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**Article (Accepted version)  
(Refereed)**

**Original citation:**

Hartley, Trevor C. (2018) *Jurisdiction in tort claims for non-physical harm under Brussels 2012, Article 7(2)*. [International and Comparative Law Quarterly](#). ISSN 0020-5893

DOI: [10.1017/S0020589318000283](https://doi.org/10.1017/S0020589318000283)

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Available in LSE Research Online: October 2018

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## JURISDICTION IN TORT CLAIMS FOR NON-PHYSICAL HARM UNDER BRUSSELS 2012, ARTICLE 7(2)

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**Abstract** Article 7(2) of the Brussels Regulation, 2012 confers jurisdiction, in matters relating to tort, on the courts of the Member State in which the harmful event occurred. In *Bier v. Mines de Potasse d'Alsace*, the CJEU held that this covers both the place where the event which caused the damage takes place and the place where the damage itself takes place. In later cases, however, it held that does not cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Member State. A problem arises if there is no physical harm but only financial loss or some other kind of non-physical harm. It is not always clear in such a situation where the damage occurs. This article considers this problem with special reference to pure financial loss but also two other torts in which no physical harm occurs: defamation and intellectual-property infringement.

**Key words** Private international law, conflict of laws, Brussels I Regulation, jurisdiction in tort cases, pure financial loss.

### INTRODUCTION

Article 7(2) of the Brussels Regulation, 2012<sup>1</sup> (henceforth 'Brussels 2012') confers jurisdiction, in matters relating to tort, on the courts of the Member State in which the 'harmful event' occurred or may occur. The phrase 'harmful event' is vague, but in *Bier v. Mines de Potasse d'Alsace*,<sup>2</sup> the CJEU held that it covers both the place where the event which caused the damage (the causal event) takes place and the place where the damage itself takes place. In the *Bier* case, the defendant had poured pollutant into the River Rhine in France. This would have caused damage to the defendant's plants in the Netherlands (he was a nurseryman) if he had not installed purifying equipment. In this context, the distinction makes perfect sense. The causal event was in France and the harm was in the Netherlands. Allowing the claimant to sue in either of these places was not unreasonable.

In every tort, there must be at least three elements: there must be an act of the defendant; the claimant must have suffered some sort of harm (even if it is presumed, as in defamation under English law); and there must be a causal link between the two. As a matter of general principle, therefore, it might seem that the *Bier* paradigm could be of universal application. There is, however, a problem since it may not always be possible to determine the location of either the causal act or the harm with any degree of accuracy. A strict application of the

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<sup>1</sup> 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 judgments in civil and commercial matters, OJ 2012, L 351, p. 1.

<sup>2</sup> Case C-21/76, ECLI:EU:C:1976:166, [1976] ECR 1735.

paradigm could then lead to arbitrariness and uncertainty, especially where there is no physical harm.

A second problem arises if the claimant suffers different kinds of harm in different places. Can he sue for the totality of his loss in the place where he suffered *any* loss? In principle, the answer should be 'Yes' since it would be undesirable to require him to bring separate actions in the courts of different Member States. However, there is a danger that this could let the claimant manipulate the law to give himself an unfair advantage.

The first case to give an indication of these problems was *Dumez v. Hessische Landesbank*.<sup>3</sup> Here some German banks allegedly did something wrong in Germany, which caused two German companies to become insolvent. The shares in the insolvent German companies were held by two French companies, which claimed that they had suffered financial loss in France as a result of the actions of the German banks.

Could they sue in France under the *Bier* formula? The CJEU held that they could not: it said that the rule in *Bier* applies only to direct harm, not indirect harm. In the words of the court, '[The Convention] cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets.'<sup>4</sup> In other words, if the initial damage was suffered by another person in another country, it is not sufficient that the claimant suffered consequential loss in his own country.

This limitation on the *Bier* formula was further extended in *Marinari v. Lloyds Bank*,<sup>5</sup> where the CJEU said that what is now Article 7(2) of Brussels 2012 does not cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Member State.<sup>6</sup> In this case the claimant, Mr. Marinari, an Italian, had entered a bank in England and presented promissory notes for \$752 million made by a provincial government in the Philippines in favour of a Beirut company. The bank had called the police, who arrested Mr Marinari. It seems that the promissory notes were not returned. Marinari sued the bank in Italy for damage to his reputation, the loss of the promissory notes and wrongful arrest. He claimed that the Italian courts had jurisdiction because Italy was the country where his reputation and bank account were located. The CJEU held that the courts of Italy had no jurisdiction.

We thus have a distinction between initial damage and consequential financial loss: only the former counts for the purpose of the *Bier* formula. The justification for this distinction has recently been considered by the UK Supreme Court in *Four Seasons Holdings v. Brownlie*<sup>7</sup> in the context of the equivalent English rule,<sup>8</sup> which was modelled on what is now Brussels

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<sup>3</sup> Case C-220/88, ECLI:EU:C:1990:8, [1990] ECR I-49.

<sup>4</sup> Ruling by the court.

<sup>5</sup> Case C-364/93, ECLI:EU:C:1995:289, [1995] ECR I-2719.

<sup>6</sup> This case differed from *Dumez* in that in *Dumez* the initial damage was suffered by *other* persons, whereas in *Marinari* it was suffered by the claimant himself.

<sup>7</sup> [2017] UKSC 80.

<sup>8</sup> CPR 6BPD, paragraph 3.1(6)(a).

