SHEVILL IS DEAD, LONG LIVE SHEVILL!

The European Court of Justice's decision in *Bolagsupplysningen* (C-194/16) EU:C:2017:766 may have come as a surprise to many. For the first time, the court denied a claimant's attempt to bring a claim for a tort committed online in their "home" country (country of domicile or incorporation) based on art.7(2) of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (the recast Brussels I Regulation). The court did so by refining two of its best-known—and most controversial—doctrines in the area of international jurisdiction for torts: the so-called "centre-of-interests approach" (introduced in *eDate Advertising and*

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Olivier Martinez (C-509/09 and C-161/10) EU:C:2011:685; [2012] Q.B. 654) and the *Shevill* doctrine (which derives its name from *Shevill* (C-68/93) EU:C:1995:61; [1995] 2 A.C. 18).

The opportunity to reconsider both doctrines arose in the context of a claim brought by an Estonian company that had been blacklisted on the website of a Swedish trade association for its allegedly unfair business practices. The Estonian company considered its blacklisting, and the comments made by users of the same website, a violation of its right to reputation, which it claimed had paralysed its ability to do business in Sweden. Consequently, it sought from the Estonian courts an injunction for rectification of the information and deletion of the comments, as well as compensation for the damage suffered. Following the ECJ's interpretation of what is now art.7(2) of the regulation in the context of online violations of personality rights in *eDate*, there were two potential bases for special jurisdiction of the Estonian courts:

(1) the fact that Estonia was the claimant's "centre of interests" (*eDate* at [48]–[50]); and

(2) the fact that the website could be accessed from Estonia, such that the claimant could be said to have suffered direct damage there (*eDate* at [51]).

While the first factor would give the Estonian courts jurisdiction for the entire claim (following the decision in *eDate*), the second factor would have allowed them to rule only on that part of the damage that was caused by the accessibility of the content in Estonia (following the approach originally developed in *Shevill* and extended to internet cases in *eDate*). Yet neither of the two criteria could be applied without difficulty.

With regard to the first potential basis of jurisdiction, the "centre of interests" criterion, the difficulty resulted from the fact that the ECJ's decision in *eDate* involved claims by natural persons whereas the claimant in the present case was a company. This raised two separate questions: first, can a company rely on the criterion at all, and second, if so, how should its centre of interests be identified?

As to the first question, the ECJ confirmed that both natural and legal persons can bring a claim for the violation of their personality rights at their centre of interests, given that the criterion "is justified in the interests of the sound administration of justice and not specifically for the purposes of protecting the applicant" (*Bolagsupplysningen* at [38]). Although this argument is in tension with the court's reasoning in *eDate*, where the centre-of-interests criterion was explicitly based "on the serious nature of the harm which may be suffered by the holder of a personality right" (*eDate* at [47]), the equation of natural and legal persons seems justified in view of the stated aims of art.7 (see Recital (16) in particular).

As to the second question, the court could more comfortably rely on its decision in *eDate*, according to which:

> "[t]he place where a person has the centre of his interests corresponds in general to his habitual residence [but] a person may also have the centre of his interests in [another Member State], in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State" (at [49]).

Applying this reasoning to a legal person, the *Bolagsupplysningen* court held that its centre of interests:

> "may coincide with the place of its registered office [but] must reflect the place where its commercial reputation is most firmly established and must, therefore, be determined by reference to the place where it carries out the main part of its economic activities" (at [41]).

Consequently, in cases such as the present one, in which a company carries out the main part of its activities in a different Member State from the one in which it is registered, it can bring a claim for the full extent of the damage only in the former country and not in the latter. This seemed to rule out the jurisdiction of the Estonian courts in the present case.

The decision in *Bolagsupplysningen* confirms that the centre-of-interests criterion relies on a presumption that a party's centre of interests will be at their habitual residence or the place of its registered office, which can be rebutted by showing that they carry out the main part of their economic activities in a different Member State. This interpretation seems to align the criterion further with the "centre of main interests" in art.3(1) of Regulation 2015/848 on insolvency proceedings [2015] OJ L141/19 (the recast Insolvency Regulation), but it seems difficult to reconcile with the aim of ensuring legal certainty, given that it will make jurisdiction more dependent on the facts of each individual case. It should be kept in mind, though, that from the perspective of the defendant, it will often be easier to predict where the claimant company exercises the main part of its economic activities than where it has its registered seat—the latter place also being much easier to manipulate.

