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Is EU Law Effective in Preventing Forum Shopping for the Pursuit of Actions Arising from Online Infringement of Personality Rights?

§1 Introduction: The Right to Privacy as a central tenet of European Union Law

The right to privacy is regarded in the European Union (the EU) and worldwide as one of the most important and widely recognised personality rights. In the EU this right is recognised both in the European Convention of Human Rights (ECHR) and in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (the Charter).¹ Article 8 of the ECHR states:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 7 of the Charter, ‘Respect for private and family life’, states simply: “Everyone has the right to respect for his or her private and family life, home and communications”.²

The EU Member States all give protection in their national laws, to a lesser or a greater degree, to the right to privacy and/or the right to one’s reputation. A comparative analysis of the various national regimes in this regard is beyond the scope of this essay, but suffice it to say that the national laws of Member States differ from each other to a degree sufficient to be problematic in cross border infringement of personality rights cases. With the advent of the internet, this problem metastasized. The question is simple: Person A (or a newspaper, for

¹ [2010] OJ 83/02.

² Article 8 of the Charter deals with protection of personal data – another contentious topic but one which is beyond the scope of this discussion.

example) publishes a statement online. Because it is online, it is in effect published worldwide. The statement is defamatory and/or invades X's privacy. If A lives in one country, and if X finds himself in another country, perhaps with his business interests in yet another or more than one other country, which court can hear the matter? Given a choice, X would of course opt for the jurisdiction with the national law most favourable to his suit. Where this is possible, there is the potential for forum shopping for the most favourable legal regime, which is problematic as it militates against the core legal tenet of predictability.

Against this background, the phenomenon of libel tourism, or forum shopping for the most favourable jurisdiction within which to pursue an action, raised concerns in recent years. This was especially true for England and Wales where libel tourism (amongst others) led to major reform of the national defamation law by means of the Defamation Act 2013. UK. The right to one's reputation, which of course forms the subject matter of all defamation actions, has for some time now been accepted as an element of an individual's private life that is also protected by Article 8 of the ECHR.³ Given that the European Parliament raised concerns about libel tourism to the UK,⁴ and the fact that it is regarded as falling under Article 8 of the ECHR, it may be fruitful to keep the English libel laws in mind when considering the question: Does EU law prevent forum shopping for the pursuit of actions arising from online infringement of personality rights?

This paper seeks to examine the EU's legal response to this issue.

§2 Libel/privacy tourism: EU law implications for online cross-border privacy breaches

³ See for example *Chauvy v France* 41 EHRR 29, par 70 (2005); *White v Sweden* 46 EHRR 3, pars 28 and 30 (2008); *Campăna and Mazăre v Romania* 41 EHRR 14, par 91 (2005).

⁴ The European Parliament in May 2012 termed England and Wales 'the most claimant-friendly in the world' for libel claimants: See the European Parliament Resolution of 10 May 2012 (2013/C 261 E/03), pars C-E. Furthermore, in its Resolution of 10 May 2012 (2013/C 261 E/03) the European Parliament made recommendations to the Commission of the European Union on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), in order to attempt to prevent libel tourism to the UK – despite noting the potentially positive effect of the then proposed Defamation Act 2013.

“...the origin of the freedoms of opinion and communication, as we know them, may be traced very specifically to the time when it became possible to disseminate them in print.”
Adv. Gen Cruz Villalón⁵

A wealth of information exists about both the right to freedom of speech and defamation.⁶ As stated above, it should be borne in mind that it is also now generally understood that the right to privacy includes the right to reputation. So when these two rights conflict (as they often do) the multiplier effect of essentially worldwide publication on the internet becomes a thorny issue.

The cross-boundary implications of differential national treatment of (especially) libel and freedom of speech are particularly problematic. This brings us to concerns about ‘libel tourism’ - the practice of forum-shopping for a jurisdiction favourable to libel claimants, that is the jurisdiction considered most likely to produce a favourable outcome for the claimant.⁷ Mostly, this term refers specifically to England and Wales for its relatively generous, jury-driven libel awards. It must be noted however that, while the UK for long carried the dubious distinction of being the ‘libel capital of the world’, it is by no means the only EU jurisdiction attractive to would-be claimants aggrieved by alleged personality rights infringements. France, for example, is seen by many as particularly strict in the enforcement of the right to privacy.

Notwithstanding the process of harmonising EU law in this area (organic or otherwise), the question still exists: Does forum shopping for personality rights infringement claims in the EU pose a problem, especially concerning online infringements? To answer this question, an analysis of the EU laws regarding jurisdiction is necessary. First, however, a closer look at an example of libel tourism may be useful.

A) Libel tourism to the UK

In *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156 a wealthy Arab businessman sued an American academic, Dr Rachel Ehrenfeld, in London for defamatory statements about him in

⁵ Case C-509/09, *eDate Advertising GmbH v X and Olivier Martinez v MGN Ltd*, Opinion of Mr Advocate General Cruz Villalón delivered on 29 March 2011 [2011] ECR 0000, 9.

⁶ See for example ERIC BARENDT, FREEDOM OF SPEECH, chapter 19 ‘Libel and Invasion of Privacy’, 198-230 (2nd edn OUP, Oxford 2005), and the literature referred to there.

⁷ It is commonly accepted that this term was coined by Geoffrey Wheatcroft – See Geoffrey Wheatcroft, *The Worst Case Scenario*, The Guardian February 28, 2008. See also the *Fifth Dame Ann Ebsworth Memorial Public Lecture* given by the Rt Hon. The Lord Hoffmann on 2 February 2010 and Trevor C. Hartley, *Libel Tourism and Conflict of Laws* 59 ICLQ, 25 (2010).

her book entitled *Funding Evil*. Only 23 copies of her book had been sold in the UK, and it was pointed out that the claimant chose England rather than the United States to sue, as the latter's constitutional protection of freedom of speech effectively cancelled his suit's prospect of success. When he won his case in England, the United States reacted by passing the 'Securing the Protection of our Enduring and Established Constitutional Heritage' (SPEECH) Act 2010. This Act makes foreign libel judgments unenforceable in U.S. courts, unless those judgments are compliant with the United States' constitutional protection of freedom of speech. It should also be noted that more than one U.S. court had, prior to the SPEECH Act, held British defamation judgments unenforceable on public policy grounds.⁸

The fact that a traditional ally such as the United States deemed it necessary to protect its citizens' right to freedom of speech against English laws by enacting legislation to that effect was seen as hugely embarrassing: The House of Commons Culture Select Committee Report on Press Standards, Privacy & Libel 2010 termed it a 'national humiliation' for the UK.

