

Determining Jurisdiction and the Applicable Law in Cross-Border Unfair Competition and Unfair Commercial Practices Cases

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Abstract The free movement of goods promotes cross-border transactions. Computerization of services and intensified use of the Internet also contribute to the development of trade within the EU. Problems that could once be addressed almost exclusively or at least prevalently at a national level currently assume cross-border character. This is also true in the case of regulation of unfair competition and unfair commercial practices. Whereas the substantive regulation of unfair competition in both EU and domestic law is quite common in scientific literature, its aspects in private international law are often neglected. Since the EU law has to a large extent replaced national conflict-of-law and procedural rules with unified EU provisions, this article focuses on the EU regulations Rome II and Brussels I bis with the emphasis put on the latter. The aim of this article is to review the rules determining jurisdiction (and the applicable law) on the basis of legal doctrine, current legislation and case law of the Court of Justice of the EU. Attention also will be paid to both off-line and on-line situations, as well as to the specifics of consumer protection in the context of unfair competition and unfair commercial practices.

Keywords: • unfair competition • unfair commercial practices • private international law • applicable law • jurisdiction • on-line torts

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1 Introduction

The European Union law (hereinafter: EU law) on unfair competition has a specific character that distinguishes it from the concept of unfair competition that is typical for national regulations. It is quite common for domestic laws to specify the unfair competition through the general definition clause. Such general clause is absent within the EU law, as it only addresses some of the aspects of unfair competition, such as misleading and comparative advertising and the protection of trade secrets. In addition, it is quite common to include unfair commercial practices into the European Union (hereinafter: EU) concept of unfair competition, which is, however, systematically speaking, part of consumer protection law. Accordingly, the use of the term “unfair competition” can be somewhat misleading within the EU law as it does not fully embrace its entire scope of regulation, and is rather limited compared to the concept adopted under national legal rules. The true reason behind this scenario is the nature and the (limited) scope of EU competence in this area. The competence of the EU to adopt measures in matters related to unfair competition acts and unfair commercial practices is closely linked to and derived from the regulation of internal market and its functioning.

In the past, differences between national regulations of unfair competition have allegedly often hindered trade in goods between Member States. Partial harmonization of misleading and comparative advertising and the protection of trade secrets has created comparable trade conditions across the EU in this field and removed obstacles to internal market.

However, from the point of view of this article, those areas of unfair competition law that are harmonized are not relevant. Where there is a common standard, the legal status of a competitor is clear and the standard of regulation in other Member States is relatively easily identifiable and predictable. However, in areas that are not subject to harmonization (or go beyond the minimum harmonized standard), there is uncertainty about the legal framework in other Member States, given that the relevant standards are inherent to domestic law. Therefore, in case of any cross-border activity, it is of utmost importance to determine both the applicable law according to which the particular situation will be assessed and which courts have proper jurisdiction to hear the proceedings.

Acts of unfair competition in the cross-border context are subject to unified regulation at the EU level, as part of the EU policy on judicial cooperation in civil matters. It shall be emphasised that this policy is not directly linked to the fundamental freedoms of the internal market. Due to the existing divergence in the scope of competences within these policies, the EU private international law covers all aspects of unfair competition acts, both in terms of conflict of laws, as well as of procedural rules, whereas the EU-harmonised substantive law is limited to certain aspects of unfair competition (Article 114 of the Treaty on the functioning of the EU (hereinafter: TFEU), which presupposes close connection to the internal market, thus cannot serve as a legal basis for full harmonisation, or even unification of substantive law of unfair competition). As a

consequence, the notion of “unfair competition” requires different understanding and interpretation in these two areas of EU law.

The aim of this article is to identify and specify approaches of the European private international law to determining the applicable law and jurisdiction, with emphasis put on the latter, in the light of the case law of the Court of Justice of the EU (hereinafter: CJEU) and doctrine. The opening chapter concerns the problem of classification and interpretation in EU private international law and provides some introductory remarks in relation to finding applicable rules on governing law and jurisdiction in cross-border unfair competition and unfair commercial practices cases which will be elaborated on further. Chapter 3 deals with the question of determining the *lex causae* (the governing law) of unfair competition acts within the EU internal market. This paper is not intended to provide a comprehensive analysis of the problem; rather, it briefly introduces and reviews the regulation of the said subject matter under EU law, in particular under the Regulation Rome II.¹ The essential part of this article is found in chapter 4, which is devoted to the issue of finding competent national courts to conduct proceedings in matters related to unfair competition acts and unfair commercial practices in EU-wide cross-border cases. Therefore, the relevant provisions of the Brussels I bis² are analysed. First, the general rule on jurisdiction under Article 4 of the Brussels I bis is elaborated on. Further, the alternative rules on jurisdiction under Article 7 and their applicability in cases involving the subject matter at hand are analysed with an emphasis on the existing case law of the CJEU. A self-contained issue that deserves special attention is the problem of determining jurisdiction in cases involving unfair commercial practices, as they affect the interests of consumers. The possibility to apply special rules concerning consumer contracts is also discussed. Lastly, particular consideration is given to the problem of determining jurisdiction in cases involving unfair competition acts committed via the Internet. Although the core of the article lies in the issue of determining jurisdiction in cross-border unfair competition and commercial practices cases, we would be remiss not to also address the conflict-of-law aspects of the subject matter at hand insofar the conflict-of-law rules under the Regulation Rome II are helpful for better understanding of the procedural rules under Brussels I bis; notwithstanding the requirement for complementary interpretation of the two regulations.

2 The problem of classification – some initial thoughts on finding the rules applicable to unfair competition and unfair commercial practices cases

The process of finding the applicable rules in order to determine jurisdiction and the governing law of a (civil or commercial) case having cross-border implications involves two key elements, i.e. classification of the facts of the case, and interpretation of the notions used in those provisions. The subsequent text will be based on the following assumptions:

- In terms of classification of the facts of the case, the more general the term is that is contained in the referring section of the potentially applicable rule, the lower usually are the demands placed upon the judge. In other words, in order to establish the applicable procedural rule, mere “superficial classification” of the facts of the case

and their subsequent subsumption under a legal concept (or a group of concepts) that is more general in nature, or even their mere categorisation in one of the sub-systems of private law, will suffice. The same is also relevant to the process of finding the applicable conflict-of-law rule although not entirely. The truth is, the notions employed by (the referring section of) procedural rules usually reflect a higher degree of generality when compared to those employed by the conflict-of-law regulations.³ As a result, the process of finding the applicable procedural rule in the cross-border context does not necessarily require such a high degree of distinction, as is the case of finding an applicable conflict-of-law rule, and definitely not as high as is the required degree of distinction when finding the applicable substantive rules.⁴

- In terms of interpretation of legal notions comprised in procedural and conflict-of-law rules, a notion more general in nature places greater requirements on the applying body or institution. Indeed, in cases where the regulation contains either no legal definition, or no guidance as to its interpretation, finding the true meaning and the scope of such a notion could be challenging. This is especially true when the notion concerned is encompassed in a set of unified rules of private international law that are to be interpreted autonomously, with no link to any national law. A great example of this can be found in the EU private international law measures, including the Regulation Rome II and the Brussels I bis which are both subject to the further analysis.

As flows from the introduction, the subject of this article covers two relatively separate fields of law: (i) acts of unfair competition, which are limited, in terms of their scope, to acts addressed primarily to another competitor, or more precisely to another entrepreneur or number of entrepreneurs; and, (ii) unfair commercial practices, which comprise acts of entrepreneurs affecting (usually a group of) consumers and their interests. This classification is derived both from the legislation introduced under EU directives, as well as by national rules adopted as a result of their implementation, but has no reflection in EU rules of private international law. These, in contrast, comprise terms of more general nature and are wider in scope.

Regarding EU conflict-of-law rules, the Regulation Rome II specifically concerns the notion of “acts of unfair competition”, or the denomination “non-contractual obligations arising out of unfair competition.”⁵ While the terminology used may appear as a narrowly defined concept of civil tort law, there is neither an overlap of its content with the definition of the same or similar notion introduced by the EU directives, nor can any definition within the scope of any national law outside the harmonised area play a significant role. For the purposes of the Regulation Rome II, it is necessary to understand the given notion in broader terms than may be done within the framework of national law. This concept follows from the requirement of autonomous interpretation.⁶ On the other, the Brussels I bis employs no analogous notion in any of its provisions. As has already been discussed, the degree of generality is higher in case of procedural rules. In particular, the Brussels I bis limits itself to distinguishing between jurisdiction in “matters relating to a contract” on the one hand, and in “matters relating to tort, delict or quasi-delict” on the other hand.⁷ The requirement of autonomous interpretation is also true for the latter.

It follows that while the content of the notions used by EU directives does not correspond to the terminology used by EU private international law measures,⁸ there is not even an overlap between the notions comprised in conflict-of-law and procedural rules of EU private international law. However, the latter is more a question of technique and selection of the notions used, rather than an intention of the legislator to set a different scope of application of the respective EU private international law measures or a lack of competence.

Having regard to the requirement for consistent interpretation of the rules of EU private international law,⁹ these should be interpreted in their mutual context and in light of an attempt to cover all areas of private law which, by virtue of their substantive definition, fall within the scope of the relevant regulations. In practical terms, this means, *inter alia*, that if a conflict-of-law rule (in terms of the present subject matter, it would be a provision of the Regulation Rome II) contains more detailed regulation using more casuistic terminology, such a rule can serve as a subsidiary source when interpreting notions used by procedural rules (that is rules under the Brussels I bis). Further, in the case of EU legislation, the meaning of this “source” will be derived from both the actual wording of the provisions and the CJEU case law interpreting those provisions.¹⁰

As to the applicability of the EU directives relating to unfair competition and unfair commercial practices, and in particular the definitions of the notions provided therein, they can only be used as guidelines for interpretation and then only with a high-degree of caution. Regardless of how identical or convertible as to their meaning they may appear at first sight in relation to the notions used either by the Brussels I bis, or the Regulation Rome II, the notions contained in the EU directives are of a narrower material scope, and their meaning does not fully correspond to the terminology employed by EU private international law measures.