2012, Article 7(2). The distinction was rejected by the majority,<sup>9</sup> who took the view that, in a case not governed by EU law, consequential loss suffered in England following a motor accident in Egypt could constitute a ground of jurisdiction for the English courts.<sup>10</sup> The opposite view was forcefully expressed by Lord Sumption (with whom Lord Hughes agreed).<sup>11</sup>

The strongest argument in favour of the *Marinari* rule is that, without it, jurisdiction could be grounded on facts completely beyond the control of the defendant. Indeed, these facts might depend solely on the actions of the claimant. Assume, for example, that a Greek claimant is injured by a Greek defendant in Greece. He is a wealthy man and he decides to go to England for medical treatment in a private hospital. Without the *Marinari* rule, he could then bring a claim in tort in England on the ground that he had incurred expenses in England as well as suffering pain there.<sup>12</sup>

It is, therefore, suggested that the *Marinari* rule is necessary, at least in the EU context. However, there is a problem: what happens if there is no initial damage but *only* financial loss or some other kind of non-material damage? Does the *Bier* formula still apply? If it does, what constitutes the damage and where is it to be regarded as having occurred? These are the questions to be considered in the pages which follow.

### PURE FINANCIAL LOSS

What happens if there is no physical harm but only pure financial loss? The defendant does something; the claimant suffers no physical injury to his person or property, but he loses money. If the financial loss, which might be simply a change in his bank balance, is the result of the defendant's action, where is that damage to be regarded as having occurred? To answer this, we consider situations of this kind in cases before the CJEU.

#### *Claimant Prevented from Acting: The DFDS Torline Case*

The first situation is where the defendant's act prevents the claimant from doing something which would have been beneficial to him. This could result in financial loss, either because he had to spend money on some alternative, or simply because he did not make a profit which he could otherwise have made.

This was what happened in *DFDS Torline*.<sup>13</sup> The claimant, DFDS Torline, was a Danish shipping company. One of its ships, the *Tor Caledonia*, was due to sail from Sweden to England. Because of an industrial dispute, SEKO, a Swedish trade union, instructed its members not to work on the ship (which was of no significance in itself since none of them did so) and called for sympathy action from other workers. The call for sympathy action

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<sup>9</sup> Lady Hale, Lord Clarke and Lord Wilson.

<sup>10</sup> *Per* Lady Hale at paragraphs 35—55.

<sup>11</sup> At paragraphs 19—31.

<sup>12</sup> It might be argued that, in the non-EU context, this problem could be solved through the doctrine of *forum non conveniens*: see *per* Lady Hale in the *Four Seasons* case at paragraph 31. However, the inherent unpredictability of the doctrine (and the problem of funding the litigation which often takes place to decide where the action should be brought) could still cause problems for the defendant.

<sup>13</sup> Case C-18/02, ECLI:EU:C:2004:74, [2004] ECR I-1417.

could have prevented the loading and unloading of the ship in Swedish ports. As a result, the shipping company cancelled the voyage. It then had to charter another ship to serve the same route. It sued the Swedish trade union in a Danish court for damages for the resulting financial loss. Did the Danish court have jurisdiction on the ground that the place where the damage occurred was Denmark? The Danish court asked whether this followed from the fact that Denmark was the State of the flag.

In a remarkably uninformative and unhelpful judgment, the CJEU said that the event giving rise to the damage was the giving of notice of industrial action. This took place in Sweden, the country where the union had its head office.<sup>14</sup> As regards the damage itself, the CJEU said that it was for the national court to inquire whether the financial loss could be regarded as having arisen where the shipping company was established.<sup>15</sup> In undertaking this inquiry, the CJEU said, the fact that the ship was registered in Denmark was only one factor amongst others in identifying the place where the harmful event took place.<sup>16</sup> It would be decisive only if the national court reached the conclusion that the damage had arisen on board the ship itself.<sup>17</sup>

If the *Tor Caledonia* had sailed to Sweden and had been prevented from loading there, it is hard to see how the initial damage could be regarded as having occurred in any country other than Sweden. The financial loss would then have been excluded from consideration under the limitations laid down in *Dumez* and *Marinari*. In view of this, it would be anomalous if the position were different if the ship had not attempted to load in Sweden. It is suggested, therefore, that financial loss of this kind should be regarded as having occurred in the place where the claimant would have acted if he had not been prevented from doing so. This is a fairly objective criterion and could not normally be manipulated by either party.

#### *Investment Loss: The Kronhofer Case*

Investment contracts are a fertile ground for the problem we are considering. If the investment turns out badly, the investor might sue the managers of the fund for mismanagement, or he might claim that he took the decision to invest on the basis of faulty information provided by the defendant. Member-State legislation (in part, giving effect to EU law) lays down various requirements regarding the provision of information. If these obligations are not fulfilled, the investor may be able to bring proceedings in tort. In both situations, the only loss suffered by the investor will be financial. Where is this to be regarded as having occurred?

In *Kronhofer*,<sup>18</sup> an investor domiciled in Austria (Mr Kronhofer) brought proceedings before a court in Austria against a number of German-domiciled individuals who were either directors or investment consultants of a German investment company. They had telephoned him in Austria and had persuaded him to enter into a highly speculative contract without

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<sup>14</sup> Paragraph 41 of the judgment.

<sup>15</sup> Paragraph 43 of the judgment.

