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## Comment

# The European Court of Justice in *Bolagsupplysningen*: The Brussels I Recast Regulation's jurisdictional rules for online infringement of personality rights further clarified

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## A B S T R A C T

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In the European Union the Brussels Ibis Regulation governs the jurisdiction of Member State courts in civil and commercial matters. The reference for a preliminary ruling coming from the Estonian Supreme Court in the *Bolagsupplysningen* case offered the European Court of Justice another opportunity to develop its interpretation of the special ground for non-contractual obligations (article 7.2). The European Court of Justice's Grand Chamber ruled that legal persons, like natural persons, have the option of bringing a claim based on the infringement of personality rights by an online publication before the courts of the Member State where their centre of interests is located. It laid down that the centre of interests of a legal person pursuing an economic activity is determined by reference to the place where the company carries out the main part of its economic activities. The victim of a tortious internet publication can only seek an order for rectification and removal of the incorrect information in the courts that have jurisdiction over the entirety of the harm sustained and not before the courts that only enjoy jurisdiction with regard to the damage suffered in their territory.

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## 1. Introduction

In its judgment of 17 October 2017 in *Bolagsupplysningen OÜ and Ingrid Ilsjan v Svensk Handel AB*<sup>1</sup> (hereinafter referred to as: *Bolagsupplysningen*) the European Court of Justice (ECJ) has added another building block to its long line of case law

interpreting article 7.2 of the Brussels Ibis Regulation. The ECJ clarifies how the special jurisdictional rule for non-contractual obligations has to be construed when dealing with the infringement of the rights of a legal person by the publication on the internet of allegedly incorrect information concerning that person and by the failure to remove comments relating to that person.

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<sup>1</sup> Case C-194/16 *Bolagsupplysningen OÜ, Ingrid Ilsjan v Svensk Handel AB* [2017] ECLI:EU:C:2017:766.

Bolagsupplysningen OÜ is a company incorporated under Estonian law doing most of its business in Sweden. Ingrid Ilsjan is an employee of the company. Together they brought an action in Estonia against Svensk Handel, a trade association incorporated under Swedish law. They alleged that Svensk Handel had put Bolagsupplysningen on a blacklist on its website, stating that the latter had engaged in acts of fraud and deceit. According to the claimants the site's discussion forum contained around 1000 comments, some of which called for violence against Bolagsupplysningen and its employees, including Ms Ilsjan. Bolagsupplysningen had requested Svensk Handel to be removed from the list and to delete the comments but this was refused, allegedly affecting Bolagsupplysningen's business activities in Sweden with the result that the company suffered material damage on a daily basis. Before the Estonian courts the claimants asked the rectification of the incorrect information on the website, the deletion of the comments, an amount of 56,634.99 euro as compensation for harm suffered and fair compensation for non-material damage sustained by Ms Ilsjan. When the case reached the Estonian Supreme Court, it separated Ms Ilsjan's requests from those of Bolagsupplysningen and sent Ms Ilsjan's claims back to the Court of First Instance. With regard to Bolagsupplysningen's claims, the Supreme Court decided to refer a number of questions to the European Court of Justice for a preliminary ruling. In order to fully understand the questions posed and the impact of the answers given, it is essential to first give an overview of the relevant preceding ECJ cases, stretching back more than four decades.

## 2. The evolution in the interpretation of the special jurisdiction for non-contractual obligations

In the European Union, the Brussels Ibis Regulation (also known as the Brussels I Recast Regulation) regulates the competence of the EU courts in civil and commercial cases.<sup>2</sup> It has replaced the Brussels I Regulation as of 10 January 2015.<sup>3</sup> The Brussels I Regulation on its turn was the successor of the Brussels Convention.<sup>4</sup> The basic rule of the Regulation is included in article 4 (previously article 2 Brussels I Regulation and article 2 Brussels Convention): jurisdiction is to be exercised by the courts of the EU Member State in which the defendant is domiciled, regardless of his nationality (this is referred to as the *forum rei*). In addition to this general ground of jurisdiction, the Brussels Ibis Regulation also contains, as did its predecessors the Brussels I Regulation and Brussels Convention, grounds of special jurisdiction. These grounds make supplementary venues available to prospective litigants. On the basis of article 7.2 Brussels Ibis Regulation (previously article 5.3 Brussels I Regulation

and article 5.3 Brussels Convention) non-contractual actions can be brought before the courts of the place in a Member State where the harmful event occurred or may occur. For this ground to apply, it is required that the defendant of the claim is domiciled in the EU. Article 7.2 is based on a close connection between the dispute and the courts of the place where the harmful event occurred which contributes to the sound administration of justice. This close connection promotes legal certainty and avoids that a defendant is being sued in a court of a Member State which he could not reasonably have foreseen. These considerations are especially important in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.<sup>5</sup>

### 2.1. Bier: The double forum

In *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace* SA (hereinafter referred to as: *Bier*) the ECJ had to decide whether the Dutch courts had jurisdiction to rule on an action brought by Handelskwekerij G. J. Bier BV, a Dutch undertaking engaged in horticulture, and the Dutch Reinwater Foundation, which exists to promote the improvement of the quality of the water in the Rhine basin, against Mines de potasse d'Alsace, established in France.<sup>6</sup> The latter had discharged saline waste from its operations into the Rhine in France. Handelskwekerij Bier downstream in the Netherlands depended mainly on the waters of the Rhine for irrigation. The polluted water caused damage to its plantations and obliged it to take expensive measures in order to limit that damage.

The European Court of Justice established the rule of the double forum, which states that article 5.3 Brussels Convention (later article 5.3 Brussels I Regulation, now article 7.2 Brussels Ibis Regulation) grants jurisdiction to the courts of the place where the damage occurred (*locus damni* or *Erfolgsort*), as well as to those of the place of the event giving rise to that damage (*locus acti* or *Handlungsort*).<sup>7</sup> In other words, under article 7.2 Brussels Ibis Regulation the plaintiff has the choice to bring his claim in the courts of the place where the damaging event took place (*in casu*: France) or in the place where the damage was sustained (*in casu*: the Netherlands). The Dutch courts, therefore, had jurisdiction to rule on the matter as the Netherlands was the *locus damni* in this case.

### 2.2. Shevill: Mosaic approach for the locus damni in cases of defamation by the press

The following landmark judgment was *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL & Chequepoint International Ltd v Presse Alliance SA* (hereinafter referred to as: *Shevill*).<sup>8</sup> The case concerned the publication of a defamatory article in France. The French newspaper *France-Soir*, published by Presse Alliance SA, contained an article about an operation which drug squad officers

<sup>2</sup> Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (Brussels Ibis Regulation).

<sup>3</sup> Regulation 44/2001 (EC) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

<sup>4</sup> Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ L 299/32.

<sup>5</sup> Brussels Ibis Regulation, recital 16.

<sup>6</sup> Case 21/76 *Handelskwekerij GJ Bier BV v Mines de potasse d'Alsace SA* [1976] ECR 1735.

<sup>7</sup> *ibid*, para 19.

<sup>8</sup> Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*. [1995] ECR 415.

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