3 Determining the law applicable to unfair competition and unfair commercial practices with cross-border dimension

At the EU level, non-contractual obligations in civil and commercial matters¹¹ with cross-border dimension are subject to the conflict-of-law rules of the Regulation Rome II. Not only that matters related to acts of unfair competition and/or unfair commercial practices are not explicitly excluded from the scope of application of this Regulation;¹² moreover, they are made subject to special provision under Article 6 of Regulation Rome II. This makes the legislation more straightforward¹³ as compared to regulation of procedural issues in cross-border context.¹⁴

The initial proposal of the regulation drafted by the Commission referred solely to acts of unfair competition.¹⁵ However, during the legislative procedure, a conflict rule on acts restricting free competition has been added by the Council^{16,17} As a result, Article 6 now covers two seemingly distinct areas of law which are closely related but do not necessarily overlap, i.e. acts of unfair competition¹⁸ and acts restricting free competition.¹⁹ Although these two areas of law may seem disparate, as they pursue a different target,²⁰ the common denominator of the two, from the perspective of conflict of laws, is to provide legal

protection in cases of private-law claims (Rozehnalová, 2013: 177, also Sehnálek, 2017: 37). As the material scope of Article 6 is wider than the subject-matter of this paper, we will limit our subsequent comments to paragraphs 1 and 2 of the said provision, leaving aside matters related to “acts restricting free competition”.²¹

Examining the Regulation Rome II closer, one discovers that none of its provisions refer to state policies, much less state interests, and both the Preamble and the Explanatory Report highlight the goal of the Regulation as “to ensure a reasonable balance between the interests of the parties, i.e. the person claimed to be liable and the person who has sustained damage.”²² Hence, the conflict rules in matters related to unfair competition are not premised upon interests of the states but rather upon firmly defined criteria centred on the individual interests of competitors and consumers. Even so, the aim of the conflict-of-law rules “to protect competitors, consumers and the general public, and to ensure the proper functioning of market economy” explicitly incorporated in the Preamble²³ can be perceived as an expression of a public interest²⁴ and the applicable policy of the EU, respectively its Member States.

Regarding the subject matter of Article 6 (1) of Regulation Rome II, it is noteworthy that the notion “(an act of) unfair competition” requires an autonomous interpretation,²⁵ with no reference to any national law and perception of the concept of unfair competition therein. Nevertheless, as this conflict-of-law rule operates against the background of a number of substantially different national laws of unfair competition, Illmer argues that the autonomous interpretation has to take the concepts of unfair competition developed under national laws into account (Illmer in: Huber, 2011: 147). Recital (21) of Regulation Rome II acknowledges wide and flexible understanding of the notion, and implies that modern conflict-of-law instruments must reflect the objective and character of modern laws against unfair competition, that is, to protect not only competitors but also consumers and the public in general.²⁶ These premises lead to the conclusions that the material scope of Article 6 (1) is inevitably wider than is the scope of EU harmonized rules against unfair competition²⁷ and unfair commercial practices,²⁸ and that the conflict-of-law rule under Article 6 does not correspond to the terminology used either by the EU directives, or substantive national laws of Member States. On the other hand, this does not mean that both the EU directives and national legal rules on unfair competition cannot serve as guidelines when interpreting Regulation Rome II. In fact, they can, and shall do so. Last but not least, provisions of Regulation Rome II shall be interpreted in relation to and in light of the provisions of other EU private international law measures, in particular the Brussels I bis. In practice, this means that where the conflict rules and procedural rules employ the same notions, interpretation thereof must be mutually consistent, with regards to the objective and scheme of the particular regulations and their scope of application.²⁹

In order to designate the law applicable to obligations arising out of an act of unfair competition, Article 6 (1) of Regulation Rome II adopts the criterion of *locus damni infecti*, that is, the place where the effect of a harmful event occurs. Nevertheless, the connecting factor is concretized for the purposes of unfair competition acts as “the place (country) where competitive relations or the collective interests of consumers are (or are likely to be) affected.”³⁰ The specific wording used reflects the protective nature of the

provisions against unfair competition (Rozehnalová, 2013: 177). The mere fact that competitive relations or collective interests of consumers *are likely to be affected* by unfair competition behaviour in a particular country is enough to determine the law of that country as governing the obligations arising out of such behaviour. Where these acts have a real effect on competitive relations or collective interests of consumers in a particular country, application of the law of that country is undisputable. Furthermore, Article 6 (1) applies also to actions for injunctions brought by consumer associations.³¹

In a very recent case, *Verein für Konsumenteninformation v Amazon EU Sàrl*, the CJEU confronted the question whether the law applicable to an action for an injunction within the meaning of Directive 2009/22/EC³² directed against the use of allegedly unfair contractual terms by an undertaking established in a Member State which concludes contracts in the course of electronic commerce with consumers resident in other Member States [...] shall be determined in accordance with the conflict rules of the Regulation Rome II, particularly with Article 6, or in accordance with Regulation No 593/2008 on the law applicable to contractual obligations³³ (hereinafter: Regulation Rome I). The applicability of Article 6 (1) of Regulation Rome II to situations similar to the one at hand was based on the established fact that the concept of “unfair competition acts” shall be treated autonomously for the purposes of Regulation Rome II, and interpreted as extendable “to any act which is likely to alter relations between the participants on a market, whether between competitors or in respect of consumers collectively.”³⁴ In other words, within that autonomous meaning, the concept of “unfair competition” shall cover the use of unfair contract terms inserted into general terms and conditions, in so far as this is likely to affect the collective interests of consumers as a category and, therefore, to influence the conditions of competition on the market. As a result, the applicable law shall be determined in accordance with Article 6 (1) of Regulation Rome II.³⁵

In cases where the acts of unfair competition affect competitive relations or collective interests of consumers in more than one country, the applicable law will be determined independently in relation to the market of each country, using the rule under Article 6 (1). From the viewpoint of a competitor whose wrongful acts have given rise to harmful events affecting competitive relations or collective interests of consumers in several countries, the claims will be made subject to different national laws depending on where the consequence thereof occurred. Such situations are easily imaginable and very likely to arise where unfair competition acts are committed via the Internet. In particular, comparative or misleading advertisement put on-line can harm collective interests of consumers, as well as competition relations in number of various countries, provided that the advertisement is accessible and advertised products or services are available in that country.³⁶

The used connecting factor not only serves the purpose of determining the applicable law but also limits itself the scope of application of Article 6 (1) of Regulation Rome II. The said provision therefore does not apply to cases where an act of unfair competition affects exclusively the interests of a specific consumer³⁷ or of a specific competitor.

The latter is subject to a special provision under Article 6 (2) of Regulation Rome II which stipulates that where individual interests of a specific competitor are affected, the general rule under Article 4 of the Regulation Rome II shall apply. According to the conflict-of-law rules under Article 4, the law applicable to obligations arising out of unfair competition acts in this case will be the law of the country in which the damage occurs (*lex loci damni infecti*), irrespective of where the harmful event or indirect consequences of that event occurred.³⁸ Subsequent conflict rules under Article 4, that is the law of the country of common habitual residence (*lex domicilia communis*),³⁹ or the law of the country to which the tort is manifestly more closely connected,⁴⁰ are applicable as well. What remains unclear is whether the choice of the governing law is allowed in cases that fall under Article 6 (2), or not.⁴¹ We agree with most of the authors who uphold the freedom of parties to choose the applicable law. In particular this is because the relationship between two individual competitors is, in its nature, different from those covered by Article 6 (1) where impact on competitive relations in general or collective interests of consumers is anticipated. Article 6 (2) can be applied for example in cases of bribery, recruitment of employees, or mongering rumour (Dickinson, 2008: 404).

Finding the governing law in cases where only individual interests of a specific consumer are affected is a little more complicated. Regulation Rome II does not provide an explicit and clear solution to this problem. Rather, the answer shall be sought in the intersection of the two conflict rules regulations, that is, Regulation Rome I and Regulation Rome II, as well as in case law of the CJEU. The core of the problem shall be sought in rigorous characterization of the circumstances of each particular case. Individual interests of a consumer (or a few consumers) will be most likely affected by unfair competition acts, or unfair commercial practices speaking in terms of EU directives, in relation to – either already existing, or newly emerging (likely to emerge) – contract between a competitor and that particular consumer(s). It is true that unfair commercial practices often play a role in pre-consensual stage, or when performing the contract on the side of a businessperson. What is crucial in our viewpoint, is whether the link to an existing or emerging contract is sufficient enough, and significant from the legal point of view. A clue how to solve the problem can be found in the already-mentioned case *Verein für Konsumenteninformation v Amazon EU Sàrl* where the CJEU held that “*whereas the law applicable to an action for an injunction for the protection of consumer’s interests directed against the use of allegedly unfair contract terms [...] must be determined in accordance with Article 6 (1) of Regulation Rome II, the law applicable to the assessment of a particular contractual term must always be determined pursuant to Regulation Rome I, whether that assessment is made in an individual action or in a collective action.*”⁴² Having said that, the governing law shall be determined in accordance with the conflict rules of Regulation Rome I,⁴³ provided that a considerable link between unfair commercial practices on the one hand and a contractual relationship with a particular consumer (or a small number of consumers) on the other is established. To the contrary, where a manifest connection to a contract does not arise from the circumstances of the case, the general rule for non-contractual obligations under Article 4 of Regulation Rome II seems to be applicable.