The substantive law of England and Wales, for these and other reasons, therefore became a very attractive jurisdiction for the pursuit of libel actions. The Defamation Act 2013 which recently came into force goes some way towards addressing this concern, but there are doubts that it goes far enough.⁹ It is against the background of this example that the EU position on online infringement of personality rights, including breach of privacy and defamation, falls to be examined.

1. Unique problems raised by the Internet

Before the internet became ubiquitous, problems arising in the sphere of personality rights infringement, such as defamation and invasion of privacy, were circumscribed by limitations on the physical distribution of paper print or other physical media. In many ways, the Internet marks the opening of a Pandora's Box in the legal arena. Advocate General Cruz

⁸ See for instance *Bachchan v India Abroad Publications* 585 N.Y.S.2d 661 (Sup. Ct. 1992) and *Telnikoff v Matusevitch* 702 A.2d 230 (Md. 1997).

⁹ Collins describes it thus: "While in a number of respects the reforms are radical, as a package, they cannot be so described. The 2013 Act does not redefine the elements of the cause of action or reduce the panoply of available defences. It does little to simplify the complexity of the law. As with reforms past, it mostly bolts new principles onto the existing structure although, to labour the metaphor, some of the monster's organs have been transplanted or received grafts." Preface to MATTHEW COLLINS, *COLLINS ON DEFAMATION* (OUP 2014), ix.

Villalón, in his opinion in the *eDate and Martinez* case¹⁰ succinctly summarises the unique legal problems raised by the pervasive quality of the Internet:

- The Internet reversed the territorial fragmentation of the media so that the dissemination of information is now a global, rather than a local phenomenon;
- In so doing it created a space, ‘cyberspace’ which has no frontiers or limits;
- nor is cyberspace bound by time: information placed in cyberspace in essence remains there forever.
- The way in which media is distributed is now significantly different: the press do not need to decide in advance, for example, how many copies to print or where to sell them, as distribution is essentially worldwide.
- Because of its global scope the Internet is ‘...characterised by a significant lack of political power. Its global nature hinders intervention by the public authorities in activities which take place on the Net, leading to a material deregulation...’¹¹
- Online publishers in effect surrender control over the dissemination of their material as ‘individuals immediately become (voluntarily or involuntarily) - distributors of the information, by means of social networks, electronic communications, links, blogs or any other methods which the internet provides.’¹²
- Potential harm to victims of publications that infringe their personality rights (such as defamatory statements) is much more acute, due to the potentially global reach of the Net.

To say that the above causes a legal headache is an understatement. For our purposes the most important problem is the fact that the media are exposed to potentially vast numbers of sometimes contradictory legal regimes. What is permitted in one State very often is proscribed in another. The same set of facts may lead to a successful claim in one jurisdiction and failure in another. This lack of legal certainty may discourage the lawful exercise of freedom of expression, and as such can have a chilling effect.¹³ What is more, not only the media, but also private individuals face this uncertainty, because when content is

¹⁰ Case C-509/09, *eDate Advertising GmbH v X and Olivier Martinez v MGN Ltd*, Opinion of Mr Advocate General Cruz Villalón delivered on 29 March 2011 ECR 0000, 9 – 12 [2011].

¹¹ Villalón *supra* 10.

¹² *Ibid.*

¹³ It is notable that the United Kingdom, for example, recently reformed its defamation laws for precisely this reason (amongst others): *See* Par 65 of the Explanatory Notes to the Defamation Act 2013.

uploaded to the Net, individuals become publishers themselves: social media, blogs and other methods of uploading information to the Net exponentially increase the possibility of global distribution.

It is therefore vital that the EU, which values the rights and freedoms accorded its citizens and also the media, respond to this by providing a legal regime that is certain, predictable and fair, and which serves to prevent potential claimants from shopping around among several legally available jurisdictions for the best possible outcomes for their claims.

How has the EU responded to this problem so far? In what follows we examine the applicable law, its interpretation in court, and its suggested improvement.

§3 Applicable EU law

A) CJEU case law on the right to privacy post entry into force of the EU Charter

The Charter of Fundamental Rights of the European Union ¹⁴(‘the EU Charter’) became legally binding on 1 December 2009, with the entry into force of the Treaty of Lisbon. It recognises the right to privacy in two ways: Article 7 recognises the right to private life (“Everyone has the right to respect for his or her private and family life, home and communications”) and Article 8 the right to the protection of personal data. For the purposes of this article, only the former will be examined.

The most recent case dealing with the right to privacy was the Dutch Biometric Passports case *Willems v Burgemeester van Nuth*. Joined Cases C-446/12 to C-449/12, Case C-446/12. While the facts of this conjoined case do not directly relate to the subject matter under discussion,¹⁵ it is nevertheless important to note the reiteration by the court that:

“...as regards Articles 7 and 8 of the Charter, it is clear from the case-law of the Court that the fundamental rights guaranteed by the Charter must be respected where national legislation falls within the scope of EU law. In other words, the applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter (judgments in *Åkerberg*

¹⁴ Charter of Fundamental Rights of the European Union [2010] OJ 83/02.

¹⁵ In this case several Dutch citizens sued various authorities that refused to issue them with passports (and in one case an identity card) unless their biometric data was recorded at the same time. They argued, amongst others, that their Article 7 rights were being infringed.