<sup>16</sup> Paragraph 44 of the judgment.

<sup>17</sup> *Ibid.*

<sup>18</sup> Case C-168/02, ECLI:EU:C:2004:364, [2004] ECR I-6009.

warning him of the risks involved. He transferred funds to the investment company's account in Germany. The investment turned out badly and Mr Kronhofer lost part of his money.

On these facts, the Austrian Supreme Court (*Oberster Gerichtshof*) asked the CJEU whether what is now Article 7(2) gives jurisdiction to the courts for the place where the claimant is domiciled and where his assets are concentrated 'by reason only of the fact that the claimant has suffered financial damage there resulting in the loss of part of his assets which arose and was incurred in another Contracting [Member] State.'<sup>19</sup>

The CJEU answered this question in the negative. After mentioning that the Austrian Supreme Court itself thought that the damage had occurred in Germany, and after referring to the *Marinari* case, the CJEU said that such a rule could give rise to uncertainty and would usually allow the claimant to bring proceedings in the courts of his domicile, something not generally allowed under the Convention, now the Regulation.<sup>20</sup>

Eleven years later, however, the CJEU gave a rather different answer in another case concerning an Austrian investor, *Kolassa*.<sup>21</sup>

#### *Investment Loss Revisited: The Kolassa Case*

In *Kolassa v. Barclays Bank*,<sup>22</sup> a British bank, Barclays Bank, issued investment certificates in the form of bearer bonds. Barclays issued a prospectus in England, which (at its request) was brought to the attention of investors in Austria. Mr Kolassa, who was domiciled in Austria, bought some bonds from a bank in Austria. The investment proved a disaster, and Mr Kolassa lost most, or all, of his money. He sued Barclays Bank in Austria. He said that he would not have made the investment if Barclays had fulfilled its obligations to provide accurate information concerning the investment.

The case raised various issues. The one relevant to the present problem was whether the Austrian courts had jurisdiction under what is now Article 7(2) of Brussels 2012 for a claim in tort for prospectus liability and other legal information obligations. The Austrian court asked whether the courts of the claimant's domicile had jurisdiction. The CJEU said that they did. Its words were: '[T]he courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, particularly when the damage alleged occurred directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts.'<sup>23</sup> This conclusion was predicated on the assumption that the actions or omissions alleged against Barclays Bank occurred before Mr Kolassa took the decision to invest, and that he was claiming that they were decisive for that decision.<sup>24</sup>

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<sup>19</sup> Paragraph 11 of the CJEU's judgment.

<sup>20</sup> On this, see further *Dumez v. Hessische Landesbank* (above) at paragraphs 16 and 19 of the judgment.

<sup>21</sup> *Infra*.

<sup>22</sup> Case C-375/13, ECLI:EU:C:2015:37.

<sup>23</sup> Paragraph 3 of the Ruling.

<sup>24</sup> Paragraph 51 of the judgment.

In a case decided the following year, the CJEU threw further light on its decision in *Kolassa*. This was in *Universal Music International Holding*,<sup>25</sup> a case discussed in greater detail below. In it, the CJEU said that in *Kolassa* the court had found that the place where the damage occurs for the purpose of the *Bier* formula is the domicile of the applicant if the damage materializes directly in his bank account held with a bank established within the area of jurisdiction of the courts of his domicile.<sup>26</sup> In *Universal Music*, it went on to say, however, that this finding was made within the specific context of the case, a distinctive feature of which was the existence of other facts contributing to the jurisdiction of those courts.<sup>27</sup> In *Universal Music*, the CJEU did not say what those other facts were, but it referred to paragraphs 44 and 45 of the Opinion of Advocate General Szpunar. In paragraph 45 of his Opinion in *Universal Music*, Advocate General Szpunar said:<sup>28</sup>

I think, however, that a general rule cannot be deduced from that case [*Kolassa*] to the effect that financial damage suffices as a connecting factor for the purposes of that provision. The facts in the case leading to the judgment in *Kolassa* were specific. The defendant in that case, a British bank, had published a prospectus concerning the financial certificates in question in Austria and it was an Austrian bank that had sold those certificates.

This extract contained a foot-note reference to paragraph 64 of Advocate General Szpunar's Opinion in *Kolassa*. Here, the Advocate General had said that, in *Kolassa*, Barclays Bank had published a prospectus in Austria and that was 'an indicator of a harmful event which could establish jurisdiction under Article 5(3).'

One can conclude from this that *Kolassa* does not lay down a universal rule: the ground of decision, as interpreted by *Universal Music*, is that, while the domicile of the claimant is not in itself enough, it does confer jurisdiction in a prospectus-liability case if, in addition, the defendant publishes the prospectus in that country. It may also be necessary that the claimant made the investment by transferring money from his bank account in the country of this domicile.

This raises the question whether, in a prospectus-liability case, the harm suffered by the investor should still be regarded as the fall in the value of the investment. Perhaps it would be more appropriate to regard it as the lack of accurate information, something caused by

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<sup>25</sup> Case C-12/15, ECLI:EU:C:2016:449.