4 Determining jurisdiction in cross-border disputes arising out of acts of unfair competition and unfair commercial practices

4.1 Some introductory remarks on the application of the Brussels I bis

The rules for determining jurisdiction or, more precisely, for determining national courts of a particular Member State that are competent⁴⁴ to settle civil and commercial disputes having cross-border dimension are contained in Brussels I bis. The Brussels I bis consists of a hierarchy of rules which serve the purpose to find the most suitable forum, taking into account in particular the requirement for a close connection (both in factual and legal terms) between the venue and the circumstances of a case. The Brussels I bis encompasses rules regarding so-called exclusive jurisdiction,⁴⁵ special⁴⁶ and alternative⁴⁷ jurisdictional rules, and general rule⁴⁸ that is in fact of subsidiary character.⁴⁹ The parties to a dispute also have the option to establish the jurisdiction of a court based on the manifestation of their free will⁵⁰ or, where applicable, by merely not contesting the jurisdiction of the court⁵¹ seized of the dispute.

Unlike conflict-of-law rules, the procedural regulation does not comprise any special and explicit provision on jurisdiction regarding acts of unfair competition or unfair commercial practices matters. On the other hand, this subject-matter has not been expressly excluded from the material scope of Brussels I bis.⁵² *A contrario*, the Regulation *does* cover disputes arising from acts of unfair competition and unfair commercial practices, since they undoubtedly represent matters that fall within the scope of civil and commercial law (Sehnálek, 2017: 28).⁵³

The decisive factor regarding the applicability of specific provisions of Brussels I bis to disputes arising from acts of unfair competition or unfair commercial practices lies in correct classification of these (il)legal acts and in subsuming them under one of the more general notions that delimit the scope of the individual provisions of the Brussels I bis. Due to the relatively general nature of the notions typical for the procedural norms set out in Brussels I bis, both in terms of the scope of application (the referring section) and the point of contact (the connecting section) of these rules, the case law of the CJEU and interpretation provided therein plays a pivotal role. On the other hand, it is true that the number of CJEU cases involving matters related to unfair competition or unfair commercial practices is not very high. In fact, there are only a few decisions of the CJEU that concern the subject matter at hand.

For this reason, this article also reviews decisions in which the CJEU has dealt with comparable legal concepts (in terms of the principles and starting points of legal regulation) that fall within the material scope of the analysed provisions. Given the more general nature of notions used in the referring sections of the Brussels I bis procedural rules, we consider such approach completely justified, and from the pragmatic point of view, in fact the only approach possible. This is also the case with respect to Article 7 (2) of the Brussels I bis, which provides the rule for determining jurisdiction in disputes concerning non-contractual obligations.

The following parts of this article attempt to analyse selected provisions of the Brussels I bis, which in terms of their material scope, could be applicable to determining jurisdiction in cross-border unfair competition and unfair commercial practices claims. Attention will be given to specific circumstances or conditions under which the application of the special or alternative rules of the Brussels I bis is conceivable. In this regard, it is of paramount importance to assess in each specific case whether acts of unfair competition or unfair commercial practices show a sufficiently close connection to an existing or emerging contract or the performance of such, or whether they appear independent on such a contract or performance thereof. Special consideration is given to the issue of determining jurisdiction in disputes arising out of unfair competition and unfair commercial practices committed by means of the Internet. The use of this medium makes it possible to reach a wide range of addressees, whether among consumers or other entrepreneurs, though a single click, with potential impact in dozens of countries.

For these purposes, several judgements of the CJEU in related cases are briefly reviewed and the conclusions thereof made subject to analysis regarding the degree to which interpretation provided by the CJEU is applicable to cases involving acts of unfair competition and unfair commercial practices. Further, where appropriate, the authors suggest how to read and apply conclusions reached by the CJEU in given cases (that are not identical in terms of their merits, though) to the subject matter at hand.

4.2 General rule – Article 4 of Brussels I bis

Article 4 (1) of the Brussels I bis contains a general rule for establishing the courts' jurisdiction and constitutes a so-called residual category in terms of the procedural rules system in the relevant proceedings. Most of the rest of the rules on determining jurisdiction represent a *lex specialis* in relation to this provision. Parties to a dispute as well as Member States' courts are thus obliged to observe these "special" rules and establish jurisdiction based on them instead of the general provision, provided that the conditions set in the special rules are met. The only exception from this system consists in the procedural norms comprised in Articles 7 and 8 of the Brussels I bis, which are equivalent to Article 4 in their nature. In other words, they represent an alternative to the general rule from which the plaintiff may choose the most favourable forum according to his preferences.

In accordance with the general rule under Article 4 (1), disputes with cross-border dimension covered by the Brussels I bis fall within the jurisdiction of the courts of the Member State in which the defendant is domiciled.⁵⁴ The nationality of the defendant or the place where his property is situated is irrelevant, and the same applies to the domicile of the plaintiff – the latter may be situated in the same Member State (if the cross-border element in the proceedings follows from another fact), in another Member State, or even in a third country. This provision thus expresses the general principle of procedural law "*actor sequitur forum rei*" and is practical for persons in the position of the passive party, i.e. the defendant, as it grants him the advantage of his home country's jurisdiction.

Within the scope of issues discussed in this article, this will concern situations where the defendant is a person who has committed unlawful acts that can be classified as unfair competition acts, or unfair commercial practices. The defendant will be sued based on claims following from the unlawful conduct, usually by multiple plaintiffs, either through individual actions or a class action via a consumer protection association or other entrepreneurs. In all these cases, the use of the general rule laid down in Article 4 seems to be a practical solution, especially in terms of procedural economy and the defendant's legal certainty, since all actions will be concentrated in courts situated within one Member State (with the possibility of a joinder of proceedings in accordance with the national procedural rules).

The interpretation of the notion "defendant's domicile" is of crucial importance for determining which courts have jurisdiction over a particular case. The Brussels I bis includes special rules for determining the domicile of individuals and the domicile of legal entities. In terms of establishing whether the defendant who is a natural person has his domicile in a given country, the Brussels I bis only refers to national rules, applicable either in the country of the court where the proceedings are held, or in the country where the defendant apparently has his domicile.⁵⁵ The domicile of a defendant who is a natural person is thus always established based on national rules applicable in the Member State in question. On the contrary, the Brussels I bis provides an autonomous definition of a "domicile" of legal entities. It is either their (statutory) seat, or the place of the central administration, or the principal place of business.⁵⁶

In terms of the personal scope of application of the Brussels I bis, Article 4 (1) shall be read in line with Articles 5 and 6 of the said regulation, and perceived as a precondition for application of special⁵⁷ and alternative rules⁵⁸ on jurisdiction (Rožehnalová, 2013: 218). In other words, only a defendant who is domiciled in the territory of a Member State may also be sued in courts of another Member State based on the special and alternative rules comprised in the Brussels I bis. Nevertheless, where the defendant is not domiciled in any of the Member States, this mere fact does not preclude him from being sued before Member States' courts based on the rules on "exclusive jurisdiction", which rests on material terms rather than the domicile of the parties to a dispute,⁵⁹ or in cases of jurisdiction agreed by the parties,⁶⁰ or by implied application of jurisdiction of the court that was seized in the given case.^{61, 62}

4.3 Special rule for civil torts as an alternative to the general rule and its applicability in respect of unfair competition

Since the general rule for determining jurisdiction is advantageous for the defendant, the other party to the dispute, i.e. the plaintiff, will usually want to avoid it. To balance the (contradictory) interests of the parties, the Brussels I bis indeed gives the plaintiff such an option. Articles 7 and 8 lay down alternatives to the rule under Article 4, providing the plaintiff with the possibility to choose in which Member State to bring an action against the other party.

As already mentioned, the Brussels I bis provides no special rule on jurisdiction related particularly to unfair competition cases. Nonetheless, Art. 7 (2) establishes court jurisdiction “in matters relating to tort, delict or quasi-delict”⁶³, which is more general in nature and undoubtedly includes unfair competition cases as an example of civil tort. In contrast, the first paragraph of Article 7 provides an alternative rule for establishing jurisdiction “in matters relating to a contract”. This dualism of alternative procedural rules reflects the roughest classification of obligations to contractual and non-contractual, the specific features of liability relationships outside the law of contracts compared to concepts of contractual law. Finally, it also reflects the conflict-of-laws regulation of obligations under EU law, in particular those laid down in the Regulation Rome I as for the law governing contracts and in the Regulation Rome II as for non-contractual obligations.

Coming back to the substantive regulation of unfair competition on the EU level, the relevant directives⁶⁴ clearly indicate the effort to balance private and public interests in the given area. Public interest is manifested especially in the protection of competition on the internal market and ensuring free trade in goods and services, while private interests of traders and consumers are protected through the protection of their rights and positions that might be affected by the conduct of another trader. The respective positions of traders and consumers is where we can see a fundamental difference. In the area under scrutiny, traders are usually in the position of a third affected party; i.e., there is typically no contractual relationship between them and the person engaging in unfair competition. In contrast, conduct of a person pursuing unfair competition aimed towards a consumer either results in the creation of a contractual relationship (but is, however, vitiated by some kind of defect – e.g. misleading the consumer; failure to provide the required information; aggressive practices) and, without such conduct, the contractual relationship would likely not be established at all, or the unfair practices of traders are applied within an already existing contractual relationship with the consumer and in the provision of a performance under the contract. The factor linking the two categories together is that the trader’s unlawful conduct affects economic interests, both of other traders and of the consumers. Nonetheless, the mentioned classification has fundamental importance in terms of determining the applicable procedural rules.