Fransson, C-617/10, EU:C:2013:105, paragraphs 20 and 22, and *Texdata Software*, C-418/11, EU:C:2013:588, paragraphs 71 to 73).”¹⁶

As far as upholding the right to privacy is concerned, the CJEU therefore mirrors the commitment displayed over years of jurisprudence from the European Court of Human Rights.¹⁷

B) Brussels I Regulation (EC) 2001/44 on jurisdiction and enforcement of judgements in civil and commercial matters ¹⁸

The Brussels I Regulation could be described as the backbone instrument of the European civil procedural law, as it provides the basic rules on jurisdiction, pendency and the free movement of civil judgments.¹⁹ One of its purposes is to prevent the multiplication of competent forums – and as such a proper reading of it should militate against forum shopping and therefore libel/privacy tourism. But does it?

1. Article 5

The Brussels I Regulation states in Article 5(3) that 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.²⁰ This of course is subject to the general principle, reiterated in the recitals to the restatement in point 15, that jurisdiction is firstly based on the defendant’s domicile, and that another jurisdiction should only be used “in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor”.

Point 16 confirms the principle that exceptions to the general principle of defendant-based jurisdiction should be based on a relevant close connection:

“In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal

¹⁶ Para. 49.

¹⁷ Numerous cases have been decided in Strasbourg where Article 8 of the European Convention on Human Rights (Right to respect for private and family life) were at issue. See, for example: *Von Hannover v Germany* 40 EHRR 1 (2005) and *Peck v United Kingdom* 36 EHRR 719 (2003).

¹⁸ OJ L12 [2001] (recast as Council Regulation (EC) 2011/1215¹⁸ (hereinafter ‘the restatement’).

¹⁹ Burkhard Hess, *The Brussels I Regulation: Recent Case Law of the Court of Justice and the Commission’s Proposed Recast* 49 CM L Rev. 1075-1112, 1112 (2012).

²⁰ Article 7(2) of the restatement, *supra* n 1.

certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.”

2. Forum shopping to be avoided

Thus, the jurisdictional rule contained in Article 5(3) supports the need for a close connecting factor between the dispute and the court hearing the case, which means that the need for the sound administration of justice is still paramount. The spirit of the convention certainly frowns upon “forum shopping” and is aimed at ensuring that the attribution of special jurisdiction is properly organised. Case law confirms this: “... the 'special jurisdictions' enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively.”²¹

3. Concurrent jurisdictions not to be multiplied

Similarly, the Brussels I Convention seeks to avoid a multiplicity of concurrent competent jurisdictions for the same cause of action. In *Effer v Kantner*,²² it was stated that “... the Convention provides a collection of rules which are designed inter alia to avoid the occurrence, in civil and commercial matters, of concurrent litigation in two or more Member States and which, in the interests of legal certainty and for the benefit of the parties, confer jurisdiction upon the national court territorially best qualified to determine a dispute.”

It could be contended that, although the restatement was not adapted to specifically relate to Internet based infringement of personality rights, the relevant non-internet based provisions may be applied by analogy.²³ In that way, online infringement of for example, privacy, may be actionable in either the jurisdiction where the defendant is domiciled, or where the infringement occurred or may occur.

4. Invasion of privacy and libel – do they fall within the scope of Article 5(3)?

²¹ *Kalfelis* par 19.

²² Case 38/81, ECR 825 [1982].

²³ Nataliya Hitsevich, *Article 5(3) of the Brussels I Regulation and its Applicability in the Case of Intellectual Property Rights Infringement on the Internet* 7(7) WASET., 1802-1809, 1802 (2013).

In *Kalfelis*,²⁴ the ECJ stated that the concept of "matters relating to tort, delict and quasi-delict" covered "... all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)". It can therefore be concluded, following the reasoning in *Shevill* below, that invasion of the right to privacy and therefore also libel, fall to be adjudicated under A5 (3).

5. *Shevill and Others v Presse Alliance SA*²⁵

In *Shevill*, the Court reconciled safeguarding individual personality rights with the interests of the media. The *Shevill* judgment was given in the years immediately preceding the expansion of the Internet. Its impact however continues with principles which are transposable to a world changed by the Net being confirmed and where necessary adapted. The question is whether the adaptation (primarily and extensively addressed in *eDate Publishing* discussed below) is sufficient.

In this case the claimants (consisting of Miss Shevill, who was domiciled in Great Britain, and three companies that were established in different Contracting States), claimed that they were defamed by an article in a newspaper published by the defendant which suggested that they were involved in a drug-trafficking network. They instituted their claim for damages in England and Wales for the harm allegedly suffered by them not only in that jurisdiction but also in France and in other States. Presse Alliance contested the jurisdiction of the court, alleging the absence of any harmful event. The plaintiffs in the main proceedings limited their claim in the course of the proceedings solely to damages for the harm occasioned in England and Wales.

Mr Advocate General Darmon was of the opinion that the plaintiff could choose to bring the proceedings before the courts (1) where the defendant is domiciled, (2) where the causal event occurred, or (3) of the place or places in which the damage arose.²⁶ He stated:²⁷

"In the case of defamation by a newspaper article circulated in more than one Contracting State, Article 5(3) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters must be interpreted as meaning

²⁴ Case 189/87, *Athanasios Kalfelis v Bankhaus Schröder, Münchmeyer, Hengst and Co. and others* ECR 5565, par 17 [1988].

²⁵ Case C-68/93, *Shevill and Others v Presse Alliance SA* ECR I-415 [1995].

²⁶ *Shevill* par 58.

²⁷ *Shevill* par 111.

that the plaintiff may sue either in the courts of the place of publication, which have jurisdiction to order compensation for the whole of the damage arising from the unlawful act, or in the courts of the places where the newspaper is distributed, which have jurisdiction solely in respect of the damage arising, according to the law applicable to the tort or delict, within their judicial district.

The jurisdiction of any of the courts seised by reason of the damage suffered is not affected by the risk of conflicting decisions which may result from the multiplicity of courts having jurisdiction.

The fact that the defendant contests the existence of the factors constituting the tort or delict alleged by the plaintiff cannot in itself deprive the national court of its jurisdiction under Article 5(3)."

