise and create common rules.

Unlike the Rome II Regulation, the Brussels I bis Regulation does not exclude defamation and privacy rights from its scope. However, there have been some proposals as regards the application and interpretation of the relevant provisions of the latter regulation as well. As already indicated above, the connection between applicable law and jurisdiction could mean, that a unified provision on applicable law may require amendments to the jurisdictional rules. While general jurisdiction is „neutral“ from the conflict of law perspective, special jurisdiction indicates a significant connection between the forum and the legal question at hand. For this reason, the authors Bizer and von Hein claim that simply agreeing on the criterion of *lex fori* determining the applicable law in defamation cases would not solve the forum shopping problem, unless the available fora are limited as well. Moreover, they also call for development of comprehensive common rules on jurisdiction concerning third-state defendants who are excluded from the scope of the Brussels I bis Regulation (2018, pp. 237–238). In his article, Meier points out that extending the scope of application of Brussels I bis Regulation to defendants domiciled in third states could lead to broad imposition of European values. This may cause, that third states would react negatively to such a trend, e.g. by not recognizing and enforcing European judgements unless they respect cultural values of those states (2016, p. 504).

Advocate General Bobek is also in favour of limiting available fora in the online defamation cases. In the *Bolagsupplysningen OÜ* case, he took the opportunity to voice his opinion on the need to depart from the previous case law interpreting jurisdictional rules. In his *Opinion*, Advocate General Bobek suggested limiting the jurisdictional competence for online infringements of personality rights only to (two) jurisdictions: i) state where the publisher has its domicile and ii) state where the plaintiff has centre of his interests. Courts of these states would have full jurisdiction to adjudicate on the totality of damages.²⁹ Centre of interests of natural and legal persons should be based on "the factual and social situation of the claimant viewed in the context of the nature of the particular statement." This suggestion aims "...at giving jurisdiction to the court that will be situated at the centre of gravity of the specific dispute."³⁰ The Advocate General Bobek considered the borderless nature of the internet to be a reason to revisit the previous case-law, namely *Shevill* and *eDate Advertising*, which enables plaintiffs to file a suit in all member states. In his view, such multiplicity of fora hardly reconciles with principles of predictability of jurisdictional rules and sound administration of justice that lie at heart of the Brussels I bis Regulation.³¹

²⁹ Opinion of Advocate General Bobek delivered on 13 July 2017, *Bolagsupplysningen OÜ* and Ingrid Ilsjan v Svensk Handel AB, C-194/16, par. 97.

³⁰ *Ibid.*, par. 100-101.

³¹ *Ibid.*, par. 71-91.

6. CONCLUSION

Internet and new technologies as well as law develop and change over time. However, both develop at a different pace. While technologies are progressing every day, law often remains left behind, too rigid and inflexible to catch up. This article analysed the relevant provisions of the Brussels I bis Regulation and the Rome II Regulation as well as the important case law of the CJEU providing interpretation of the established rules in the online context. It has been shown that the existing private international law provisions at the EU level are either not satisfactory or absent. The *status quo* may lead to negative consequences, such as making use of harassment suits, libel tourism and disregarding appropriate balance between individual human rights (which currently heads towards diminishing freedom of expression). In the author's view, these challenges could be best tackled by solutions that take into account the specific circumstances of an individual case and – using the words of Mr Kuipers – do not prefer in abstracto one claim over the other. In that sense, the potential available fora should be limited as well. As AG Bobek suggested, the place where the gravity of the dispute lies should play the key role.

Despite the urge to find solutions and amendments to the legal framework, but no action has been taken yet. To conclude, it is argued that the existing territorial regulation of online defamation should be reconsidered and therefore, further research on this topic is strongly encouraged.

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