<sup>26</sup> Paragraph 36 of the judgment in *Universal Music*. This statement constitutes a subtle distortion of what the CJEU actually said in *Kolassa*. In paragraph 55 of *Kolassa*, the CJEU said: 'The courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, in particular when that loss occurred itself directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts.' The phrase 'in particular' (*'notamment'* in French) is standard CJEU terminology to indicate that what follows is not necessarily the only circumstance in which the preceding statement applies. In other words, the statement that the courts of the applicant's domicile have jurisdiction is not conditional on the loss occurring in his bank account: the loss occurring in his bank account is simply an added reason for them to have jurisdiction. In paragraph 36 of *Universal Music*, however, the CJEU said: 'in *Kolassa* ... the Court found, in paragraph 55 of its reasoning, jurisdiction in favour of the courts for the place of domicile of the applicant by virtue of where the damage occurred, if [*lorsque* in the French text] that damage materialises directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts.' The switch from 'in particular' to 'if' implies that materialization in the applicant's bank account is a necessary condition for the courts of the domicile to have jurisdiction.

<sup>27</sup> Paragraph 37 of the judgment in *Universal Music*.

<sup>28</sup> Footnotes omitted.

the failure of the defendant to comply with its obligations under the law. The fall in the value of the investment would then constitute consequential loss, which would be excluded from consideration under the rule in *Dumez* and *Marinari*. Approaching the matter in this way takes account of the fact that the investor does not claim that the inadequate or inaccurate information *caused* the investment to decrease in value. What he claims is that, if he had been properly informed, he would not have *made* the investment.

This interpretation of *Kolassa* does not, however, make it easy to distinguish *Kronhofer*. Although *Kolassa* was a prospectus-liability case and *Kronhofer* was not, the issues were really the same. In *Kronhofer*, the investor claimed that he had made his decision to invest on the basis of misleading information provided by the defendants when they telephoned him in Austria. For this reason, *Kronhofer* may have to be reconsidered one day.

It is suggested, therefore, that in cases where the essence of the claim is that the investor would not have made the investment if the defendants had fulfilled their legal obligation to provide adequate information, the courts of the investor's domicile should have jurisdiction if the investor received the faulty information in that country. This rule protects the interests of the claimant, without being unfair to the defendant.<sup>29</sup>

#### *Negligent Action by Legal Advisors: The Universal Music Case*

In *Universal Music International Holding*,<sup>30</sup> a Dutch company agreed to buy shares in a Czech company. The legal documents were prepared by a firm of Czech lawyers. Unfortunately, one of the employees of the firm made a mistake in drawing up a document, and this resulted in Universal Music being obliged to pay considerably more for the shares than had been agreed. Universal Music and the Czech shareholders (together with the Czech company) had gone to arbitration in the Czech Republic, and a compromise had been agreed. Universal Music had paid the sum agreed by transferring money from its bank account in the Netherlands to the Czech Republic. It then sued the Czech law firm in the Netherlands, claiming that the loss it had suffered occurred in the Netherlands where it was domiciled and where its bank account was located.

The CJEU rejected this: it held that *Kolassa* did not lay down a general rule that financial loss is to be regarded as located where the claimant's bank account is situated. Additional factors must exist. It held:

[T]he 'place where the harmful event occurred' may not be construed as being, failing any other connecting factors, the place in a Member State where the damage occurred, when that damage consists exclusively of financial damage which materialises directly in the applicant's bank account and is the direct result of an unlawful act committed in another Member State.<sup>31</sup>

The CJEU said that the contract to buy the shares was negotiated and concluded in the Czech Republic. It was this contract which created the obligation to pay more than had been intended. Therefore, said the CJEU, the obligation to pay the additional sum arose in the

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<sup>29</sup> For a slightly different approach, see the Opinion of Advocate General Bobek in *Löber v. Barclays Bank*, Case C 304/17 (not yet decided by the CJEU). The Advocate General's Opinion may be found at ECLI:EU:C:2018:310.

<sup>30</sup> Case C-12/15, ECLI:EU:C:2016:449.

<sup>31</sup> Paragraph 1 of the Ruling.



Czech Republic.<sup>32</sup> The exact amount that had to be paid became certain in the course of the settlement agreed between the parties before an arbitration board in the Czech Republic. This placed an ‘irreversible burden’ on Universal Music’s assets.<sup>33</sup> From this, the CJEU concluded that the place of the damage was the Czech Republic.<sup>34</sup> The fact that, to make the payment, the claimant transferred funds from its Dutch bank account was irrelevant.<sup>35</sup> As the CJEU said, a company may have the choice of several bank accounts from which to make a payment, so that the place where that account is situated does not necessarily constitute a reliable connecting factor.<sup>36</sup> This assumes that the essence of the harm suffered by Universal Music was the incurring of an obligation to pay the additional sum, rather than the actual payment of the sum, although the payment appears to have been made in the Czech Republic as well.

This case shows the inherent ambiguity of the concept ‘place where the damage occurred.’ On a strict application of legal principle, it might seem equally plausible to say that the damage occurred where the contract was concluded, where the settlement was agreed, in the bank account from which the payment was made and in the bank account into which the payment was made. However, a rule based on the conclusion of the contract (and settlement) would probably be less open to manipulation than one based on the mechanism by which the payment was made. For this reason, it seems preferable.

#### *Tort Claims under EU Competition Law: The CDC Case*

EU law prohibits various anti-competitive activities and the EU Commission has power to enforce this prohibition by bringing quasi-criminal proceedings in which fines can be levied.<sup>37</sup> The Commission decision definitively establishes the illegality of the defendants’ conduct and this can be relied on in subsequent proceedings in the courts of Member States. Tort actions against the members of the cartel can then be brought by companies which have suffered loss as a result of the defendants’ activities. The most common situation is where the effect of the cartel is to raise the price that has to be paid for the product. The measure of the claimant’s loss is the difference between the price he had to pay and the price he would have paid if there had been no distortion of competition. These actions are brought in Member-State courts under Member-State law, but the unlawfulness of the defendants’ conduct depends on EU law.