If we limit our analysis to the first category, i.e. conduct aimed against another trader(s), it is clear from the above that these cases will be covered by Art. 7 (2) of the Brussels I bis, which lays down the rules for determining jurisdiction for non-contractual relationships. In the light of this provision, jurisdiction rest with the courts for the place *where the harmful event occurred or may occur*. The formulation of the connecting factor in the cited provision reflects the preventive nature of the rules for protection against unfair competition, as it envisages court jurisdiction also for the place where there is a mere danger of a harmful event. Determination of the venue for claims based on unfair competition is therefore based on the trader’s unlawful conduct; the property or any analogous rights affected by unfair competition are irrelevant. Such conduct has its cause and must therefore occur at a certain place (*locus delicti commissi*) and also have its consequence; in other words, the harmful effects of the conduct will or may occur at a certain place (*locus damni infecti*). These places may be identical, but may also be located

in different countries. It is therefore the task of international procedural law to choose a criterion for connecting a legal norm that will result in determining the local and legally most suitable venue with respect to the interests of the affected parties and the requirement for predictability and procedural economy in proceedings with an international element.

The rule embodied in Art. 7 (2) of Brussels I bis, which is clear at first sight, entails certain difficulties in terms of interpretation and application. Indeed, the notion of the “place where the harmful event occurred” is broad and ambiguous and can thus be construed in various ways. It comprises terminologically as to both the place where the unlawful conduct was committed, i.e. where, for example, untrue information on some other entrepreneur or his products was published, or where a comparative advertisement was published, and the place where the effects of the unlawful conduct (i.e. damage) occurred, e.g., the place where the goodwill or an entrepreneur or his products was harmed or where a business opportunity was lost. These “cause and effect” places may be located in different countries. It is not unusual if the damage itself occurs in several countries. It will be especially difficult to find a suitable solution in those cases where unfair competition is pursued within the Internet, as in that case harmful consequences can potentially arise in many different countries. Moreover, the problem becomes even more complicated if we consider the current reality of commercial relations, as interconnection of individual competitors can lead to a situation where harm incurred by one entrepreneur can have an indirect influence on the reputation of another entrepreneur connected with the former, but having his seat in some other country.^{65,66}

The solution to the questions delineated above can be inferred from the case-law of the CJEU pertaining to Brussels I (bis), and the Brussels Convention^{67,68} However, none of the judgements rendered by the CJEU prior to this date scrutinizes the issue of determining jurisdiction in cases involving acts of unfair competition or unfair commercial practices. It is as if this matter was outside the sphere of interest of national courts that refer preliminary questions to the CJEU. Nevertheless, we consider the existing case law relevant to the extent to which it deals with non-contractual obligations of similar nature that pursue the same objectives, e.g. cases involving cross-border libel. In other words, we prefer abstraction over a casuistic approach.

As regards determining the place where the damage occurred,⁶⁹ in *Mines de potasse d'Alsace*, the CJEU came to the conclusion that this notion had to be interpreted as comprising both the place where the unlawful conduct took place and the place where the damage was manifested. In the CJEU's opinion, it is not purposeful to restrict interpretation of the notion of the “place where the damage occurred” to only one of these two criteria, as they both can establish a sufficiently close connection with the place where the dispute is being pursued and may be relevant, e.g., in terms of taking evidence (Rozehnalová, 2013: 222–223). At the same time, these serve as alternatives to each other, where the choice between these venues is left to the plaintiff as the person initiating the litigation.

In *Shevill*,⁷⁰ the CJEU confirmed the aforesaid conclusions and indicated how the criterion of “place where the damage occurred” used in Art. 7 (2) of Brussels I bis should be construed in cases of court enforcement of claims ensuing from infringement of moral rights by defaming information published in the press. The proceedings before the national court were concerned with claims ensuing from liability for damage caused by a libel published in press that was distributed, along with the publisher’s country, also in several other Member States. The CJEU concluded that, in such a case, the place where the harmful event occurred was the place where the given publisher was established, since this was where the unlawful conduct causing the ensuing damage had been committed. It further inferred that the place where the damage had occurred was also the place where the press was distributed, provided that the aggrieved party was known there. Indeed, this is where the effects of the unlawful conduct were manifested (Rozehnalová, 2013: 251). The competence of courts to conduct proceedings in the given case is established in both situations; although the scope of the competence differs. The court determined according to the criterion of the place of the unlawful conduct may hear the entire case to the full extent of the damage incurred, while the courts determined according to the place where the damage occurred may only hear the dispute to the extent of the damage incurred in that particular country.⁷¹

Generalising this otherwise highly specific solution, it follows that the CJEU used *the criterion of unlawful (anti-competitive) conduct* complemented by *the criterion of a particularly close connection between the dispute and a specific country*. In view of the practical procedure in court proceedings (the possibility and availability in terms of taking evidence, service of process, etc.), only such a criterion will sufficiently justify the existence of jurisdiction of courts of the aforesaid countries, because this solution best reflects the requirement for *proper and economic process*.⁷² This requirement would not be met if the dispute was to be conducted in some other country, where there is no such close connection to the dispute. Of course, this does not mean that the dispute could not be *de facto* resolved in this country; however, this would not be purposeful.

Even though the *Shevill* case was only concerned with libel by the press, the conclusions reached therein are also, by analogy, applicable to unfair competition cases. After all, libel is ultimately not unknown to law of unfair competition; rather, they are closely associated and libel is in fact a special body of offence under unfair competition law (Dyer, 1988: 396). This area of law also protects the reputation of competitors, which can be harmed not only directly (through libel, unfair comparative advertising, etc.) but also through other typical unfair competition practices, such as inducing the likelihood of confusion in case of goods or services (where substandard non-branded goods are presented as high-quality branded goods). In any case, the same legal rule is to be applied to both cases, as the situations are essentially analogous. When interpreting the rule, we must bear in mind the necessity to ensure proper and efficacious court proceedings, which applies to both cases and which can only be satisfied if there is a close connection between the venue and the case at hand. It is once again true that there are other solutions available. However, they are not fully aligned with the sense and spirit of the legal regulation and the above doctrine underlying the EU legislation stipulating the rules for determining the competent court.

If the decisive criterion is particularly close connection (close connecting factor or close link) to a certain State, which is manifested, in accordance with the judgement in *Shevill*, in the possibility to pursue court proceedings in the State where the infringing (defaming) party is established, then we can also infer the competence of the courts of the State where the person engaging in unfair competition is established. The connecting factor between the two situations is the place of establishment, localising the infringing party in space and time, and the damage incurred. The situations differ only as regards the manner in which the damage was caused. However, we believe that this fact alone cannot be seen as a sufficiently distinctive element justifying a different legal solution.

The same conclusion also applies to the second rule inferred from *Shevill*. If, according to the judgement, a particularly close connection arises due to the effects of the infringing defamatory conduct, then jurisdiction of the courts of the State where the effects of unfair competition arose must be given by analogy. Yet, the same restrictions must apply here and the above statement is thus only true if the aggrieved party actually competed in the relevant State. The latter requirement for engagement in competition is analogous to the requirement for being known in the relevant country, as stipulated in the *Shevill* ruling. Being known results from being involved in public life in the relevant country, which is essentially equivalent to competing (engaging in competition). In this case, just like in the previous one, the type of conduct that caused the damage is not sufficiently distinctive and, therefore, it is not capable of anchoring the action at a certain place for the purpose of determining the venue. However, the effect of the infringement is certainly capable of doing so.

In the sense of the above, we can conclude that a competitor whose reputation has been damaged, or incurred other damage – whether proprietary or non-proprietary – in a causal link with acts of unfair competition taken by another competitor, the aggrieved competitor may assert full damages (or other claims under substantive law) from the infringing competitor before the courts of the Member State where the infringement (unfair competition) took place (as a rule, this will be the country where the person engaging in unfair competition is established or represented⁷³). Furthermore, the aggrieved competitor may also assert liability claims for damages resulting from unfair competition in courts of the Member States where the damage occurred. However, the aggrieved competitor may claim in each of these countries only a proportional part of the total damage, corresponding to the damage incurred in the country. Nonetheless, we consider this rule generally applicable in relation to unfair competition *vis-à-vis* another competitor, regardless of whether it consists in damage to reputation, i.e. the reputation of the entrepreneur or his product or services, or in some other offence under unfair competition law.

4.4 Applicability of the special provisions for consumer disputes to unfair competition cases

With reference to the above classification of competitors' unlawful conduct as either unfair competition or unfair commercial practices, which is based on European directives but is not supported by the (European) regulations governing private international law,

we can introduce our further considerations to be made in this chapter as follows: While unfair competition *vis-à-vis* another competitor (entrepreneur) is always classified as liability for an offence (tort), giving rise to non-contractual obligations,⁷⁴ we believe that the situation is rather more complex if unfair commercial practices (or unfair competition) affect also the interests of a consumer/consumers.

As a rule, where unfair commercial practices, and potentially also acts of unfair competition, can affect the interests of consumers, they are usually connected to a contract, whether already existing or emerging. These can thus occur either at the stage of entrepreneur's performance of a contractual relationship or at the pre-consensual stage. Indeed, such conduct on the part of an entrepreneur is often the reason why the consumer decides to conclude the respective contract. This contract, or rather the contracting process, is then vitiated by a defect which can potentially render the contract invalid.