While it is true that the limitation on the jurisdiction of the courts in the State of distribution solely to damage caused in that State presents disadvantages, the plaintiff always has the option of bringing his entire claim before the courts either of the defendant's domicile or of the place where the publisher of the defamatory publication is established.²⁸

Having examined the principles arising from *Shevill*, it needs to be pointed out, of course, that since its publication in 1995 the world has changed dramatically, largely due to the advent of the Internet. The legal problems raised by this were mentioned earlier. In addition, since the *Shevill* judgment, there have also been a number of significant changes in the legal framework of the Union. Most significantly, with the entry into force of the Charter of Fundamental Rights of the European Union, the fundamental right to privacy and freedom of information was confirmed. It was already stated above but it bears repetition: Articles 7 and 11 of the Charter refer to the special protection which information warrants in a democratic society, in addition to emphasising the importance of privacy, which also encompasses the right to one's own image. Prior to the entry into force of the Charter, of course, the European Court of Human Rights had already specified the content of these rights,²⁹ and the ECJ had also ruled on both of these rights.³⁰

²⁸ *Shevill* par 32.

²⁹ On Article 10 of the European Convention on Human Rights, 'freedom... to receive and impart information and ideas', see, amongst others, the judgments of the European Court of Human Rights in *Handyside v. United Kingdom*, 7 December 1976; *Leander v. Sweden*, 26 March 1987; *Bladet Tromsø and Stensaas v. Norway*, 29 May 1999; *Feldek v. Slovakia*, 27 February 2001; and *McVicar v. United Kingdom*, 7 May 2002. On Article 8 of

In the following case the Court had the opportunity to test the further applicability of the *Shevill* principles to the new circumstances occasioned by the Net.

6. *eDate Advertising and Martinez*

The conjoined case C-509/09, *eDate Advertising GmbH v X and Olivier Martinez v MGN Ltd* E.M.L.R. 12 [2012] relates to an alleged infringement of personality rights of a German citizen who had previously been convicted of murder, by an article published by an Austrian online newspaper, and an alleged invasion of privacy of two French nationals by an English newspaper's online edition: in the latter case the claimants were the French actor Olivier Martinez and his father, who complained about an article published online entitled "*Kylie Minogue is back with Olivier Martinez*". Both cases involved an attack on the local court's jurisdiction, as both cases were instituted outside of the respective defendants' domicile (in the case of *eDate Advertising*, in Germany instead of in Austria, and in the case of *Martinez* in France instead of in England).

In his opinion, Adv. Gen Villalón stated: "At this juncture, I believe that it is possible to provide a reply which alters the *Shevill* case-law and, at the same time, is technologically neutral... It will be sufficient to add an additional connecting factor to the ones already laid down, without it being necessary, furthermore, to specifically restrict the criterion to damage caused by means of the internet."³¹ The additional connecting factor with the competent jurisdiction is the 'centre of gravity' of the dispute.

The Grand Chamber, in interpreting Article 5(3) of the Brussels I regulation, reiterated that the preamble states that in the interests of predictability, as a starting point jurisdiction is based on the defendant's domicile, and that derogation from this principle should only be available in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor.

the Convention, concerning the right to respect for family and private life, *see*, amongst others, the judgments in *X and Y v. Netherlands*, 26 March 1985; *Niemetz v. Germany*, 16 December 1992; *Stjerna v. Finland*, 25 November 1994; *Vertiere v. Switzerland*, 28 June 2001; and *Von Hannover v. Germany*, 24 June 2004.

³⁰ On Article 11 of the Charter and the application of the right to freedom of information before the Charter, *see*, amongst others, Case 155/73 *Sacchi* ECR 409[1974] ; Case C-260/89 ERT ECR I-2925 [1991]; Case C-100/88 *Oyowe and Traore v Commission* ECR 4285 [1989]; Case C-376/98 *Germany v Parliament and Council* ECR I-8419 [2000]; Case C-288/89 *Collectieve Antennevoorziening Gouda* ECR I- 4007 [1991]; Case C-148/91 *Veronica Omroep Organisatie* ECR I-487 [1993]; Case C-274/99 *P Connolly v Commission* ECR I-1611 [2001]. In connection with Article 7 of the Charter and the case-law which preceded it, *see*, amongst others, Case C-62/90 *Commission v Germany* ECR I-2575 [1992], paragraph 23, and Case C-404/92 *P X v Commission* ECR I-4737 [1994], paragraph 17.

³¹ Vilalón *supra* par 54.

Turning to the e-Commerce directive (discussed below), it noted that Recital 23 as well as Article 1(4) state that the directive does not deal with conflict of laws issues, that is it does not establish additional rules on private international law, and nor does it deal with questions of jurisdiction.

In the German case, the question was twofold: Whether the German court had jurisdiction to try the matter and secondly, if it had, whether German or Austrian law was applicable. To answer the first question Article 5(3) of the Brussels I regulation needed interpretation, and for the second question Article 3(1) and (2).

In the French case, an interpretation of Articles 2 and 5(3) was requested, specifically asking for clarification in the following situation (all relating to Member States): X, domiciled in A, places information or photos on a website in A (or B) and this allegedly infringes the personality rights of Y, who is domiciled in C. The question is whether the national courts of C will have jurisdiction in a resulting action, and whether there would be conditions for such jurisdiction, such as whether the site can be accessed from that state's territory, or whether there is a link which is sufficient, substantial or significant. As to such a link, it is queried whether it can be created by, for example, the number of hits on the page at issue made from the relevant Member State; the residence, or nationality, of the claimant/victim; the language in which the information at issue is broadcast or any other factor which may demonstrate the site publisher's intention to address specifically the public of the relevant Member State; and so on

The Court held that, in essence, both national courts were asking how the expression 'the place where the harmful event occurred or may occur', used in Article 5(3) of the Regulation, is to be interpreted in the case of an alleged infringement of personality rights by means of content placed online on an internet website.