*Cartel Damage Claims (CDC) Hydrogen Peroxide*<sup>38</sup> was just such a case. The manufacturers of a chemical had established a cartel, and this had been declared unlawful in proceedings before the Commission. The users of the product then wanted to bring tort actions. To facilitate this, they assigned their claims to a company specially set up for the purpose, Cartel Damage Claims (CDC), and this company brought proceedings against one of the

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<sup>32</sup> Paragraph 30 of the judgment.

<sup>33</sup> Paragraph 31 of the judgment.

<sup>34</sup> Paragraph 32 of the judgment.

<sup>35</sup> *Ibid.*

<sup>36</sup> Paragraph 38 of the judgment.

<sup>37</sup> An appeal lies to the CJEU.

<sup>38</sup> Case C-352/13, ECLI:EU:C:2015:335.

members of the cartel in the courts of the latter's domicile. CDC then sought to join the other members under what is now Brussels 2012, Article 8(1). An additional ground of jurisdiction was what is now Article 7(2). We deal only with his latter issue.

The CJEU first considered the causal act.<sup>39</sup> The wrongful act on the part of the defendants was restricting the buyers' freedom of contract by creating the cartel. This prevented the buyers from obtaining supplies at a price determined by the rules of supply and demand. The CJEU said that the place where this occurs can be identified 'in the abstract' as the place where the cartel was concluded. Once the cartel has been concluded, the participants will take steps to ensure that they do not compete with each other. This creates the distortion of prices.

However, it is not always possible to identify a single place where a cartel is concluded: it may consist of a number of collusive agreements concluded at various times in different places. In such a situation, it may still be possible to identify one agreement which was the sole causal event of the loss inflicted on a particular buyer. If this is the case, the courts of that place will have jurisdiction with regard to the loss inflicted on that buyer.<sup>40</sup> Although the CJEU did not expressly consider the matter, it would seem that if it is not possible to identify such a place either, jurisdiction based on the causal event will not apply.

The CJEU next turned to the place where the damage occurs.<sup>41</sup> It said this is identifiable only for each alleged victim taken individually and is located, in general, at that victim's registered office.<sup>42</sup> This solution 'guarantees the efficacious conduct of proceedings' in view of the fact that the illegality of the cartel has already been established by a decision of the Commission and the assessment of the claim then depends on factors specifically relating to the situation of the claimant.<sup>43</sup>

The correctness of this reasoning is open to question. The fact that the illegality of the defendants' action is no longer subject to dispute makes the place where the cartel was formed less appropriate, but this does not necessarily justify giving jurisdiction to the courts of the claimant's domicile. The remaining issues would normally be how much of the product the claimant had bought, what he had paid for it, and what he would have paid for

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<sup>39</sup> Paragraphs 43—50 of the judgment.

<sup>40</sup> This ground of jurisdiction would apply only to claims brought by the buyer in question, but all the participants in the cartel could be joined as defendants.

<sup>41</sup> Paragraphs 52—56 of the judgment.

<sup>42</sup> Paragraph 52 of the judgment. In the French text of the judgment, 'registered office' is '*siège social*.' In Brussels 2012, Article 63(1), the English text uses the phrase 'statutory seat' for '*siège social*;' however, Article 63(2) states that 'for the purposes of Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.' This means that, where the forum is not in Ireland, Cyprus or the United Kingdom, 'registered office' should be read as 'statutory seat.' However, the phrase 'statutory seat' is misleading in English since it does not refer to the seat of the company as laid down in a statute (Act of Parliament), but to its seat as laid down in the constitution of the company (*statut* in French).

<sup>43</sup> Paragraph 53 of the judgment.

it if there had been no cartel. This would seem to point to the place where the purchases were made.

If one looks at the question from the point of view of principle, the wrongful act would be the rigging of the market and the harm to the claimant would be the higher price the claimant paid. The place where this occurs would be the place where purchases are made. Strictly speaking, this is the place where the loss occurs. However, this would mean that if the claimant made several purchases in different places, he would have to bring several actions to recover all his losses. This militates in favour of the solution adopted by the CJEU.<sup>44</sup>

### *Should the Bier paradigm be abandoned?*

In view of the problems caused by it, should the *Bier* paradigm be abandoned in cases of pure economic loss? This was proposed by Advocate General Szpunar in *Universal Music*, where he used two German terms, '*Handlungsort*' (place where the defendant's act occurs) and '*Erfolgort*' (place where the result of that act occurs) to discuss the *Bier* paradigm. What he said was the following:<sup>45</sup>

35. The referring court states, however, that it has not found an answer, in the Court's case-law, to the question of whether financial damage alone may constitute an '*Erfolgort*' and, therefore, establish jurisdiction under Article 5(3) of Regulation No 44/2001 [now Article 7(2) of Brussels 2012]. In other words, it wonders whether there is jurisdiction under that provision when there is not already initial damage, as in the case which gave rise to the judgment in *Marinari*.<sup>46</sup>

36. Alternatively, and in such a hypothesis, the key question in the present proceedings is therefore whether the Court's statement in the judgment in *Mines de potasse d'Alsace*<sup>47</sup> judgment that the words 'place where the harmful event occurred' covers both places also applies when damage is purely financial.