However, this is irrelevant from the viewpoint of international procedural law. When determining the venue, it is of paramount importance to establish whether there is a sufficiently close connection between the unfair commercial practices, or unfair competition, relating to the consumer and the contract, or whether the unfair commercial practices, or unfair competition, are asserted outside a contractual relationship – or, more precisely, whether the connection to a contractual relationship is classified as insufficiently close. If a close connection to the contract is established, it is then decisive to determine whether or not the contract with respect to which the unfair commercial practices are asserted meets the defining criteria of a consumer contract, as autonomously defined in Brussels I bis; if this is not the case, the jurisdiction will have to be determined under the general rule stipulated in Article 4, or alternatively under Art. 7 (1) of Brussels I bis, which provides for a special rule for “matters relating to a contract”.⁷⁵

As regards interpretation of the notions of “contract” and “matters relating to a contract”⁷⁶ under Brussels I bis, there has been a predominating tendency to use extensive interpretation, where autonomous construction is naturally also conceivable. The legal conduct giving rise to a contract should consist in a voluntarily assumed obligation of a person towards another person.^{77, 78} In this respect, we consider it necessary to note that the CJEU does not insist that the obligations are mutual. The term “matters relating to a contract” can then involve e.g. the question of existence, or validity, of a contract, claims from invalid or non-existent contracts, claims based on breach of contract, including compensation for damage or surrender of unjust enrichment, third-party claims under contracts concluded for their benefit and even claims from unilateral promises. However, if the relevant conduct does not give rise to a contract, then the liability in question will be that for a tort, delict, or quasi-delict, which is outside the scope of the rules for determining the jurisdiction in matters relating to “contracts”. The non-existence of a mutual obligation, however, does not preclude the application of the special rule for matters relating to contracts. The CJEU tackled this issue in *Petra Engler*.⁷⁹ The above party, an Austrian national, received a letter from a German mail order company, addressed to her, ostensibly informing her that she had won in a lottery organised by the company. Complying with the instructions included therein, she signed the letter and sent it back; however, she did not receive any prize. She thus claimed payment of the relevant

amount from the German company in court. The CJEU concluded in the preliminary ruling procedure that the special rules for consumer contracts under the Brussels I bis could not give rise to jurisdiction (of Austrian courts) because no contract had been concluded. However, the CJEU held that this did not prevent basing the jurisdiction on Art. 7 (1) of the Regulation, as this provision does not require actual conclusion of a contract.

It follows from the above that the defining characteristics of a “contract” in the sense of Art. 7 (1) are much more vague than those of a consumer contract under Articles 17 *et seq.* of Brussels I bis. The scope of Art. 7 (1) is thus much broader not only as regards the parties, but also with respect to the subject-matter of the contract. This is because a broad spectrum of claims can be subsumed under Art. 7 (1) even if they are only remotely related to a contract. The outlined facts of the *Petra Engler* case can serve as an example of a rather common unfair commercial practice used by an entrepreneur *vis-à-vis* a consumer, and it thus documents the applicability of the rule under Art. 7 (1) to the topic at hand. It is also important in terms of the introductory considerations relating to this chapter that – unless the dispute involves a consumer contract, which is subject to special rules for determining the jurisdiction – the relation to a contract is interpreted rather loosely, which makes Art. 7 (1) applicable to a significant number of cases of enforcing claims from unfair commercial practices, or unfair competition, *vis-à-vis* the consumer.

If the defining characteristics of a consumer contract are met in the given case in the sense of Article 17 of Brussels I bis⁸⁰ and if there is simultaneously a sufficiently close connection between the unlawful conduct of the entrepreneur on the level of unfair competition, or unfair commercial practices, and the conclusion of the contract with a consumer or (non-)performance of the contract, then the special rules for determining jurisdiction under Articles 18 and 19 apply *instead of* the general rule (Article 4), or its alternative in Art. 7 (1). The basic principle underlying these provisions, and actually permeating through the entire EU law, is the requirement for reasonable (i.e. not absolute) protection of the consumer as a weaker party. On the procedural level, consumer protection manifests itself in the entrepreneur’s duty to only sue the consumer in the State where he is domiciled, while the consumer can choose whether to sue in courts of the country where the entrepreneur is domiciled (seated), or in his own State. The protective provisions also limit the space for procedural free will of the parties, restricting the possibility of derogating from regular competence of courts and establishing the competence of the courts of another Member State by means of a joint manifestation of will.⁸¹

The possibility to apply the special provisions concerning consumer contracts to cases involving unfair commercial practices in the pre-consensual phase has also been confirmed by the CJEU in its case-law. This is true of the ruling in *Rudolf Gabriel*,⁸² which is, in terms of the facts, ostensibly similar to the above-outlined case of *Petra Engler*. This former case, too, concerned a dispute between an Austrian consumer and a German mail order company. The company sent several letters addressed to Mr Gabriel, intended to create the impression that if he ordered goods to a specific amount, he would automatically be awarded a financial benefit. Mr Gabriel ordered the goods, but received

no benefit. This case was different from the case of *Petra Engler* in that a contract had been concluded in this case, as a result of sending the letter promising the benefit (which was supposed to be much higher than the value of the ordered goods). The CJEU considered this circumstance sufficiently significant, concluding that the contract was a consumer contract in its nature and that the claim for payment of the benefit was a contractual claim. Therefore, even if the concept of a consumer contract is narrower as compared to the concept of a “contract” and “matters relating to a contract” as stipulated in Art. 7 (1), the above decision confirms that it is necessary to consider the contract and its contents in view of the acts made at the pre-consensual stage, and *vice versa*.

Finally, the last issue that we perceive in connection with enforcement of claims ensuing from unfair commercial practices or unfair competition affecting consumers in cross-border context lies in applicability of the provisions of Brussels I bis in situations where protection against such practices is claimed by consumer protection organisations using the instrument of “preventive action”. Such a case was dealt with by the CJEU in *Henkel*. The substance of the case lay in the fact that a German national, Mr Henkel, used unfair commercial practices prohibited by Austrian law in his contractual dealings with consumers domiciled in Vienna. On the grounds of that conduct, he was sued by an Austrian non-profit consumer protection association.

Speaking in legal terms, the substance of the problem lies in the following:

- the dispute has no direct relation to any contract;
- the action is filed by a third party which, even if a contract had been concluded, would not be a party to it;
- the action is filed even before actual damage occurs; at the stage when it is filed, it has preventive nature;⁸³
- the consumer protection organisation does not pursue its own interests, but rather individual interests of the consumers that it represents and, ultimately, also a public interest.

The application of special rules on jurisdiction in matters relating to consumer contracts⁸⁴ is prevented not only by paragraph 2 but also by paragraph 1. Consequently, this is not a consumer contract within the meaning of the definition laid down in Article 17 of the Brussels I bis. We believe that in view of the aforesaid, paragraph 1 cannot be reconciled with the above even through extensive interpretation of the notion “contract”, which is not possible for special provisions anyway. Paragraphs 2 and 3 can further prevent the application of the rules for determining jurisdiction in cases of non-contractual obligations, as damage has yet to occur and is only more or less imminent. Moreover, it will be incurred by some other entity. Finally, it could be argued that paragraph 4 might exclude the applicability of Brussels I bis, which restricts its scope only to civil and commercial matters, and thus lays down rules for determining court jurisdiction in cases of enforcement of private-law claims and protection of private interests.

Primarily, it must be stated that although a consumer association can be perceived as an entity protecting the public interest, it is nonetheless an entity under private law that has

no special powers nor is authorised to exercise public authority. Furthermore, even if we accepted the broad concept of contract, where such an approach is currently not embraced by EU law,⁸⁵ this concept can in no case comprise an entity that is not, has never been and never will be a party to the contract.⁸⁶ Existing case-law of the CJEU moreover indicates that the regulation of tort, delict or quasi-delict in Brussels I bis is concerned with all questions aimed to enforce the defendant's liability and are not matters relating to a contract and the rules set out for them.⁸⁷ Finally, as regards paragraph 3, i.e. that damage has yet to occur, it must be emphasised that a requirement for actual occurrence of damage as a prerequisite for application of Art. 7 (2) of Brussels I bis does not follow from that provision, nor is it a decisive factor for determining court jurisdiction.⁸⁸ To the contrary, the mere wording of Art. 7 (2) indicates the preventive nature of the provision, implying that preventive actions are permissible.

We can therefore conclude that preventive actions for the protection of consumers against unfair commercial practices that are filed by consumer protection organisations fall substantively within the scope of Art. 7 (2) of Brussels I bis, as they relate to tort, delict or quasi-delict. Indeed, our conclusion is also confirmed by the current case-law of the CJEU.⁸⁹

4.5 Determining jurisdiction in disputes concerning acts of unfair competition and unfair commercial practices in the Internet environment

Just as means of electronic communication result in a growing number of cross-border contracts concluded among traders and between traders and consumers, which thus have a relation to laws of several countries, easier access to the Internet also facilitates unlawful conduct, where the results can be manifested in dozens of different countries, and potentially anywhere in the world. The above applies not only to criminal activity, but also to civil torts, including unfair competition and unfair commercial practices. It is easily conceivable that misleading or comparative advertisements will be posted on-line, where such advertising can cause harm to other traders and consumers in each and every country where it is accessible via the Internet and where the offered goods or services can be purchased. Similar to other offences, such as freeriding on reputation of the enterprise or products of some other entrepreneur, creating a likelihood of confusion, disparaging, or violating business secrets, means of electronic communication can be used in this case, thus extending the effects of the competitor's unlawful conduct to a number of foreign jurisdictions. With slight exaggeration, it could be submitted that today a single click can cause harm to a high number of competitors and/or consumers in various parts of the world.