The Court reiterated that derogation from the defendant's domicile principle in Article 5(3) is only allowed if there was a particularly close connecting factor between the dispute and the roots of the place where the harmful event occurred,³² and that the expression 'place where the harmful event occurred' is intended to cover both the place where the damage occurred and the place of the event giving rise to it. In turn, these two places could themselves constitute a significant enough 'connecting factor' for jurisdiction. In *Shevill*, as stated above,

³² Par 40.

the claimant can claim for his/her entire damage in the defendant's jurisdiction, or in each Member State in which the publication was distributed and where he/she claims to have suffered injury, but then *only for the harm caused in that State*. This final qualification or restriction on substantive jurisdiction is problematic in the event of online publication, where the potential distribution and resultant real harm is multiplied much more than in the case of traditional paper publication.

Therefore, although the basic *Shevill* principles could be applied to other media, the ubiquity of the internet makes the *Shevill* decision not entirely apt for online publication cases, as is clear from the following:

“The connecting criteria referred to in paragraph 42 of the present judgment must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all of the damage caused, depending on the place in which the damage caused in the European Union by that infringement occurred. Given that the impact which material placed online is liable to have on an individual's personality rights might best be assessed by the court of the place where the alleged victim has his centre of interests, the attribution of jurisdiction to that court corresponds to the objective of the sound administration of justice, referred to in paragraph 40 above.”³³

The Court goes on to say that the term ‘centre of interests’ is not restricted to where the claimant is domiciled but could for example refer to where he/she has the most business interests or pursues a professional activity. Since the defendant, at the time when he/she places the content online is in a position to know the centres of interest of the persons who are the subjects of such content, the Regulation's criterion of predictability of rules governing jurisdiction is also fulfilled.³⁴

As to the extent of damages claimable in the relevant jurisdictions: Following *Shevill*, the Court held that in the courts that have jurisdiction based on the place where damage occurred (if different from the defendant's domicile), they have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.³⁵

³³ Par. 48

³⁴ Pars 49-50.

³⁵ Par 51.

The Court of Justice therefore held that Article 5(3) must be interpreted in cases of online personality rights infringements, as meaning that the claimant has the option of bringing an action for liability either: - where the defendant (that is the publisher) is established or domiciled; or – before the courts of the Member State in which the centre of his interest is based. The claimant may also bring his action before the courts of each Member State in whose territory the online content is or has been accessible. However, in case of the latter option the courts of each Member State only have jurisdiction in respect of the damage caused in the relevant Member State’s territory.³⁶

The decision in *eDate Advertising and Martinez* certainly clarified the situation about how the Brussels I Regulation works in this area. It now falls to turn to another pillar of EU law significant in this area.

C) Rome II Regulation (law applicable to non-contractual obligations)

The law applicable to non-contractual obligations is set out in the Rome II Regulation.³⁷ A basic principle of the Rome Regulations is that the law specified therein shall be applied whether or not it is the law of a Member State (Rome I, Article 2 and Rome II, Article 3). This universal scope, amongst other factors, makes it relevant to the issue under discussion.

However, the Rome II Regulation lacks a provision for the determination of the law applicable to violations of privacy and rights relating to personality. There are various reasons why this is the case, mostly relating to the historical background to the negotiations leading up to the treaty – Member States simply could not reach agreement on the scope and content of a regulating provision.³⁸ It was agreed that the matter would receive attention,³⁹ but as will be seen from the discussion below, it has not been resolved up to now and the *lacuna* remains.

³⁶Par 52.

³⁷Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II).

³⁸ See ANDREW DICKINSON, *THE ROME II REGULATION: THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS*, (OUP 2008) 238-240.

³⁹ Article 30(2) states: “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.”

Controversy about "libel tourism", especially, has surrounded calls for a negotiated provision to be included to fill this gap in the Rome II regulation – this is particularly the case for England and Wales, which as has been pointed out earlier, was regarded as the libel capital of the world. Recent legislative reform in England and Wales by means of the Defamation Act 2013 goes some way towards addressing this concern, but the fact that the process is still very costly and reforms do not go as far as some critics would have liked,⁴⁰ mean that there is still concern in this area.

The Committee on Legal Affairs of the European Parliament ('the Justice Committee) at the end of 2011 tabled a draft report⁴¹ with recommendations to the Commission on the amendment of the Rome II Regulation specifically aimed at including a section addressing personality rights ('the Recommendation').

In this motion the Justice Committee reiterated that any such amendment should couple the basic principle that the law of the place where the damage occurs is paramount with a foreseeability clause. It further recommended that the criterion of the closest connection should be used for the right of reply, since such relief should be granted swiftly and is *interim* in nature.⁴²

The Justice committee also recommended that options such as alternative dispute resolution (ADR) be explored, facilitating a move towards '... a more modern mediation-friendly justice culture', and suggested that the Commission should carry out extensive consultations with interested parties, including journalists, the media and specialist lawyers and judges, to this effect.⁴³

The suggested motion reads as follows:

“The European Parliament considers that the following Article 5a ought to be added to 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):

⁴⁰ See for example Matthew Collins *op cit* ix; David Hooper, *et al*, *Defamation Act 2013 – what difference will it really make?* Entl. L.R. 199 (2013); Alastair Mullis and Andrew Scott, *Tilting at Windmills: The Defamation Act 2013* 77(1) M.L.R. 87-109 (2014); and Thomas Sanchez, *London, Libel Capital No Longer?: The Draft Defamation Act 2011 and the Future of Libel Tourism* 9 U.N.H. L. Rev. 469 (2010-2011).

⁴¹ PR\885652EN.doc PE469.993v02-00

⁴² Recital L.

⁴³ Recital M.

Article 5a – Privacy and rights relating to personality

(1) Without prejudice to Article 4(2) and (3), 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 in which the rights of the person seeking compensation for damage are, or are likely to be, directly and substantially affected. However, the law applicable shall be the law of the country in which the person claimed to be liable 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 the first sentence.

