Opinion of Advocate General Bobek on jurisdiction in cases concerning violations of personality rights on the internet (Bolagsupplysningen, C-194/16)

We have already alerted our readers to the preliminary reference triggered by the Estonian Supreme Court concerning violations of personality rights of legal persons committed via the internet (**Bolagsupplysningen OÜ, Ingrid Ilsjan v. Svensk Handel AB**; *see our previous post here). Recently, AG Bobek has presented his conclusions in this case (see here).* ***Anna Bizer****, doctoral candidate at the University of Freiburg, has kindly provided us with her thoughts on this topic:*

After the case *eDate* (C-509/09 and C-161/10), the CJEU will have to rule on the question of how Art. 7 (2) Brussels I*bis* is to be interpreted when personality rights are violated on the internet for the second time. This case provides not only the first opportunity to confirm or correct the Court's ruling on *eDate*, but also poses further questions:

1) Which courts have jurisdiction when the claimant seeks removal of the publication in question?
2) Should legal persons be treated the same way as natural persons under Art. 7(2) Brussels I*bis* concerning personality rights?
3) If question 2) is to be answered in the affirmative, where is the centre of interest of a legal person?

AG Bobek holds the following opinion:
•In cases concerning personality rights violations on the internet, the place where the damage occurs is the place where the claimant has his centre of interest – regardless of whether the claimant is a natural or legal person. The same applies to claims of removal.
•The place where a legal person conducts its main professional activities is its

centre of interest.
•It is possible that a person has more than one centre of interest.
•The mosaic approach as developed in case *Shevill* should not be applied to personality infringements on the internet at all.

The facts

The claimant is an Estonian company operating mostly in Sweden whose management, economic activity, accounting, business development and personnel department are located in Estonia. The company claims to have no foreign representative or branch in Sweden. A Swedish employers' federation blacklisted the Estonian company for "deals in lies and deceit" on its website, what led to an enormous amount of comments capable of deepening the harm to the company's reputation. All information and comments were published in Swedish and caused a rapid decrease in turnover, which was listed in Swedish kroner.
The Estonian company brought an action before Estonian courts asking for rectification of the published information and removal of the comments from the website as well as damages for pecuniary loss. The referring court doubted its jurisdiction based on the Brussels I*bis* Regulation.

The Law

The basic principle in jurisdiction is that claims have to be brought before the courts where the defendant is domiciled (Art. 4 Brussels I*bis*). According to Art. 7 Brussel I*bis*, the claimant can also choose to sue before the courts of a member state that have special jurisdiction, i.e. in tort cases, the place where the harmful event originated as well as the place where the harm was suffered. In *Shevill* (C-68/93), the CJEU ruled that the courts of those member states have jurisdiction where the establishment of the publisher is located as well as the courts of the state in which the newspaper was published and where the claimant asserts to have suffered harm to his reputation. The latter jurisdiction is limited to the harm suffered in this member state. Concerning the violation of personality rights and reputation on the internet (*eDate*), the CJEU transferred the *Shevill*-ruling to online publications and added a third possibility: the courts of the member state where the victim has his centre of interest.

Reasoning of AG Bobek

AG Bobek answers the questions in three parts: First, he explains why the

jurisdiction of the courts in the member state where the centre of interest is located should be open to legal persons as well (A). In a second step, he proposes a more strict interpretation of Art. 7 (2) Brussels I*bis* compared to the case *eDate* and gives reasons why the mosaic approach should not be applied to personality infringements on the internet at all (B). In the last part, he aims at giving an alternative solution for claims for an injunction ordering the rectification and removal if the CJEU decides to continue with the mosaic approach (C).

(A) AG Bobek sees the main reason for creating the new head of jurisdiction in *eDate* in the protection of fundamental rights. Examining the case law of the CJEU and the ECtHR, he records that the personality and the reputation of legal persons are protected but restrictions are easier to justify that restrictions to rights of natural persons. In his opinion, fundamental rights should not be valued differently. Hence, the protection of fundamental rights of natural persons as intended by *eDate* should be at the same level as the protection of the fundamental rights of legal persons.
He recommends, however, that the CJEU puts aside the issue of fundamental rights since the Brussels Ibis regulation must be applied to determine jurisdiction as long as a legal person can sue the alleged violator of its personality rights or reputation according to the Member States' law. Therefore, the CJEU has to answer the Estonian court's questions regarding its jurisdiction irrespective of the level of protection.
As Art. 7 (2) Brussels I*bis* is applicable to claims concerning the violation of personality rights of a legal person, a distinction between legal and natural persons within this regulation might only be justified if natural persons were typically the "weaker party". AG Bobek objects to this general assumption mentioning the diversity of legal persons, on the one hand, and the growth of power that natural persons experience thanks to the medium internet on the other hand. He also points out that special jurisdiction does not aim to protect a weaker party but to "facilitate the sound administration of justice" (Recital 16 Brussels I*bis*). Therefore, natural and legal persons should not be treated differently under Art. 7 (2) Brussels I*bis*.