The problem that arises in connection with determining the venue in cases of unfair competition on the Internet,⁹⁰ to which international law must respond through suitably formulated procedural norms, lies especially in localisation of the unlawful conduct (*locus delicti commissi*) and its effects (*locus damni infecti*) and their connection to national legislation. In other words, the substance of the problem remains the same as in the traditional, "off-line" environment. However, its solution is complicated by the fact that, on the Internet, it is difficult to find the required close (while sufficiently substantial)

connection or link to a specific single body of national legislation. Analogous considerations apply to determining the venue, i.e. the system of national courts that should have jurisdiction to hear and decide on claims of persons affected by unfair competition in the light of the requirement for predictability of the solution⁹¹ and efficiency of conducting the proceedings.

The Brussels I bis, notwithstanding the fact that the regulation has recently been revised and recast, does not comprise any special rule concerning the enforcement of claims ensuing from unlawful conduct on the Internet. One must therefore remain content with the “classical” rule for determining court jurisdiction in cases of unlawful conduct as analysed above, and overcome this shortcoming by means of interpretation. Given the absence of case-law that would specifically deal with the issue of unfair competition or unfair commercial practices on the Internet, we must yet again use as a starting point those rulings of the CJEU that deal with an analogous subject, which is in fact related to unfair competition – defamatory conduct on the Internet.

The above-indicated conclusions of the CJEU in *Shevill* were relativized in the recent ruling of the CJEU in joined cases *eDate Advertising* and *Martinez*,⁹² which concerned libel (and means of protecting personal rights) in the on-line environment. The basic starting point lies in consideration that the effects of an (il)legal act in the environment of the Internet can be manifested anywhere in the world⁹³; in terms of procedure, this means that a person pursuing unfair competition can be sued in any country of the world. From the viewpoint of the person affected by unfair competition, the aforesaid could ultimately represent the option to claim court protection anywhere in the world, as conduct pursued via the Internet can have effects worldwide. Nonetheless, this approach would lead to absolutely absurd results, where a dispute could be pursued practically anywhere, in any country, where this would undermine the very sense and purpose of Brussels I bis, including the sense of Art. 7 (2) of the Regulation (Šehnálek, 2017: 33). It must therefore be rejected.

In joined cases *eDate Advertising* and *Martinez*, the CJEU faced the question of how it should interpret Art. 7 (2) of Brussels I bis and determine the court with jurisdiction in a case where proceedings were concerned with claims of a person aggrieved by unlawful infringement of moral rights by disseminating untrue information via a website. In other words, the conclusions made in *Shevill* had to be adapted to new conditions, specifically those of the Internet.

Both the Advocate General and the CJEU concluded that the connecting factor consisting of distribution or dissemination of information on the Internet and the ubiquity of the content of published information was no longer important,⁹⁴ and “[m]oreover, it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State.”⁹⁵ In the centre of attention remains the criterion of close link (connection) between the dispute and a specific country, which is defined in that decision by means of the “*place of the centre of interests*” of the person affected by the harm. According to the Court of Justice, this “... corresponds in general

to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, 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.”⁹⁶ There, this person can then sue for compensation for the entire damage incurred. With reference to the ruling in *Shevill*, it remains true in the on-line environment that compensation for full damage can be claimed in the country of domicile (seat) of the publisher, which is considered the place of unlawful conduct. Finally, compensation for damage may also be claimed in all countries where the given information was published, provided that the aggrieved person was known there and could thus have incurred damage thereby. However, the courts of these countries have only jurisdiction to hear and decide on claims pertaining to the harm caused in the given country. It is thus up to the aggrieved party to choose in which Member State it will claim compensation for the damage incurred. While the CJEU should have the task to clarify general or ambiguous notions comprised in EU law, it is a question whether this task was actually performed in the case at hand and whether the indicated approach is consistent with the objectives of Brussels I bis, especially in view of the requirement for a high degree of predictability of the rules for determining jurisdiction.⁹⁷ It can be quite justifiably claimed that this was not the case.⁹⁸

If we, nonetheless, attempt to apply the aforesaid to cases of unfair competition and enforcement of ensuing claims, it must primarily be considered who will be the person aggrieved by unfair competition and who will have the position of plaintiff. The most typical example will be a situation where an act of unfair competition employing electronic communication media has affected the interests of another competitor (entrepreneur). In the light of the ruling in *eDate Advertising* and *Martinez*, it can be noted that such a person will be able to initiate proceedings before the courts of the Member State (i) where the competitor pursuing unlawful conduct has his domicile (seat)⁹⁹, as this will be considered the place of the unlawful conduct;¹⁰⁰ (ii) at any other place where an act of unfair competition was committed that caused damage to the affected competitor; and (iii) finally, at the place where the “centre of interests of the person affected by the unfair competition” is located. In all those countries, the aggrieved person can sue for compensation for the full damage caused by the unfair competition. In this respect, the construction of the notion of “centre of interests of the affected person”, in particular the “centre of interests of the affected competitor” is of a key importance. If the conclusions of the CJEU specified above are applied analogously in this respect, we consider that this place will be located in the country where the affected competitor is established, i.e. where he has his “domicile”, or where his place of business or headquarters are located.¹⁰¹ Of course, an action may also be filed in other countries where the given entity engages in competition, whether through a branch or on a one-off basis in cross-border provision of services or supply of goods. In those cases, however, the courts’ jurisdiction will only be restricted to harm caused in the territory of that country. In our opinion, the aforesaid can also apply in those cases where the plaintiff is a consumer protection organisation.

In contrast, if an action is filed by a consumer affected by an act of unfair competition or unfair commercial practice committed on-line, one would tend to prefer application of the special provisions concerning consumer contracts. The question thus stands how the

above should be interpreted in those situations where means offered by the Internet are used for such acts. If the defining elements of a consumer contract as laid down in Article 17 of Brussels I bis do not exist or if a sufficiently close link is lacking between an act of unfair competition or unfair commercial practice and the creation of a contract or its performance, it is conceivable that the general rule for determining court jurisdiction laid down in Article 4, or alternative rules in Article 7¹⁰² of Brussels I bis, could apply even in the case of a consumer as plaintiff. In respect of application of those rules, we refer to what was stated above.

5 Conclusion

The particular conflict-of-law and jurisdictional rules contained in Regulation Rome II and Brussels I bis show high degree of generality. Therefore, without reference to existing doctrine of private international law, it is not possible to solve even current problems that emerge in terms of finding the applicable law and competent courts in cross-border cases.

The rules of EU private international law were formulated to reflect both individual interests of private parties, as well as public interest in the proper functioning of the internal market. Speaking in terms of unfair competition, the private interests are represented by individual interests of competitors and consumers.

The Brussels I bis does not explicitly mention matters related to unfair competition. It is, therefore, necessary to use an alternative rule for determining the jurisdiction in cases involving non-contractual obligations contained in Article 7(2) of the said Regulation. The action can therefore be brought before the courts of the Member State *where the harmful event occurred or may occur*. The interpretation of this provision is unfortunately problematic as the appearance of a harmful event can be understood as *the place where the damage occurred or the place where the event giving rise to the damage occurred*. For the purposes of unfair competition claims, the place of damage shall be understood as any place where the trader participates in the competition and is damaged in his interests. However, in such jurisdiction, only the damage suffered there may be dealt with, not damage as a whole. The whole damage may be claimed only in state determined according to the latter connecting factor for the application.

However, the rule on what amount of damages can be claimed before courts of a particular Member State is modified in cases where the harm is caused through the use of the Internet. An additional criterion has been defined by the CJEU for these purposes, and that is the trader's centre of interest. The reason for this additional criterion is that the traditional approach which is based on the determinant connected to the dissemination of information loses its distinctive ability in the realm of the Internet. The *criterion of centre of the interest* largely overcomes these shortcomings. Consequently, in every country where such a centre of interests exists, the competitor will be able to sue for all the harm suffered. In case of other states, the general rule remains unchanged. Common to both situations is that it is based on anticompetitive behaviour and complemented by a particularly close link between the dispute and a particular state.

Acts of unfair competition can also adversely impact interests of consumers. The consumer will then most likely seek defence against unfair commercial practices, and usually because of a particular contract or obligations arising therefrom. The most likely scenario is thus the application of the special rules on jurisdiction in case of disputes arising out of consumer contracts under Brussels I bis Regulation. The solution will be conceptually the same, regardless of whether the behaviour has occurred in the “real world” or on-line. If the conditions for the application of a specific rule for consumer contracts are not met, the consumer will be obliged to proceed in accordance with the general rule on jurisdiction under Article 4 or the alternative rules contained in Article 7 of the Brussels I bis. The said rules are applicable also in cases involving on-line unfair competition acts (unfair commercial practices). One shall bear in mind the specific interpretation of the used criteria in matters related to on-line torts of unfair competition as can be derived from the CJEU case law.

On the other hand, Regulation Rome II contains explicit and special rules for determining the applicable law in matters related to unfair competition. The interpretation of the concept for the purposes of this Regulation is autonomous and also includes the issue of unfair commercial practices regulated by EU law. It also applies to the pre-contractual stage (without any link to a specific contract) if the purpose of the action is to prohibit the use of disproportionate provisions in consumer contracts. According to Article 6 (1) of Regulation Rome II, the applicable law is the *law of the State where the competitive relations or the common interests of consumers are or are likely to be affected*, except in situations that do not have a general impact in the sense that they concern only one single competitor, or consumer. In such a case, the procedure provided for in Article 4 of the Rome II Regulation and the applicable law will in general be the law of the country where the damage occurred.