(2) When the rights of the person seeking compensation for damage are, or are likely to be, affected in more than one country, and that person sues in the court of the domicile of the defendant, the claimant may instead choose to base his or her claim on the law of the court seised.

(3) The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

(4) The law applicable under this Article may be derogated from by an agreement pursuant to Article 14.”

1. When will the amendment be considered?

It seems that the Commission is in no hurry to consider the amendment. In an answer to a question put to the European Parliament in March 2013 by a journalist enquiring when the commission will consider the Legal Affairs motion of amendment, Mrs Reding said this on behalf of the Commission:

“The Commission took careful note of the 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).

The exclusion from the scope is the result of very intense negotiations between the Council and the Parliament. This shows that the matter is highly sensitive, complex and difficult.

Following adoption of the regulation, the Commission has been following closely the developments in Member States. The Commission will issue a report on the application of the

regulation by the end of 2013. In this context the suggestions made by the European Parliament will be carefully considered.”⁴⁴

So the situation remains that subject to the Brussels I regulation and its interpretation (notably the decision in *eDate and Martinez*, jurisdiction with regards to violations of personality rights including defamation, remains subject to the individual Member State’s PIL rules as read against Article 5(3) of the Brussels I regulation and any applicable EU Directive. The most apt example of such an applicable Directive is the e-Commerce Directive.

D) E-Commerce Directive

The Council also addressed online privacy concerns in Directive 2000/31/EC, (‘the e-Commerce Directive’).⁴⁵ It is important to note however, that the Directive only applies to ‘Information Society Service Providers’ in relation to the provision of services and goods that take place online.⁴⁶ Information society services, in turn, refer to “...any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.”⁴⁷ In general, this relates to functions such as caching,⁴⁸ hosting⁴⁹ and acting as a ‘mere conduit’⁵⁰ for information flow via the internet: in other words, where the activity is merely of a passive, automatic or technical nature. The Directive thus attempts to provide a European response to the problem of disproportionate imposition of liability on Internet Service Providers (ISPs). But the nature of the Internet means that here too, boundaries blur and actions/potential actions may overlap. The following two cases are illustrative.

1. *eDate Advertising and Martinez* ‘s interpretation of Article 3 of the Directive

The first applicant in *eDate Advertising and Martinez*, asked whether the provisions of Article 3(1) and (2) of the Directive have the character of a conflict-of-laws rule in the sense

⁴⁴ Accessed 9 June 2015 and available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-002703+0+DOC+XML+V0//EN>.

⁴⁵ Directive 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’) (OJ 2000 L 178), p. 1.

⁴⁶ As can be deduced from Recitals 17 and 18.

⁴⁷ Recital 17.

⁴⁸ Article 13.

⁴⁹ Article 14.

⁵⁰ Article 12.

that, for the field of private law, they also require the exclusive application, for information society services, of the law in force in the country of origin, to the exclusion of national conflict-of-laws rules, or whether they operate as a corrective to the law declared to be applicable pursuant to the national conflict-of-laws rules in order to adjust it in accordance with the requirements of the country of origin.⁵¹

The Court noted that the e-commerce Directive's prime objective, as set out in Article 1(1) thereof, is to ensure the free movement of 'information society services' between the Member States. The directive recognises that there are divergences in legislation and legal uncertainty as regards which national rules apply to such services.⁵² This state of affairs is of course a legal obstacle to the proper functioning of the internal market in the field of 'information society services'. Nevertheless, the court emphasised that for the majority of the aspects of electronic commerce:

“...the Directive is not intended to achieve harmonisation of substantive rules, but defines a 'coordinated field' in the context of which the mechanism in Article 3 must allow, according to recital 22 in the preamble to the Directive, information society services to be, in principle, subject to the law of the Member State in which the service provider is established.”⁵³

(This includes the relevant Member State's own private international law / conflict of laws provisions). But what if the Member State's IPL rules indicate another jurisdiction, than the one indicated through the rules of the Directive? In that case it should be borne in mind that Article 1(4) states the Directive does not establish additional rules on private international law relating to conflicts of laws. Put another way: As long as it does not result in a restriction of the freedom to provide electronic commerce services, any Member State is free to designate, pursuant to their own PIL, the substantive rules that are applicable.

Having said that, it is important to note that if the situation arises where the legal system of one Member State makes electronic services (as a subject of dispute) subject to stricter requirements than those applicable in the Member State from which they arise/in which they are established, and if this means that in effect the free movement of services cannot be fully

⁵¹ *eDate Advertising and Martinez*, par 53.

⁵² Recital 5 in the preamble.

⁵³ Par 57.

guaranteed, the Directive must supersede the national law of the Member State with the stricter regulatory regime.

In relation to the mechanism provided for by Article 3 of the Directive, it must be held that the fact of making electronic commerce services subject to the legal system of the Member State in which their providers are established pursuant to Article 3(1) does not allow the free movement of services to be fully guaranteed if the service providers must ultimately comply, in the host Member State, with stricter requirements than those applicable to them in the Member State in which they are established.⁵⁴

How did this pan out in subsequent cases?

2. The *Papasavvas* case

From the recent ECJ decision in *Papasavvas*⁵⁵ it is clear that, although the Court held that the directive applies not only to consumer transactions but also potentially to private civil matters such as defamation suits,⁵⁶ the directive does not apply as soon as there is any kind of editorial input by the ISP.⁵⁷ So, it was held that the newspaper publishing company in *Papasavvas* which operates a website on which the online version of a newspaper is posted could not avail itself of the limitations of civil liability specified in Articles 12 to 14 of the e-Commerce Directive.

Whilst superficially the reasoning in *Papasavvas* seem straight-forward and just, Woods rightly points out that it is also a missed opportunity to deal with matters of privacy and freedom of expression, Recital 9 stressing the importance of ISS for freedom of expression.⁵⁸ More attention was given to this aspect in *Delfi v Estonia*.⁵⁹

3. *Delfi v Estonia*

The claimant, a corporation, successfully sued the defendant in libel based on comments made ‘below the line’ by readers on the defendant’s website, despite the fact that most of these comments were made anonymously and that there was evidence that the

⁵⁴ Pars 66-68.

