Opinion on Case C-800/19: AG Bobek Proposes Foreseeability Test for 'Centre of Interests' Jurisdiction

The CJEU's interpretation of Article 7(2) Brussels Ia with regard to online defamation has long been criticized (including on this blog) for its lack of predictability, especially from the defendant's point of view. While these concerns could, in many cases, be dismissed as purely academic, Case C-800/19 *Mittelbayerischer Verlag* seems to put them back on the agenda in a politically somewhat delicate context. AG Bobek's Opinion on the case has been published today.

As a reminder, the legal framework emerging from the Court's decisions in *Shevill*, *eDate* and *Bolagsupplysningen* can be summarised as follows: the victim of an alleged violation of personality rights can

- either seize the courts of their *centre of interests* (which regularly coincides with their domicile) and seek compensation of the entire damage as well as all other remedies,
- or seize the courts of each other Member State in which the content in question *has been made available*, with compensation being limited to the damage caused through publication in that Member State and 'indivisible' remedies such injunctions to rectify or delete not being available (the so-called 'mosaic' approach).

The case in *Mittelbayerischer Verlag* concerns the claim of a Polish holocaust

survivor living in Poland, who is suing a German local newspaper who published an article on the internet that referred to a Nazi concentration camp in then-occupied Poland, using the phrase 'Polish extermination camp'. As some readers might remember from a similar affair involving a German public broadcoaster and resulting in the refusal to enforce a Polish judgment by the German *Bundesgerichtshof*, Polish substantive law considers the use of the term 'Polish extermination camp' as an infringement of the personality rights of any Polish survivor of Nazi concentration camps because it could create the impression that those who have been prisoners in these camps may have played a role in their creation or operation.

Unlike the Court of Appeal of Kraków in the 2016 case, the Court of Appeal of Warsaw had doubts as to its international jurisdiction based on Article 7(2) Brussels Ia. While Warsaw clearly constituted the claimant's centre of interest, the Court wondered if this was sufficient to render it competent for the entire range of remedies sought by the claimant (damages; prohibition to use the term in the future; public apology) given the circumstances of the case. In particular, the Warsaw court pointed out that the claimant did not claim to have personally accessed, let alone understood the article, which had only been online for a few hours; the claimant had also not been personally identified in the article in any way; the defendant, on the other hand, had not directed their article, or any other part of their online presence, to an audience in Poland.

The Warsaw Court of Appeal thus referred the following questions to the CJEU:

1. Should Article 7(2) [Brussels Ia] be interpreted as meaning that jurisdiction based on the centre-of-interests connecting factor is applicable to an action brought by a natural person for the protection of his personality rights in a case where the online publication cited as infringing those rights does not contain information relating directly or indirectly to that particular natural person, but contains, rather, information or statements suggesting reprehensible actions by the community to which the applicant belongs (in the circumstances of the case at hand: his nation), which the applicant regards as amounting to an

infringement of his personality rights?

2. In a case concerning the protection of material and non-material personality rights against online infringement, is it necessary, when assessing the grounds of jurisdiction set out in Article 7(2) [Brussels Ia], that is to say, when assessing whether a national court is the court for the place where the harmful event occurred or may occur, to take account of circumstances such as:
   – the public to whom the website on which the infringement occurred is principally addressed;
   – the language of the website and in which the publication in question is written;
   – the period during which the online information in question remained accessible to the public;
   – the individual circumstances of the applicant, such as the applicant's wartime experiences and his current social activism, which are invoked in the present case as justification for the applicant's special right to oppose, by way of judicial proceedings, the dissemination of allegations made against the community to which the applicant belongs?'

In his Opinion, Advocate General Bobek (who had also rendered the AG Opinion in *Bolagsupplysningen,* calling for the abolition of 'mosaic' jurisdiction in cases of violations of personality rights) leaves no doubt that he still believes the current approach to Article 7(2) Brussels Ia to be imperfect (paras. 39–44). Yet, he argues that the present case is not the right place for its reconsideration because 'the sticky issue in this case does not concern international jurisdiction, but rather the substance of the claim' (para. 43). Thus, he proposes to adopt 'a narrow and minimalist approach' (para. 44).

He develops this approach through two steps. First, he explains why he does not believe that the question of whether or not the claimant has been named (or otherwise personally identified) in the publication in question provides a helpful criterion for the establishment of centre-of-interests jurisdiction (paras. 45–57) as there is 'no visible line in the sand' (para. 51) but rather

> *[55] … a fluid, continuum of possible 'degrees of individualisation' to be assessed in the light of the infinite factual variety of cases, when looking at a given statement assessed in its context with regard to a particular claimant.*

In a second step, AG Bobek then explains that centre-of-interests jurisdiction as established in *eDate* nonetheless requires a certain degree of foreseeability to be reconciliable with the aims of foreseeability and sound administration of justice as required by Recitals (15) and (16) of the Regulation. He believes that such foreseeability does not depend on the subjective intent of the publisher but rather requires an objective centre-of-gravity analysis (along the lines suggested by AG Cruz Villalón in his Opinion on *eDate*):

> *[69] I would also caution against introducing, in essence, 'a criterion of intent' to online torts. The subjective intent of the publisher at the time of publication, if indeed discernable, may be used as an indication only. It is, however, not conclusive. Instead, what matters is whether, as deduced from a range of objective 'items of evidence', it could reasonably have been foreseen that the information published online would be 'newsworthy' in a specific territory, thereby encouraging readers in that territory to access it. Such criteria could include matters such as the subject matter of the publication, the top-level domain of the website, its language, the section in which the content was published, the keywords supplied to search engines, or the website access log.*
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> *[70] However, since those considerations apply to the impact side of Bier, that is to say, where the damage occurred, it is indeed logical that they focus on the objective, subsequent impact of a given publication from the point of view of the public, rather than being primarily concerned with the original and rather subjective intentions of a publisher. It is from this perspective that, in line with recital 16 of Regulation No 1215/2012, a clear objective connection between the action and the forum ought to be assessed, which then justifies the seising of jurisdiction, as a counterweight to the virtually unlimited geographical reach of online content.*

This culminates in the following proposition:

> *[73] … [A]t the level of international jurisdiction, the issue of foreseeability ought to be properly characterised as enquiring as to whether a particular statement, in view of its nature, context and scope, could have caused harm to a given claimant within the given territory. It thus relates clearly to foreseeability and predictability of the given forum. It should not be reduced to the question of whether a particular publisher knew or could have known the domicile of a*

possible victim at the time the material was uploaded online.

Applied to the case at hand

[74] … it is indeed difficult to suggest that it would have been wholly unforeseeable to a publisher in Germany, posting online the phrase 'the Polish extermination camp of Treblinka', that somebody in Poland could take issues with such a statement. It was thus perhaps not inconceivable that 'the place where the damage occurred' as a result of that statement could be located within that territory, especially in view of the fact that that statement was published in a language that is widely understood beyond its national territory. Within that logic, while it is ultimately for the national court to examine all those issues, it is difficult to see how jurisdiction under Article 7(2) of Regulation No 1215/2012 could be axiomatically excluded.

Although unlike *eDate* and *Bolagsupplysningen*, the case has not been assigned to the Grand Chamber, making any proper reconsideration of the two former decisions unlikely, it certainly provides another opportunity for incremental adjustments. The AG's proposition may just fit that bill.