Notes

¹ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), OJ L 199, 31. 7. 2007, pp. 40-49. Hereinafter: Regulation Rome II.

² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matter (recast), OJ L 351, 20. 12. 2012, pp. 1-32. Hereinafter: Brussels I bis.

³ This statement is surely valid when it comes to comparison of the Brussels I bis and Regulation Rome II.

⁴ It ought to be emphasised that the above-stated observations are applicable only and solely in relation to the classification process aimed at finding the applicable international procedural rule, based on which the court having jurisdiction to hear the dispute can be determined. They are not – and it follows from their nature that they cannot be – applicable in relation to classification at the level of national law and seeking the applicable substantive-law rule, since substantive law will always be more casuistic than private international law (and procedure). On the other hand, the above does not preclude that classification might only be carried out at the level of individual legal concepts within the issue at hand; however, finding applicable substantive law could be problematic at the previous stage. This, however, is a question of employing suitable classification methods.

⁵ See Article 6 (1) of the Regulation Rome II.

⁶ As regards autonomous concept of interpretation of the notion „acts of unfair competition” see the respective part of the following chapter. Cf also Dickinson, 2008: 399; Illmer in Huber, 2011: 147.

⁷ See Article 7 (1) and (2) of the Brussels I bis. Only the first paragraph that is related to contractual obligations further distinguishes between certain specific types of contracts, namely sale of goods and contracts on the provision of services as the most frequent types of contracts. In the case of non-contractual obligations, the distinction is limited only to tort, delict or quasi-delict without any narrower definition.

⁸ At this point, we merely summarise that this disproportion is, in the case of European private international law, based on two reasons: (i) private international law, in general, typically uses notions of a more general nature, and (ii) there is no overlap between the power of the EU to regulate unfair competition at the level of substantive law (indeed, EU directives show that regulation is limited only to select aspects over which agreement has been reached) and in conflict-of-law and procedural matters (in the event of any cross-border implications, the latter is thus regulated comprehensively as a part of civil law).

⁹ Cf Bogdan, 2012: p. 145. It is also expressed in the Preamble of the Regulation Rome II – see Recital (7) thereof.

¹⁰ However, we are of the opinion that the conclusions of the CJEU with respect to interpretation of a notion used in another EU private international law instrument can only be used to the extent that the notions are identical, or were intended to be identical, insofar as the facts of the case are similar, and in consideration of the material scope and interrelation of the rules in question, as well as of the wider framework and objectives of the legal regulation that is to be interpreted by analogy with the CJEU's judgment rendered in another case.

¹¹ I.e., torts, delicts, and quasi-delicts except those particularly excluded from the scope of application of the said Regulation under Article 1 thereof.

¹² See Article 1 (2) of the Regulation Rome II.

¹³ *Dyer* argues this to be understood as a result of historical development (of tort law) that led to formulation of unfair competition as an independent and unique kind of non-contractual obligation that requires a special conflict-of-laws rule. See *Dyer*, 1988: 431.

¹⁴ In particular, we refer to the rules on determining jurisdiction in cross-border civil and commercial cases in the Brussels I bis.

¹⁵ See Article 5 of the Commission's initial proposal, COM(2003) 427 final.

¹⁶ See the Common Position (EC) No 22/2006 of 25 September 2006, OJ 2006 C 289E/68.

¹⁷ It is most likely a consequence of the tendency towards a certain convergence of the approach to competition in EU law with approaches that are traditional in US law, where the strict distinction between unfair competition and competition (antitrust) law is disregarded, and where the treatment of unfair competition is directed at limiting means of competition whereas competition law focuses on effects (*Dyer*, 1988: 403).

¹⁸ Article 6 (1) and (2) of the Regulation Rome II.

¹⁹ Article 6 (3) of the Regulation Rome II.

²⁰ Namely, the rules against unfair competition on one hand are to ensure that the competition takes place in a manner consistent with the good morals of the competition while on the other, the rules on free competition aim at ensuring a mere existence of a (free) competition and of a functioning market. See also Valdhans, 2012: 183 with further references provided therein.

²¹ With regard to law applicable to acts restricting free competition (Article 6 (3) of the Regulation Rome II) we refer to the available (and more comprehensive) writings, see e.g. Valdhans, 2012: 183; Hellner, 2008: 52; or Rosenkranz, Rohde, 2008: 436 with further references therein.

²² See Recital (16) of Regulation Rome II.

²³ See Recital (21) of Regulation Rome II.

²⁴ The CJEU refers to collective interests, in its view: “*since Article 6 (1) of the regulation [Rome II Regulation – added by authors] aims to protect collective interests — more extensive than the*

relations between the parties to the dispute — by providing for a rule specifically suited to that purpose. That aim would not be achieved if it were permissible to block the rule on the basis of personal connections between those parties.” See the judgement of the CJEU C-191/15, *Verein für Konsumenteninformation v Amazon EU Sàrl*, ECLI:EU:C:2016:612, para. 45 (hereinafter: *Verein für Konsumenteninformation v Amazon EU Sàrl*).

²⁵ It defines the material scope of a uniform European conflict rule whereas the Regulation itself does neither provide any definition, nor specifically allows reference to national set of rules. See e.g. Illmer In: Huber, 2011: 147, also Valdhans, 2012: 185.

²⁶ Hereby, as the Commission emphasizes, the three-dimensional function (i.e. protection of other competitors, consumers, and public in general) of competition law is ensured both in terms of substantive law, as well as in terms of conflict of laws. See the Explanatory Memorandum of the Commission to the Proposal for a Regulation of the European Parliament and of the Council (EC) on the Law Applicable to Non-Contractual Obligations (Rome II). COM (2003)0427 Final. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2003:0427:FIN>

²⁷ For example, Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), OJ L 376, 27. 12. 2006, pp. 21-27.

²⁸ For example, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21. 4. 1993, pp. 29-34.

²⁹ See also the CJEU's judgement in the case *Verein für Konsumenteninformation v Amazon EU Sàrl*, paras 38 and 39, where the CJEU proclaims existence of such a duty.

³⁰ The place where the harmful event, that is the act of unfair competition, took place is not relevant in terms of determining the applicable law.

³¹ Similar conclusion has already been adopted by the CJEU in its judgement C-167/00, *Verein für Konsumenteninformation v Karl Heinz Henkel*, ECLI:EU:C:2002:555 (hereinafter: *Henkel*), on the question of application of Article 7 of the Brussels I bis to preventive actions brought by a consumer protection organisation. The CJEU established that “*a preventive action brought by a consumer protection organisation for the purpose of preventing a trader from using terms considered to be unfair in contracts with private individuals is a matter relating to tort, delict or quasi-delict within the meaning of Article 5(3) of that convention* [i.e. Article 7 (2) of the Brussels I bis – note of the authors].” Applicability of the CJEU conclusions in the said case to Article 6 (1) Regulation Rome II was confirmed also by the Commission in the Explanatory Memorandum to the Proposal of the Regulation Rome II (see comments under Article 5 of the Proposal). COM (2003)0427 Final.

³² Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), OJ L 110, 1. 5. 2009, pp. 30-36.

³³ Regulation (EC) No 593/2008 on the law applicable to contractual obligations, OJ L 177, 4. 7. 2008, pp. 6-16.

³⁴ See the Opinion of the Advocate General Saugmandsgaard Øe in case C-191/15, *Verein für Konsumenteninformation v Amazon EU Sàrl*, ECLI:EU:2016:388, para. 73.

³⁵ CJEU's judgement in the case *Verein für Konsumenteninformation v Amazon EU Sàrl*, paras 42 and 81(1). See also Opinion of the Advocate General Saugmandsgaard Øe in *Verein für Konsumenteninformation v Amazon EU Sàrl*, para. 73.

³⁶ On this issue, see for example Valdhans, 2012: 188.

³⁷ Such approach has been inspired by a number of EU consumer-protection directives, such as the Parliament and Council Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11. 6. 1998, pp. 51-55.

³⁸ See Article 4 (1) of the Regulation Rome II.

³⁹ Article 4 (2) of the Regulation Rome II.

⁴⁰ The so-called escape clause under Article 4 (3) of the Regulation Rome II.

⁴¹ Consult Article 6 (2) and (4), together with Article 4 and Article 14 of the Regulation Rome II.

⁴² See the operative part of the CJEU's judgment in *Verein für Konsumenteninformation v. Amazon EU Sàrl*, para. 81(1).

⁴³ Namely, it would be the special rules on law applicable to consumer contracts under Article 6, or even general rules under Articles 3 and 4 of the Regulation Rome I.

⁴⁴ Subject to just a few exceptions, the rules contained in legislation on European international procedural law do not result in determining a specific national court which has jurisdiction to settle the dispute, but merely determine the judicial system of one of the Member States as a whole, where the choice of the specific national court having jurisdiction to conduct proceedings in the given case remains under the remit of national procedural provisions.

⁴⁵ Article 24 of the Brussels I bis.

⁴⁶ Articles 10 to 23 of the Brussels I bis which aims at the protection of the weaker party through procedural norms, in particular in disputes arising from insurance, consumer and individual labour contracts.

⁴⁷ Articles 7 and 8 of the Brussels I bis.

⁴⁸ Article 4 of the Brussels I bis.

⁴⁹ See the wording of the provision at hand: “*Subject to this Regulation...*”.

⁵⁰ Articles 25 of the Brussels I bis.

⁵¹ Articles 26 the Brussels I bis.

⁵² Cf. list of excluded issues in Article 1 (2) of the Brussels I bis.