⁵⁵ Case C-291/13, *Sotiris Papasavvas v O Fileftheros Dimosia Etairia Ltd, Takis Kounnafi, Giorgio Sertis*, judgement of 11 September 2014.

⁵⁶ See par. 36 of the reasoning and par. 2 of the ruling.

⁵⁷ Par 40. See also C-236/08, *Google France and Google* EU:C 474 [2010] at par. 113.

⁵⁸ Lorna Woods, *Civil liability for Internet publishing: the CJEU clarifies the law* (Case comment on the *Papasavvas* decision) 12 September 2014 available at <<http://eulawanalysis.blogspot.co.uk/2014/09/civil-liability-for-internet-publishing.html?m=1>> accessed 8 June 2015.

⁵⁹ *Delfi AS v Estonia* (2014) (Application no. 64569/09) Grand Chamber decision.

defendant had in effect censored many of the most inflammatory statements. The Grand Chamber of the European Court of Human Rights affirmed this decision: It held the Internet portal (that is the publisher of an online newspaper) liable for offensive comments made by its readers. In its reasoning it interpreted the electronic commerce directive and as part of that stated:

“When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the “protection of the reputation or rights of others”, the Court may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (*see Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007; *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011; and *Axel Springer AG*, cited above, § 84).”

The parties did not dispute that the domestic courts' decisions in respect of the applicant constituted an interference with its freedom of expression, but the applicant contended that this was not justified. In particular the applicant company pointed to the Declaration on freedom of communication on the Internet and Article 15 of the Electronic Commerce Directive, and argued that a host was not obliged to seek or monitor the hosted material. It contended that such an overly burdensome obligation was contrary to freedom of expression and information.

The Court reiterated the well-known principle that an interference with the applicant's right to freedom of expression had to be 'prescribed by law', have one or more legitimate aims in the light of art 10(2) of the Convention, and be 'necessary in a democratic society'.⁶⁰

In the instant case, the comments in question had been insulting, threatening and defamatory. It is clear from its reasoning that the Court placed a high value on the fact that the nature of these comments was foreseeable by the applicant. The article's nature was provocative and as such the applicant should have expected offensive posts, and therefore have exercised an extra degree of caution so as to avoid a defamation action. The applicant did use filters, and it did remove offensive comments when notified. However, the court found that the former

⁶⁰ Par. 7

was easy to circumvent and the other measures were ineffective to prevent harm being caused to others. What about suing the makers of the statements rather than newspaper? The court held that in principle this was possible but in reality many of the posts were anonymous and the identity of the potential defendants was thus very difficult if not impossible to ascertain.⁶¹

The Court noted that, considering that the applicant company was a professional operator of one of the largest Internet news portals in Estonia, a damages award given by the domestic court to the equivalent of EUR 320 in non-pecuniary damages could not be seen as disproportionate.

The Court also stressed the measure of editorial control exercised by the applicant. The publication of the news articles and publishing readers' comments was part of the applicant company's professional activity. Its advertising revenue depended on the number of readers and/or their comments. Furthermore, publishing on a large Internet news portal, such as that of the applicant means that a wide audience is reached. The Court further noted that '...the applicant company – and not a person whose reputation could be at stake – was in a position to know about an article to be published, to predict the nature of the possible comments prompted by it and, above all, to take technical or manual measures to prevent defamatory statements from being made public.' It was also significant, as an indication of editorial control, that the actual writers of comments could not modify or delete their comments once posted on the Delfi news portal, and that only the applicant itself could do this.⁶²

Although a cross-border element of the online statements did not feature in *Papasavvas* or *Delfi*, the principles laid down by the Court would of course also apply if they had.

§4 Conclusion, suggestions and further questions

A) Organic harmonisation of national laws?

To the question of when the European Parliament will consider the motion for inclusion of personality rights in the Rome II Regulation, the rather cryptic answer was given that the Parliament is 'closely following developments' in Member States.⁶³ This response of course

⁶¹ Pars 84-87, 91.

⁶² Par. 89.

⁶³ See the response by Mrs Reding on behalf of the Commission, accessibly at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-002703+0+DOC+XML+V0//EN>>.

was given during the birth process of the new English defamation laws in the Defamation Act 2013. Could it be that the EU Parliament is hoping that the applicable law in Member States would harmonise without more drastic intervention? Is it conceivable that pending clarity as to the application of, for example, the new Defamation Act 2013, reform of the Rome II Regulation is on the back burner? Andrew Dickinson, a long-time observer of the tortuous process of (non)reform of the Rome II Regulation, certainly seems to think that the EU had more pressing problems to contend with.⁶⁴

B) Substantive reform necessary?

It could be argued that the continued dissimilarities in national laws relating to personality rights infringement (recent regulatory reform by way of the UK's Defamation Act 2013 notwithstanding), such as the perceived claimant friendly regimes in the UK (for libel) and France (for breach of privacy) make forum shopping an attractive option to the would-be litigant. Absent substantive, unified law the rules of Private International Law must be used to determine which forum has jurisdiction. The Brussels I regulation and its clarification in notably the *eDate and Martinez* case go some way towards simplification (and limitation) of choice of forum issues. So is it even necessary to amend Rome II? Adv. Gen Villalon stated in this regard in his opinion (par 76):

“It is well-known that Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II) excludes from its scope 'non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.' (Article 1(2) ([g]) of Regulation (EC) No 864/2007.) The travaux préparatoires for the regulation make clear the strikingly different views put forward by the Member States on that subject, which led to an exemption from the regulation for which a solution is currently being sought in a new legislative initiative led by the Commission. To my mind, it is at the very least doubtful that Regulation No 864/2007 had to apply an exemption of that kind, since Directive 2000/31 had already laid down a rule harmonising the applicable national provisions in the field.”