Still, the decision raises questions with regard to companies that pursue different economic activities in several Member States. Do all economic activities have to be taken into account in order to identify a company's centre of interests? Or can a company have its centre of interests in more than one country, depending on the activity concerned? Considering that special jurisdiction of the courts of the claimant's centre of interests will always be for the entirety of the damage, the ECJ seemed cautious not to lower the threshold too much. Thus, it pointed out that:

> "where it is not clear from the evidence ... that the economic activity of the relevant legal person is carried out mainly in a certain Member State, so that [its] centre of interests ... cannot be identified",

the person would not be allowed to bring a claim based on the centre-of-interests criterion at all (*Bolagsupplysningen* at [43]).

These remaining uncertainties should not take away from the fact that the solution adopted in *Bolagsupplysningen* accords well with the key idea underlying the centre-of-interests approach, i.e. that the place in which the claimant enjoys their "greatest" reputation has a particularly close connection to the claim, which justifies the special jurisdiction of its courts for the entire damage. It is to be hoped that the court's reference to the fact that the information had also been "intended ... to be understood by people living in that Member State" (at [42]) was meant only to emphasise this consideration, rather than introducing an additional criterion.

The ECJ's decision is even more interesting with regard to the second potential basis for jurisdiction, the fact that the website could be accessed from Estonia. The possibility of relying on the place-of-the-damage limb of art.7(2) of the regulation to bring legal proceedings in each country in which the content can be accessed, with the jurisdiction of the respective courts being limited to the damage caused by publication in this country (referred to as the "mosaic approach" by continental writers) had originally been established for printed publication in *Shevill* [1995] 2 A.C. 18. Although the appropriateness of this possibility for internet cases had repeatedly been questioned in the literature, and despite having introduced the centre-of-interests criterion, the ECJ had explicitly preserved it in *eDate Advertising and Olivier Martinez* [2012] Q.B. 654 (at [51]).

The availability of jurisdiction under the *Shevill* doctrine formed part of the request for a preliminary ruling in *Bolagsupplysningen* because the claimant was trying to secure both compensation for their alleged damages and an injunction for rectification of the published information and removal of certain comments. Although a similar application had been made in *eDate*, the court did not need to elaborate on the applicability of the approach to claims of that kind since the jurisdiction of the referring court could be based on the centre-of-interests criterion (see the subsequent decision of the German *Bundesgerichtshof*, 8 May 2012, NJW 2012, 2197). Thus, the court made only one reference to the accessibility of the relevant content in *eDate*, which could be read as being limited to damage awards (at [51]).

But with Estonia ruled out as the defendant's centre of interests, the court had to take a decision in *Bolagsupplysningen* as to whether special jurisdiction for an injunction could be based on the fact that the online content was accessible from Estonia. Under the impression of a fairly critical opinion by Advocate General Bobek (Opinion on *Bolagsupplysningen* (C-194/16) EU:C:2017:554), which expressed serious concerns as to the appropriateness of the *Shevill* doctrine for what he described as "indivisible" remedies (at [71]–[118]), the court held that:

> "in the light of the ubiquitous nature of the information and content placed online on a website and the fact that the scope of their distribution is, in principle, universal ... an application for the rectification of the former and the removal of the latter is a single and indivisible application and can, consequently, only be made before a court with jurisdiction to rule on the entirety of an application for compensation for damage ... and not before a court that does not have jurisdiction to do so" (*Bolagsupplysningen* EU:C:2017:766 at [48]).

Considering the regulation's aim to increase legal certainty, one might argue that the decision merely replaces one difficult distinction—between territorial slices of the overall damage—with another one—between "divisible" and "indivisible" remedies. This new distinction seems particularly difficult when it comes to injunctions to *prevent* the publication of certain information, which could theoretically be limited to a specific Member State but will often have global effects in practice. Yet, the wording of the relevant paragraphs in *Bolagsupplysningen* and *eDate* clearly indicates a rather restrictive understanding of "divisible" remedies. Presumably, only compensatory damage awards will be considered as

such, while all kinds of injunctive relief, as well as restitutionary, vindicatory, and punitive damages, should be qualified as "indivisible" remedies that can be awarded only by a court with "full" jurisdiction.