⁵³ The concept of civil and commercial matters must be interpreted autonomously, in other words within the scope of EU law and without any reference to any national law. See, for example Magnus, Mankowski, 2016: 38–41, where the jurisprudence of the CJEU is listed and analyzed. Just to name the most significant one in this regard: Judgement of the CJEU 29/76, *LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol*, ECLI:EU:C:1976:137.

⁵⁴ It follows that an EU instrument may only establish the competence (jurisdiction) of a court or courts of a Member State, not of a third country. Within the framework of Brussels I bis, Denmark is not considered a Member State (pursuant to Protocol No 22 on the position of Denmark annexed to the founding treaties, the Regulation does not apply to and is not binding on the Kingdom of Denmark).

⁵⁵ See Article 62 of the Brussels I bis.

⁵⁶ Article 63 of the Brussels I bis.

⁵⁷ I.e. rules on jurisdiction in disputes arising from insurance contracts, consumer contracts, and individual employment contracts. See Articles 10 to 23 of the Brussels I bis.

⁵⁸ Articles 7 and 8 of the Brussels I bis.

⁵⁹ See Article 24 of the Brussels I bis.

⁶⁰ Article 25 of the Brussels I bis.

⁶¹ Cf. Article 26 of the Brussels I bis. See also Rozehnalová, 2013: 222–223.

⁶² See also Article 6 of the Brussels I bis.

⁶³ “All claims for the liability of a defendant which are not related to a ‘contract’ within the meaning of Article 7 (1) of the Brussels I bis are included” (Pauknerová, 2008: 141, Rozehnalová, 2013: 245).

⁶⁴ Particularly Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), OJ L 376, 27. 12. 2006, pp. 21–27, and Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, 15. 6. 2016, pp. 1–18.

⁶⁵ So, e.g., in situations where subsidiaries are affected, negative consequences may also be felt by the parent company, and *vice versa*. It is no exception in the present globalised world that such two companies are seated in different countries.

⁶⁶ Beyond the scope of the legal problems indicated above, it may also be asked whether in a situation where several competitors are affected by a certain act of unfair competition, these

competitors have the option to choose among different individual venues or whether they are mutually bound by applications that have already been filed or by the choice of venue made, e.g., by the first of their ranks; further issues and questions could certainly be found.

⁶⁷ Brussels Convention (1968) on jurisdiction and the enforcement of judgments in civil and commercial matters, consolidated version, OJ L 299, 31. 12. 1972, pp. 32–42.

⁶⁸ The fact that the previous legislation is interpreted in these decisions is not an obstacle on its own, because there have been no major changes in the text of the legislation in this area. Furthermore, the new regulation itself declares continuity with the previous one. See point 38 of the Preamble to the Brussels I bis. Continuity has been ensured since the Brussels Convention of 1968, and the CJEU's previous conclusions are therefore considered valid even today, unless the law or recent case-law explicitly indicates the opposite. Compare the judgment of the CJEU (Fifth Chamber) C-147/12, *ÖFAB, Östergötlands Fastigheter AB v Frank Koot and Evergreen Investments BV*, ECLI:EU:C:2013:490, paras. 28 and 29. See also Pauknerová, 2008: 126.

⁶⁹ Directly damaged where there is a causal link between the unlawful act and its origin. See also Rozehnalová, Týč, 2003: 209.

⁷⁰ Judgment of the CJEU C-68/93, *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, ECLI:EU:C:1995:61 (hereinafter: *Shevill*).

⁷¹ We would like to point out that there was no such similar restriction that developed in the area of public regulation of competition (antitrust). Therefore, the courts may, in both situations discussed above, deal with the damage caused for example by cartel agreement in its entirety. Our opinion is that the reason for such different approach was correctly identified by Advocate General Jääskinen (even though the CJEU did not agree with him in its final conclusions), when he stated in his Opinion that it seems useful to take into account all the places where the market was disturbed by the infringement of the Article 101 of the Treaty on the Functioning of the EU, since the purpose of the rules of competition law is to protect the proper conduct of an economic activity, i.e. the public interest, and not to protect the individual interests of the company, as in the case of libel, as well as damage caused by unfair competition. In the area of public regulation of competition, however, this interest covers the entire territory of the EU, which justifies such a different approach. Cf. the Opinion of Advocate General Jääskinen in the CJEU's case C-352/13, *Cartel Damage Claims Hydrogen Peroxide SA (CDC) v Evonik Degussa GmbH and others*, ECLI:EU:C:2014:2443, para. 50. See also Wurmnest, 2016: 242.

⁷² Cf. Judgment of the CJEU (Fourth Chamber) C-352/13, *Cartel Damage Claims Hydrogen Peroxide SA (CDC) v Evonik Degussa GmbH and others*, ECLI:EU:C:2015:335, para. 41.

⁷³ We consider, however, that this might not apply universally. While it is difficult for a publisher to publish press in some other country, an entrepreneur can easily act even outside the country where he is established, especially in terms of the EU internal market free movement.

⁷⁴ As regards the applicability of the European international procedural law, this means that the only applicable provision is the above-mentioned Article 7 (2) of the Brussels I bis, rather than the general rule.

⁷⁵ Meaning other than consumer contracts, as stipulated under Article 17 of the Brussels I bis.

⁷⁶ These terms are primarily concerned by Article 7 (1) of the Brussels I bis, which provides an alternative rule to establish jurisdiction in disputes related to cross-border contracts. Similarly, Article 17 *et seq* refers to disputes arising out of consumer contracts.

⁷⁷ Cf. judgment of the CJEU, C-26/91, *Jakob Handte & Co. GmbH v Traitements Mécanochimiques des Surfaces SA.*, ECLI:EU:C:1992:268.

⁷⁸ When determining the meaning of this notion, Regulation Rome I can serve as an interpretative tool and guideline. In particular, we refer to Article 12 thereof which provides a list of questions that fall within the scope of the law applicable to contractual obligations. The possibility to use Regulation Rome I as a guideline when interpreting provisions of the Brussels I bis is derived from the principle of consistent interpretation of EU private international law notions.

⁷⁹ Judgment of the CJEU (Second Chamber), C-27/02, Petra Engler v Janus Versand GmbH, ECLI:EU:C:2005:33.

⁸⁰ We are dealing here with an autonomous concept of a consumer contract, which is not necessarily identical with the notions of consumer law and contractual relationship under the national substantive law and even under European directives.

⁸¹ See Article 19 of the Brussels I bis.

⁸² Judgment of the CJEU (Sixth Chamber), C-96/00, Rudolf Gabriel, ECLI:EU:C:2002:436.

⁸³ From the perspective of the objectives pursued by the European Union in relation to consumer protection, preventive actions or measures are generally of paramount importance, as for the person concerned it is easier to prevent the damage rather than to eliminate the consequences thereof through a rather complicated system of judicial enforcement (Wilman, 2016: 915).

⁸⁴ Articles 17 to 19 of the Brussels I bis.

⁸⁵ Cf. the Opinion of Advocate General Saugmandsgaard in case *Verein für Konsumenteninformation v Amazon EU Sàrl*, para. 50: “Although the concept of a contractual obligation is not limited to binding relations between the parties, it means at least a concrete and existing obligation ...”.

⁸⁶ Moreover, this entity is not in the position of consumer.

⁸⁷ *Ibid*, para. 36.

⁸⁸ The aforesaid is evidenced by the rulings of the CJEU analysed above.

⁸⁹ See the judgment in case *Verein für Konsumenteninformation v Amazon EU Sàrl*, para. 38.

⁹⁰ These considerations are, of course, of a more general nature and can therefore be related to any civil delict committed in the online environment using the means of electronic communication.

⁹¹ The principle of the foreseeability of the solution is also explicitly mentioned in Recital (15) of the Brussels I bis. See also Hrnčíříková, Ryšavý, 2014: 69.

⁹² Judgment of the CJEU (Grand Chamber), joined cases C-509/09 and C-161/10, eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited, ECLI:EU:C:2011:685 (hereinafter: *eDate Advertising and Martinez*).

⁹³ Cf. the judgement in case *eDate Advertising and Martinez*, para. 46.

⁹⁴ See the Opinion of Advocate General Cruz Villalón in joined cases C-509/09 and C-161/10, eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited, ECLI:EU:C:2011:192, paras. 44 – 47 and the judgement in *eDate Advertising and Martinez*, para 46.

⁹⁵ See the judgement in *eDate Advertising and Martinez*, para. 45.

⁹⁶ *Ibid*, para. 49.

⁹⁷ As already stated, such requirement is also incorporated in Recital 15 of the Brussels I bis.

⁹⁸ The use of the connecting factor consisting in distribution or dissemination of information has a limited relevance within the Internet environment as it leads to uncertainty. This is also reflected by the CJEU in its case law. Nevertheless, instead of adopting a wax of interpretation that would overcome such a shortcoming and help to increase legal certainty, the CJEU resigns and introduces an approach that, in fact, results in the opposite (Kuipers, 2012: 1220).

⁹⁹ In light of its wording, this rule is in fact no alternative to the general rule under Article 4 of the Brussels I bis.

¹⁰⁰ Nevertheless, it is noteworthy that in cases of acts of unfair competition, unlike labels published in a newspaper (no matter whether in print or electronic), it is quite imaginable that those places will not be located within single Member State. Further, especially within the EU internal market, it is easy to commit an act of unfair competition in a Member State, or Member States other than the one where the competitor is seated.

¹⁰¹ Here, we use the term “domicile” in respect of legal persons and natural persons operating a business as set out in Article 63 of the Brussels I bis.

¹⁰² Depending on classification of a certain act as conduct pursued within a contractual obligation or outside of it, it possible to apply Art. 7 (1) or (2) of the Brussels I bis.

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