Nevertheless it is suggested that it is preferable that the gap in Rome II be filled, and the reform suggested by the Commission's Justice Committee makes eminent sense, because the

⁶⁴ Cf. Andrew Dickinson, 'Privacy and Personality Rights in the Rome II Regime – Not Again?' 19 July 2010, available at <[conflictoflaws.net/2010/privacy-and-personality-rights-in-the-rome-ii-regime-not-again/Andrew Dickinson](http://conflictoflaws.net/2010/privacy-and-personality-rights-in-the-rome-ii-regime-not-again/Andrew_Dickinson)>, accessed 9 June 2015.

proliferation of Directives is a questionable solution which hampers determination of the applicable law because it creates a complexity of sources. True, if the defendant is an ISP, the E-commerce directive goes some way towards addressing concerns about forum shopping. But its application is too restrictive to assist in the current problem as it only concerns ISPs without editorial control. De Sousa Gonçalves rightly observes that “[t]o ensure the coherence of the regulation of non-contractual obligations, all the questions of torts and liability should have been submitted to the Rome II Regulation and excluded from the directives.”⁶⁵

C) Inclusion of the Foreseeability Principle

Recital 16 of Brussels I emphasises that: “[t]he existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he *could not reasonably have foreseen*.” The Grand Chamber of the ECtHR in *Delfi* reiterated the importance of the foreseeability (of harm by commenters’ defamatory statements on the applicant’s newspaper website) in its reasoning for limiting the applicant’s Article 10 right to freedom of expression.⁶⁶ The Justice Affairs Committee also stressed the notion of foreseeability and recommended its inclusion in its proposed motion for an amendment to the Rome II Regulation.

It is therefore suggested that any proposed amendment to the Rome II regulation be built around this common denominator.

⁶⁵ Anabela Susana de Sousa Gonçalves, *The Application of the Rome II Regulation on the Internet Torts* 35 7 Masaryk U.J.L & Tech. 39 (2013).

⁶⁶ At par 76 the Grand Chamber states that: “Thus, the Court considers that the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore finds that the interference in issue was “prescribed by law” within the meaning of the second paragraph of Article 10 of the Convention.”

§5 Summary

National laws of Member States protecting the right to privacy and reputation differ from each other to a degree sufficient to be problematic in cross border infringement of personality rights cases, which in turn potentially fuels the phenomenon of libel tourism. The advent of the Internet exacerbated this problem, and the media especially are exposed to potentially vast numbers of sometimes contradictory legal regimes. This lack of legal certainty may discourage the lawful exercise of freedom of expression, and as such can have a chilling effect. This paper seeks to examine to what extent EU law addresses the issue; whether there are any lacunae that need to be filled, and proposals for reform.

We start with the Brussels I Regulation (EC) 2001/44 on jurisdiction and enforcement of judgements in civil and commercial matters, the backbone instrument of the European civil procedural law which provides the basic rules on jurisdiction, pendency and the free movement of civil judgments. One of its purposes is to prevent the multiplication of competent forums – and as such a proper reading/application of it should militate against forum shopping and therefore libel/privacy tourism. Article 5(3) states that 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'. Two key cases explain how this works in practice. Before the advent of the Internet, it was decided in *Shevill and Others v Presse Alliance SA* ECR I-415 (Case C-68/93) [1995] that the plaintiff in defamation actions has the choice to bring the proceedings either before the courts (1) where the defendant is domiciled, (2) where the causal event occurred, or (3) of the place or places in which the damage arose. In the latter instance the plaintiff can however only sue for the damage actually suffered in the relevant jurisdiction (not for the entire sum of damages, which may arise and occur in several jurisdictions). In the conjoined case C-509/09, *eDate Advertising GmbH v X and Olivier Martinez v MGN Ltd* E.M.L.R. 12 [2012] the Court had the opportunity to test the further applicability of the *Shevill* principles to the new circumstances occasioned by the Net.

The Court of Justice held that Article 5(3) must be interpreted in cases of online personality rights infringements, as meaning that the claimant has the option of bringing an action for liability either: - where the defendant (that is the publisher) is established or domiciled; or – before the courts of the Member State in which the centre of his interest is based. The claimant may also bring his action before the courts of each Member State in whose territory

the online content is or has been accessible. However, in case of the latter option the courts of each Member State only have jurisdiction in respect of the damage caused in the relevant Member State's territory.

Having looked at the Brussels I Regulation, we move to the second leg of civil jurisdiction in EU law: Regulation No 864/2007 on the law applicable to non-contractual obligations (Rome II). The main issue here is that the Rome II Regulation lacks a provision for the determination of the law applicable to violations of privacy and rights relating to personality. There are various reasons why this is the case, and it was agreed that the matter would receive attention, but despite some effort by especially the Justice Committee of the European Parliament, it has not been resolved up to now and the lacuna remains.

There are those who say that, following the decision in *eDate Advertising and Martinez*, inclusion of privacy rights and rights relating to personality in Rome II is not necessary – notably this is the view of Advocate General Cruz Villalon. Added to this there is the Council also addressed online privacy concerns in Directive 2000/31/EC, ('the e-Commerce Directive').

However, these views are open to criticism. The e-Commerce Directive is too limited in scope to be truly useful in all kinds of online cross border personality rights infringements, and besides it is not advisable to proliferate directives where a Regulation could be drafted, as this creates a complexity of sources. It would have been more coherent to include ALL the questions of torts and liability in the regulation of non-contractual obligations which is the subject matter of the Rome II Regulation.

The research questions raised by this paper can therefore be summarized as follows:

Given the gap in the Rome II regulation dealing with non-contractual obligations, an examining national laws on privacy infringement and defamation in particular:

1. Are there indications that national laws are harmonising to such an extent that inclusion in Rome II is unnecessary?
2. Does the clarity arising from recent case law on; and the interpretation of the Brussels I regulation likewise make inclusion of privacy infringement and defamation in Rome II unnecessary?
3. If the answers to questions 1 and/or 2 are 'no', what would be the optimum wording for an Article on privacy rights and rights relating to personality for inclusion in

Rome II, taking due notice of the phenomenon of libel tourism and the multiplier effect of the internet?