37. I think not.

38. When there is financial damage, namely, damage which consists only in a reduction in financial assets,<sup>48</sup> I think that the term '*Erfolgort*' is not wholly relevant.<sup>49</sup> In certain situations, it is impossible to distinguish between '*Handlungsort*' and '*Erfolgort*'. In order to determine whether there is an '*Erfolgort*', it all depends, in such a situation, on where the financial assets are situated, which is usually the same as the place of residence or, in the case of a legal person, the place in which it has its registered office. That matter is often uncertain and connected with considerations which are unrelated to the events at issue.

39. I am therefore wary of transposing to the letter the decision in *Mines de potasse d'Alsace*<sup>50</sup> to a situation in which the damage is financial. As the Commission rightly points out in its observations, it was not in order to extend the derogation from the general rule of jurisdiction that the Court acknowledged, in the *Mines de potasse d'Alsace* judgment,<sup>51</sup>

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<sup>44</sup> In practice, it might be easier to sue one of the defendants in the courts of its domicile and to join the other members of the cartel under Article 8(1) of Brussels 2012. Since there will normally be a number of defendants from different Member States, the claimant will usually have a choice of countries in which to bring the proceedings.

<sup>45</sup> Paragraphs 35–39 of the Opinion. Footnotes have been renumbered.

<sup>46</sup> C-364/93, ECLI:EU:C:1995:289.

<sup>47</sup> 21/76, ECLI:EU:C:1976:166.

<sup>48</sup> '*Vermögensschade*' in the terminology of the referring court.

<sup>49</sup> Obviously it is different if it is the assets themselves that are the object of the unlawful act. In such a situation it is clear to me that the '*Erfolgort*' may very well be the place where the financial damage is suffered. See also, to that effect, Mankowski, P., in Magnus, U., and Mankowski, P., *Brussels Ibis Regulation Commentary*, Verlag Dr. Otto Schmidt, Cologne, 2016, Article 7, paragraph 328.

<sup>50</sup> Case 21/76, ECLI:EU:C:1976:166.

<sup>51</sup> Case 21/76, ECLI:EU:C:1976:166.

the applicant might choose between the place where the damage occurred and the place where the event which initially caused the damage took place. The reason for that choice lies in the necessity of staying as close as possible to the facts of the case and of designating the court aptest for settling the case and, in that context, of conducting proceedings efficiently, for example by taking evidence and hearing witnesses.

So far, however, the CJEU has not expressly adopted this approach.<sup>52</sup> Nevertheless, there is no doubt that in cases of pure financial damage, it is often easier to put on one side the *Bier* paradigm and ask simply what the harmful event was. In *DFDS Torline*, for example, the harmful event was a non-event: the non-loading of the ship. This took place in Sweden, the country where the ship would have loaded if it had not been prevented from doing so. In *Kronhofer* and *Kolassa*, it was the giving of misleading information to the investor. This took place in Austria, where the investor received the information.

This approach has the advantage of looking to see where the defendant's act impacts on the claimant, without having to conduct an often-futile search for the place where the loss occurred. Perhaps one day the CJEU will come around to this view.

## DEFAMATION

Defamation is another tort in which no physical harm occurs. The essence of the tort is damage to reputation: when defamatory material is communicated to a third person, it affects that person's opinion of the claimant. It generally leads the person to whom the material has been communicated to think less well of the claimant. Under the English law of libel, is it not, however, necessary for the claimant to prove that this has actually happened: it is presumed. It is also unnecessary to prove any financial loss.

Since the harm consists in the effect of the material on the person to whom it is communicated, the place of the harm must be the place where the communication occurs. In determining where this is, we must make a distinction between hard-copy publication and Internet publication. We deal first with the former.

### *Hard-copy Publication*

In *Shevill v. Presse Alliance SA*,<sup>53</sup> which concerned alleged defamation in a newspaper, the CJEU held that the distinction laid down in *Bier v. Mines de Potasse d'Alsace*—between the place where the damage occurs and the place of the event giving rise to it—applies equally where there is no physical or pecuniary loss or damage.<sup>54</sup> It held that, in the case of defamation in a hard-copy publication, the place where the damage occurs is the place or places where the publication is distributed, provided that the victim is known in that place or those places. Thus, the courts of each Member State in which the defamatory publication is distributed, and in which the victim claims to have suffered injury to his reputation, have jurisdiction to rule on the injury caused in that State to the victim's reputation.<sup>55</sup> Although

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<sup>52</sup> However, in *ÖFAB*, Case C-147/12, ECLI:EU:C:2013:490, the CJEU, while acknowledging the distinction laid down in *Bier* (see paragraph 51 of the judgment), in the end simply ruled on where the harmful event occurred, without distinguishing between the causal event and the harm.

<sup>53</sup> Case C-68/93, ECLI:EU:C:1995:61, [1995] ECR I-415.

<sup>54</sup> At paragraph 23 of the judgment.

<sup>55</sup> Paragraphs 29 and 30 of the judgment and the first paragraph of the Ruling.

the CJEU did not explain exactly what ‘distribute’ means, it is reasonable to assume that it involves communicating the material to a third party.