(B) According to AG Bobek, the mosaic approach is not adequate for cases concerning the violation of personality rights on the internet. As online publications can be accessed worldwide, lawsuits might be brought in all 28 member states. The mosaic approach is based on the idea that the harm in one

member state can be measured. But unlike newspapers online publications do not have a number of copies that can be counted. Especially due to the easy access to machine translation it is impossible to measure the harm suffered in one member state. The opportunity to sue in 28 different states leads to the possibility of abuse and is also not compatible with the aim of predictability of jurisdiction. The mosaic approach also provokes difficulties to coordinate the different proceedings, especially concerning *lis pendens* and *res judicata*.
Therefore, AG Bobek proposes the following: The place where the event giving rise to harm took place should be the location of the person(s) controlling the information typically being identical with the domicile of the publisher. The place where the harm occurred should be "where the protected reputation was most strongly hit", i.e. the person's centre of interest.
According to AG Bobek, the centre of interest depends on "the factual and social situation of the claimant viewed in the context of the nature of the particular statement". For natural persons, the habitual residence should be the basic element. Concerning legal persons, the centre of interest is in the member state where it "carries out its main professional activities provided that the allegedly harmful information is capable of affecting its professional situation". That is supposed to be where the legal person records the highest turnover or, in the case of non-profit organisations, where most of the clients can be located.
AG Bobek argues that in respect of a specific claim, a (natural or legal) person can have more than one centre of interest. Consequently, a claimant with more than one centre of interest can choose between several member states. Each jurisdiction identified that way comprises the entire harm suffered.

(C) Concerning the rectification and removal of a publication, AG Bobek states that those claims are indivisible by nature because of the unitary nature of the source. AG Bobek argues that an alternative solution is actually impossible even if the CJEU prefers to continue with the mosaic approach.
The overall result remains that the mosaic approach is not an adequate solution for personality infringement on the internet.

Assessment of the AG's opinion

AG Bobek raises some important issues concerning the infringement of personality rights on the internet. Following the AG's opinion, the result will typically be that Art. 7 (2) Brussels I*bis* allows the claimant to sue before the courts of the member state where he has his domicile. Thus, it creates a *forum*

actoris that is the complete opposite of the basic rule of jurisdiction according to which the claimant has to sue at the domicile of the defendant (Art. 4 Brussels I*bis*). Exceptions to a basic rule should be applied restrictively and only where the law explicitly allows doing so or where the aim of the law requires an exception.

Concerning the place where the event giving rise to harm took place, I can agree with AG Bobek. In internet cases, the crucial place of acting is normally the place where the allegedly infringing publication was uploaded. The disadvantage of this approach is that this place can be random and may lack the specific connection to the place. This applies especially when a natural person uploads the publication while travelling. Thus, the approach of the AG proposing the place where the person normally has control over the publication avoids jurisdiction based on a merely fugitive connection to a member state.

AG Bobek quite rightly points out that the mosaic approach is not adequate for the medium internet due to the worldwide accessibility. And since the European conflict-of-law system excludes personality rights and reputation (Art. 1(2)(g) Rome II), the mosaic approach applied to online cases can provoke forum shopping – especially if applied to claims for an injunction for rectification or removal.

The CJEU maybe should consider determining the centre of interest by other criteria that take more into account the specific circumstances of the case. Applying the definition of AG Bobek, the place where the harm occurs will almost always be where the claimant has his main administration (or his habitual residence in case of a natural person) irrespective to how strong the connection to another state may be. In the case at hand, the pecuniary damage and the economic consequence are probably in Estonia but the appearance of the company is mainly affected in Sweden. For example, the comments (mainly in Swedish and uploaded from Sweden) can not only be personality violations themselves but also show that the originally published information affected the reputation of the company in Sweden.

Furthermore, it is doubtful whether a person can have various centres of interest. It shifts the balance of interests that was tried to reach in *eDate* to the advantage of the claimant: the claimant may ask for the entire damages in another state than the state of the defendant's domicile (advantage to the claimant) but he cannot choose between different states– and thus between different choice-of-law rules –

as it would be possible under the mosaic approach (advantage for the defendant). Of course, there might be cases where the centre of interest is difficult to identify. The approach of the AG, however, implies that in those difficult cases the claimant might just choose. I am not sure if this really fosters predictability. Besides, it is somehow contradictory because the concept of the centre of interest is that even if the person-ality is affected in another state to a considerable extent, the courts in that state should not have jurisdiction.

I cannot agree with the AG concerning the relevance of fundamental rights. Of course, the level of protection is not relevant to the question whether the Brussels I*bis* Regulation is applicable or not – including special jurisdiction. Nevertheless, the fundamental rights can influence how jurisdictional rules have to be interpreted. AG Bobek himself states that *eDate* can be understood as the protection of fundamental rights. Thus, the CJEU should consider whether the decision on *eDate* offering a claimant-friendly approach is owed to the fact that it is necessary to protect fundamental rights of the affected natural persons. If that is the case, the reasoning cannot simply be transferred to legal persons. It is rather necessary to check if the personality rights and the reputation of a legal person can justify the restrictions to the rights of the defendant, e.g. freedom of speech.