

Recent clarifications concerning the jurisdiction of the courts over torts allegedly committed on the internet

The application of the law to websites sometimes gives rise to difficulties when one seeks to locate certain facts relating to these websites, which are, by definition, virtual. This issue, in particular the application of the rules governing the jurisdiction of the courts of the Member States pursuant to EC Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels I Regulation") continues to frequently give rise to new European case law.

For instance, a rather particular case where it was impossible to locate the physical address of the editor of the website in question enabled the Court of Justice of the European Union (the "CJEU") to provide significant clarifications on such a situation (CJEU, *Cornelius de Visser*, 15 March 2012, Case no. C-292/10). Apart from this decision, the CJEU ruled on several occasions these last months on the determination of the place of the harmful event when such an event has allegedly been committed on the Internet.

Impossibility to locate the defendant, editor of a website

In re *Cornelius de Visser*, a person having posed in Germany for naked photographs sued the editor of a website who had unscrupulously posted them online. When she became aware of this publication to which she had never agreed, the alleged victim sought the liability of the editor of the website, who could not be found despite the efforts made to find him. The editor of the website, who was also the owner of the domain name, could no longer be found at the addresses declared a few years before. The claimant thus brought her action before a German court, which, noting the impossibility to find the editor of the website to inform him of the proceedings initiated against him, ordered the service of the writ of summons by way of a publication, i.e. the display of a notice of service on a board held by the Court in question, in compliance with German law.

The German Court, torn between the rights of the defence and the right to bring an effective action before the courts, raised several referral questions before the CJEU, in particular to determine whether it had to apply the Brussels I Regulation even though there was no proof that the defendant was domiciled in a Member State.

Relying on the absence of proof of a possible domicile in a third party State, the CJEU gives priority to the applicability of the Brussels I Regulation in such a situation with, however, one condition. Indeed, the Brussels I Regulation should apply to cases where the defendant is probably a citizen of the European Union but is located in an unknown place, provided that the court hearing the case does not have any conclusive clues leading it to conclude that the defendant would be domiciled in a country outside the European Union. Should there be such clues, the national court must apply its own law pursuant to the reference made in Article 4.1 of the Brussels I Regulation.

The solution of this decision is thus based on the presumption that a European citizen having previously been located in different Member States is not domiciled in a third party State in the absence of any proof in this respect. By giving priority to the application of the uniform European rules, this solution protects, according to the CJEU, both the requirement of legal certainty and the objective of strengthening the legal protection of citizens of the European Union, "*by enabling the applicant to identify easily the court in which he may sue and the defendant reasonably to foresee before which court he may be sued*".

The applicability of the Brussels I Regulation thus established, the issue was then to know whether the German Court could, in such a situation, hand down a judgment by default without breaching the other provisions of the Regulation. The CJEU had previously held that avoiding denials of justice represents an objective of general interest that may justify restrictions on the rights of the defence, lessened by the possibility for the defendant to then challenge the recognition of the judgment handed down by default against it pursuant to Article 34.2 of the Brussels I Regulation (CJEU, *Hypoteční banka*, 17 November 2011, Case no. C-327/10).

National courts are thus authorised to give a ruling against a defendant on which the writ of summons was served by way of a mere publication due to the impossibility to locate it. The CJEU concludes that a judgment may be handed down by default "*provided that the court seised of the matter has first satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant*".

To protect the rights of the defence, however, the CJEU excludes the certification of a judgment by default as a European enforcement order within the meaning of EU Regulation no. 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims. Such a certification, removing all control in the Member State of enforcement, is "*inextricably linked to and dependent upon the existence of a sufficient guarantee of observance of the rights of the defence*". It can thus not be granted in a case where the absence of any challenge only results from the non-appearance of the defendant. In fact, this Regulation does not acknowledge the validity of the service of decisions when the address of the defendant is not known with certainty. As a consequence, it is only because of the limits that may eventually be set against the circulation in Europe of such a judgment that the CJEU agrees to let the national courts deal with this kind of disputes in the scope of judgments by default.

The search for balance between compliance with the rights of the defence and absence of a denial of justice is no longer an issue when determining whether the substantial European rules can apply. Thus, the provisions of Directive no. 2000/31/EC of 8 June 2000 on electronic commerce,

which require the identification of the Member State in which the editor of the website is established, cannot apply when the place of establishment of this service provider is unknown.

In this case, the German Court had also requested the CJEU's position on the interpretation of Article 5.3 of the Brussels I Regulation, which confers jurisdiction, in matters relating to tort, on the court of the place of the harmful event. However, as the CJEU had not long before handed down a decision concerning the application of this provision in the event of an alleged infringement of personality rights on the Internet, the referral question was removed as it had become groundless.