What the CJEU had to say about the place where the causal act occurs was less satisfactory. It said that this is the place where the publisher of the newspaper is established, since this is the place where the harmful event originated and from which the libel was issued and put into circulation.<sup>56</sup> Apart from the fact that, as the CJEU admitted,<sup>57</sup> this will generally coincide with the domicile of the defendant—an independent ground of jurisdiction under Brussels 2012, Article 4(1)—the concept of ‘establishment’ is not clear. Does it refer to the editorial centre of the newspaper, its printing centre or its distribution centre?

If, as is the case with most newspapers, these are all the same, no problem arises. However, they will not always be the same. Assume that the editorial centre of a British newspaper is in London. That is where the newspaper is put together. The British edition will be printed in London and distributed from there. However, there is a separate (Continental) European edition. This is also edited in London, but the material is then electronically transmitted to its European printing centre in Belgium, where the European edition is printed. Copies for sale in Benelux are distributed directly from there, but copies for sale in Germany and France are sent in bulk in the newspaper’s own vehicles to separate distribution centres in Germany and France.<sup>58</sup> If a French claimant brings proceedings in France, claiming that he was libelled by material distributed in France, where should the causal act be regarded as having occurred? Is it in England, where the newspaper is put together; is it in Belgium, where the newspaper is printed; or is it in France, where copies distributed in France leave the control of the publisher? What is decisive: the decision to publish the material or the loss of control over it? One imagines that the CJEU would probably go for the former.

In defamation cases, there is a significant difference between jurisdiction obtained on the basis of these two grounds (the place of the causal act and the place of the damage). Jurisdiction based on the place of the damage permits the court to consider only the harm resulting from the copies distributed in the country concerned;<sup>59</sup> jurisdiction based on the place of the causal event, on the other hand, permits the court to grant a remedy for the totality of the damage, wherever occurring.<sup>60</sup>

This distinction is no doubt based on the fact that distribution may occur in many countries and if the claimant could obtain a remedy for the whole of the damage in the courts of any such country, he would normally choose the one in which he was likely to win the highest damages. This would mean that the most claimant-friendly courts would hear a disproportionately large number of international libel cases. Defamation is excluded from the scope of the Rome II Regulation;<sup>61</sup> so the applicable law would be determined by the

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<sup>56</sup> Paragraph 24 of the judgment.

<sup>57</sup> Paragraph 26 of the judgment.

<sup>58</sup> This is not a fanciful example: it is believed that some well-known newspapers are produced on a somewhat similar basis.

<sup>59</sup> Paragraphs 30—33 of the judgment.

<sup>60</sup> Paragraph 25 of the judgment.

<sup>61</sup> 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, OJ 2007, L 199, p.40, Article 1(2)(g).

choice-of-law rules of the country of the forum. Since actions for defamation (and invasion of privacy) involve balancing two important rights which often conflict—the claimant’s right to reputation (and privacy) and the defendant’s right to freedom of speech—it would be unacceptable for the claimant to have something approaching a free choice of forum and then to be able to sue there for harm caused throughout the world.

### *Internet Publication*

The leading cases on Internet publication are two joined cases, *eDate Advertising v. X and Martinez v. MGN Limited*.<sup>62</sup> These were cases on privacy, but the principles are the same as for defamation. In its judgment, the CJEU held that the two grounds of jurisdiction established in *Shevill* continue to apply in Internet cases, the place of the harm being the place where the online content is or has been accessible,<sup>63</sup> and the place of the causal act being the place where the publisher of the content is established.<sup>64</sup>

The big innovation was the creation of a new ground of jurisdiction, the claimant’s centre of interests. Where the court has jurisdiction on this basis, the claimant can obtain compensation for the totality of his loss, wherever occurring.<sup>65</sup> Although used in insolvency law, the centre of the claimant’s interests has not before been used under Brussels 2012. In *eDate*, the CJEU explained it as follows:

The place where a person has the centre of his interests 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.

The concept was further developed in a more recent case, *Bolagsupplysningen OÜ*,<sup>66</sup> in which the CJEU held that where a company incorporated in one Member State and having its registered office there carries out the main part of its activities in another Member State, its centre of interests is in the latter Member State, not the former. The company in question was established in Estonia, but its sales activities were targeted at Sweden. This meant that it could sue in Estonia only for the harm occurring in Estonia. If it wanted to sue for the totality of harm caused to it, it would have to sue in Sweden.<sup>67</sup>

In addition to claiming damages, the claimant in the *Bolagsupplysningen* case also wanted an order that the defendant rectify or remove the allegedly misleading information on its website. The CJEU held, however, that since the Estonian courts only had jurisdiction on the ground that the allegedly defamatory content was or had been accessible there, they had no jurisdiction to grant such an order. Only the courts of the claimant’s centre of interests (or presumably those of the defendant’s domicile or place of establishment) could do this.

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<sup>62</sup> Joined Cases C-509/09 and C-161/10, ECLI:EU:C:2011:685, [2011] ECR I-10269.

<sup>63</sup> Paragraph 52 of the judgment.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> Case C-194/16, ECLI:EU:C:2017:766.

<sup>67</sup> Besides being the claimant’s centre of interests, Sweden was the defendant’s domicile. It also appeared to be the place where the defendant was established.

The reason is presumably the same as that for not allowing the courts for the place where some of the damage occurs to award compensation for the totality of the damage.