Regardless of the remaining uncertainty as to its scope, the decision should certainly be welcomed. The *Shevill* doctrine has always been at odds with the centre-of-interests approach to jurisdiction in internet cases, requiring an artificial slicing up of damages and reducing predictability for the defendant while providing the claimant with a *de facto forum actoris*. Although most claimants have indeed been content with the possibility of bringing a claim in their own Member State, the fact that they would theoretically have access to 28 fora in the EU alone, each with territorially limited jurisdiction, also created an obvious potential for abuse and raised serious problems of co-ordination. Articles 29 and 30 of the regulation never seemed particularly well suited to the effective co-ordination of such claims, which would be based on the same content but aim for different remedies. Similarly, the regulation provides little guidance with regard to the authority that Member State courts should give to foreign decisions of that kind. The decision in *Bolagsupplysningen* offers a solution to this problem with regard to the injunction, a remedy that is becoming increasingly important in the internet context. For these claims, jurisdiction under art.7(2) of the regulation can no longer be based on the mere accessibility of content in a certain Member State but, instead, is now concentrated in the courts at the claimant's centre of interests.

At the same time, it has to be kept in mind that the scope of the decision is quite limited. It is limited, first, to "indivisible" remedies and does not seem to affect the claimant's ability to invoke the *Shevill* doctrine for compensatory damages claims. Secondly, it is also limited to infringements of personality rights, for which the claimant always has the option to bring a claim at their centre of interests. The ECJ has expressly refused to extend this option to other online torts (see *Wintersteiger* (C-523/10) EU:C:2012:220; [2013] Bus. L.R. 150 at [24]–[25]) and instead adopted—or, rather, adapted—the *Shevill* doctrine to violations of IP rights (*Peter Pickney* (C-170/12) EU:C:2013:635; [2013] Bus. L.R. 1313 at [43]–[45]; *Pez Hejduk* (C-441/13) EU:C:2015:28; [2015] Bus. L.R. 560 at [34]–[36]) and, more recently, to acts of unfair competition (*Concurrence SARL* (C-618/15) EU:C:2016:976; [2017] Bus. L.R. 758 at [32]–[33]). In these cases, the claimant will still be able to rely on the availability of online content, even where they seek "indivisible" remedies.

It should be noted that in each of the decisions just mentioned, the claimant was allowed to seise the courts of their respective countries of residence. The ECJ has thus created a *de facto forum actoris* for internet cases. While the jurisdiction of these courts may be limited to a territorially defined portion of the damage, this seems to contradict the doctrine of *actor sequitur forum rei* underlying the regulation (see *Coty Germany* (C-360/12) EU:C:2014:1318; [2014] Bus. L.R. 1294 at [38]; *Besix* (C-256/00) EU:C:2002:99; [2003] 1 W.L.R. 1113 at [53]). It seems to reflect a strong wish to protect the claimant: much like the introduction of the centre-of-interests criterion in *eDate*, it can be seen as an attempt to counteract the perceived risk that rights will not be sufficiently protected on the internet.

Overall, the decision in *Bolagsupplysningen* thus marks a significant change in the court's jurisprudence as it requires claimants to bring their claims in a forum

other than their Member State of registration. Whether it is indicative of a general move away from an overly broad and claimant-friendly interpretation of art.7(2) in internet cases remains, of course, to be seen. But it should be noted that the court explicitly referred to case law according to which the rules on special jurisdiction do *not* aim to protect the claimant (see *Bolagsupplysningen* EU:C:2017:766 at [40]).

Still, it seems highly unlikely that the court will abandon the *Shevill* doctrine—even for "indivisible" remedies—in areas of law in which the claimant does not have the option to rely on the centre-of-interests criterion. The recent decision in *Concurrence SARL* [2017] Bus. L.R. 758, rendered more than a half-year after the request for a preliminary ruling in *Bolagsupplysningen* had been submitted, may be evidence of the court's continued adherence to the accessibility of online content as a relevant connecting factor. The centre-of-interests approach and the *Shevill* doctrine are thus likely to continue to coexist as two different interpretations of art.7(2)'s place-of-the-damage element: one applying exclusively to violations of personality rights, the other applying to all other torts committed online as well as to compensatory damages claims for violations of personality rights.

Although the limited scope of the decision in *Bolagsupplysningen* thus seems to create a rather complex, maybe even incoherent picture of special jurisdiction for internet torts, it should still be welcomed for the court's openness to reconsider well-established doctrines and to refine them in order to come to appropriate solutions. Given the limited scope of the present reconsideration, which still leaves many of the problems created by the *Shevill* doctrine unresolved, the court will certainly get further opportunities to do so in the future. ⁂

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⁂ Allocation of jurisdiction; Companies; Connecting factors; Defamation; EU law; Place of establishment; Websites