The possible locations of the harmful event

Indeed, in *re eDate Advertising* (CJEU, 25 October 2011, Cases no. C-509/09 and C-161/10), the CJEU transposed and adapted the now well-known *Fiona Shevill* case law to situations where personality rights have been infringed via the Internet. Thus, the person alleging a damage can request compensation for his/her entire loss either before the court of the place of establishment of the transmitter of the content in question, or before the courts of the Member State of the place where he/she has the centre of his/her interests (this concept mainly refers to the habitual residence of the alleged victim or the place where he/she has his/her professional activity). The alleged victim can also initiate an action before the courts of each Member State where content posted online is or was accessible. However, in this latter case, the courts will only have jurisdiction over the loss caused in their country.

The CJEU adopts a different approach in matters relating to the infringement of intellectual property rights. In cases where infringement of intellectual property rights is alleged, the CJEU gives priority to the criterion of orientation of the website on which the cyber-tort would allegedly have been committed over the criterion of mere accessibility, deemed insufficient to apply European law (CJEU, *L'Oréal*, 12 July 2011, Case no. C-324/09). Similarly, the CJEU previously refused to acknowledge as general ground of jurisdiction, under Article 5.3 of the Brussels I Regulation and the concept of place of the harmful event, the place where the assets of the claimant are concentrated (CJEU, *Kronhofer*, 10 June 2004, Case no. C-168/02).

Furthermore, the CJEU has provided further clarifications in the scope of a dispute relating to the reservation of sponsored links on the Google search engine. To be more precise, the owner of a trademark alleged that its competitor had illicitly used its trademark registered in Austria by reserving an identical keyword to the protected sign, which led, when the keyword was entered on the German website www.google.de, to the appearance of an advert for this competitor (CJEU, *Wintersteiger*, 19 April 2012, Case no. C-523/10).

The CJEU firstly underlined that the factors concerning foreseeability that had led to the above solution in matters of infringement of personality rights could not be transposed in matters relating to the alleged infringement of intellectual property rights due to the limited territorial scope of such rights. The European Court added that the courts of the Member State in which the trademark is registered, considered to be the place of materialisation of the loss, can have jurisdiction over the entire alleged loss. The CJEU then considered that the causal event only results from the behaviour of the advertiser using the referencing service (and not the search engine which does not itself use the trademark in the scope of the display of the advert, as specified by the CJEU in its *Google France and Google Inc.* decision, 23 March 2010, Cases no. C-236/08 to C-238/08). Thus, the CJEU also confers jurisdiction on the courts of the place of establishment of the operator.

In this respect, one can note the wish of the CJEU to limit the impact of these solutions by insisting on the fact that they only apply to situations that are similar to the one that gave rise to the litigious case (i.e. the use of a keyword that is identical to a trademark as sponsored link on a search engine operating under an extension referring to a Member State other than the one where the trademark is registered). To date, it thus seems difficult to reconcile all the recent case law of the CJEU to establish guidelines that could apply beyond the situations that have already been examined. Nevertheless, additional clarifications can be expected, the CJEU being regularly requested to rule on referral questions relating to the application of Article 5.3 in matters relating to cyber-torts.

Lastly, the French Supreme Court requested an interpretation of the CJEU as it faced a new situation compared with the previous European decisions. The situation relates to the case where a work is allegedly illicitly reproduced on a material medium (for instance, a CD) that is offered for sale online, in contrast with the more typical case where the allegedly protected content (the piece of music) is reproduced or broadcasted on a website without any authorisation to do so. The issue thus relates to the determination of the appropriate interpretation of Article 5.3 of the Brussels I Regulation when a CD containing an illegal copy of a piece of music is offered for sale online. In this case, the litigious CDs had been burned in Austria but offered for sale by British companies and allegedly infringed the rights of a French singer-songwriter.

The French Supreme Court thus questioned the CJEU to know whether, in matters relating to the alleged infringement of authors' rights via content posted online, (i) the allegedly injured party can act before the courts of each Member State where the content is or was accessible to obtain compensation for the loss caused in this country, or (ii) whether it is also necessary to establish a particular connection with this State, such as the orientation of the content towards the public of this country. The French

Supreme Court also wishes to know whether the answer to this question is identical when the alleged infringement results from the offer online of a material medium reproducing content or when it results from the posting online of the very dematerialised content (French Supreme Court, 1st Civil Chamber, 5 April 2012, *Pourvoi* no. 10-15.890).

The rules of jurisdiction laid down on a case-by-case basis by the CJEU do thus not apply to all the situations that can arise in matters relating to cyber-torts. The national courts frequently seek to obtain confirmation of the transposable nature of the interpretations already provided in each new case. On the other hand, people involved in court proceedings can, without incurring too significant risks, anticipate a broad application of the European rules even if it seems difficult to establish the precise place of establishment of the operator of the website in Europe.



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