In defamation, the harm is the change in other people's attitude towards the claimant. Strictly speaking, this occurs where the defamatory material is communicated to those people. So, this ground of jurisdiction cannot be regarded as being derived in any real sense from the *Bier* principle. It is a new ground of jurisdiction based on policy grounds. The argument is that the claimant should be able to bring a single claim for the totality of his loss wherever occurring, and to do so he should have an option other than that of going to the defendant's country. Despite the attractions of such a rule, however, it has the effect of conferring jurisdiction on what is essentially the claimant's forum. This is generally regarded as undesirable.

### INTELLECTUAL-PROPERTY INFRINGEMENT ACTIONS

The law regarding intellectual-property infringement actions is less satisfactorily systematized than defamation. Nevertheless, the CJEU's judgment in *Wintersteiger v. Products 4U Sondermaschinenbau*<sup>68</sup> could be regarded as establishing<sup>69</sup> the rule that, in the case of online infringement of a registered Member-State<sup>70</sup> intellectual-property right (*in casu*, a trade mark), the place of the causal act is the place where the infringer is established, and the place of the harm is the Member State of registration. Although the CJEU did not say so, it would seem that the latter ground would give jurisdiction only regarding the infringement of the right granted by the law of the Member State of registration. If a parallel right is registered in another Member State, a claim for the infringement of that right would have to be brought in that Member State. On the other hand, a claim could be brought in the Member State of the infringer's establishment for the infringement of all relevant rights. This rule parallels that for online defamation established in *eDate Advertising*.

This rule cannot be applied in the case of unregistered rights such as copyright. In *Pinckney v. Mediatech*,<sup>71</sup> which concerned copyright in songs, the CJEU held that where CDs are marketed online in breach of copyright, a claim for infringement may be brought in any Member State where the website through which the CDs are distributed is accessible. This is the place where the damage occurs. The CJEU rejected the contention that the defendant must have targeted that Member State.<sup>72</sup> However, this gives jurisdiction only with regard to damage arising (infringements occurring) in that Member State. This also parallels the law on defamation. In *Hejduk v. EnergieAgentur*,<sup>73</sup> a similar rule was applied where the defendant put a photograph on its website without the consent of the copyright owner (the

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<sup>68</sup> Case C-523/10, ECLI:EU:C:2012:220.

<sup>69</sup> The actual Ruling in *Wintersteiger* was restricted to the specific circumstances of the case.

<sup>70</sup> The jurisdictional rules in Brussels 2012 are largely inapplicable in the case of EU intellectual-property rights; but see *Coty Germany*, C 360/12, ECLI:EU:C:2014:1318.

<sup>71</sup> Case C-170/12, ECLI:EU:C:2013:635.

<sup>72</sup> Paragraph 42 of the judgment. However, in *Football Dataco*, Case C-173/11, ECLI:EU:C:2012:642, the CJEU held that targeting was required in the case of the *sui generis* intellectual-property right in databases given protection in the European Union under Directive 96/9, OJ 1996, L 77/20.

<sup>73</sup> Case C-441/13, ECLI:EU:C:2015:28. See also *Hi Hotel HCF*, Case C-387/12, ECLI:EU:C:2014:215.

photographer). Again, this applied only to damage occurring in the Member State in question.<sup>74</sup>

## CONCLUSIONS

The concept set out in Article 7(2) of Brussels 2012, ‘the place where the harmful event occurred or may occur,’ is inherently uncertain. The CJEU clarified it in *Bier v. Mines de Potasse d’Alsace* and clarified it further in *Dumez* and *Marinari*. However, the cases discussed above show that, in a number of situations, it is still not possible to reach a definite conclusion by simply applying the rule in an objective and logical way. Uncertainties still exist. In spite of this, the CJEU tries to follow the *Bier* paradigm by asking where the causal occurs and where the damage occurs. Nevertheless, in practice the CJEU does not always apply the *Bier* test strictly. In the case of some torts, it takes policy considerations into account and, to a greater or lesser extent, departs from a strict application of the *Bier* principle. The rule that the harm in competition-law claims occurs in the place of the victim’s registered office is one example;<sup>75</sup> the rule that in online defamation cases it occurs in the place where the victim’s centre of interests is located is another.<sup>76</sup> However, these rules are specific to the torts with regard to which they were created. They cannot be applied to other torts. Thus, in *Wintersteiger v. Products 4U Sondermaschinenbau*,<sup>77</sup> the CJEU refused to apply the ‘centre of interests’ test to the online infringement of a registered trade mark.

Where policy considerations are relevant, the most important are the need to have a clear, easily ascertainable rule; the need to have a rule that cannot be manipulated by one of the parties to the disadvantage of the other; and the need to provide for the expeditious resolution of disputes, if possible by giving the same court jurisdiction over all claims arising from the set of facts.

In certain specific areas—for example, defamation—clear rules have been established by the CJEU which satisfy these requirements. In others, however, there is no clear rule and, when a new case arises, one has to start from first principles and work from there, taking into account the policy considerations set out above.

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<sup>74</sup> The causal act occurred where the defendant company had its seat. This is where the defendant took and carried out the decision to put the photographs online.

<sup>75</sup> *Cartel Damage Claims (CDC) Hydrogen Peroxide*, Case C-352/13, ECLI:EU:C:2015:335.

<sup>76</sup> *eDate Advertising*, Joined Cases C-509/09 and C-161/10, ECLI:EU:C:2011:685, [2011] ECR I-10269.

<sup>77</sup> Case C-523/10, ECLI:EU:C:2012:220.