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**Draft study on forms of liability and jurisdictional issues
in the application of civil and administrative defamation laws in
Council of Europe member states**

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I) INTRODUCTION

Owing to the growing inter-connectedness of modern societies, content published in one state can be accessed instantly across the globe, producing effects on an unlimited number of persons. An allegedly defamatory statement can therefore be claimed to have produced damage in several states, which may result in complex international legal disputes. Indeed, the occurrence of forum shopping has become more frequent as well as more creative, which can negatively impact on the freedom of expression. This study aims to provide a better understanding of the phenomenon of forum shopping in defamation cases, and to distinguish factors that may be conducive to it, with a view to identifying existing or emerging good practices.

1) Forum shopping in defamation cases

(i) The phenomenon of forum shopping

The term forum shopping describes the practice of choosing the court in which to bring an action based on the prospect of the most favourable¹ outcome, even when there is no or only a tenuous connection between the legal issues and the jurisdiction. Such practice may be observed in various fields and is not limited to defamation cases.

The need to choose a forum to bring a case naturally arises before the claimant where an overlap of jurisdictions exists. In such context, the choice of forum forms part of the exercise of one's right to access to court, as guaranteed by the Convention. It is therefore the lack of or the far-fetched nature of the link between the subject-matter of the dispute and the jurisdiction where the lawsuit is filed that distinguishes forum shopping from the ordinary choice of forum.

The choice of a specific forum may open to the claimant a range of advantages: (1) the chosen forum's rules of procedure may be more 'plaintiff-friendly' than in other jurisdictions, (2) substantive law applicable to the merits of the case (as determined under the chosen forum's conflict-of-laws rules) may be more advantageous for the claimant, or (3) the chosen forum's practice may be favourable to the claimant's case (for instance the practice of high damages awards). Therefore, various interconnected factors may influence the choice of forum, irrespective of the claimant's personal motives.

¹ Favourable, in this context, can relate to many aspects of the litigation process: cause of action, burden of proof and standard of proof, but, most commonly, it will relate to the level of compensation available to the claimant.

Forum shopping does not necessarily involve abuse of procedural or other rights by the claimant, nor malicious intent. Wishing to have the best prospects of success for one's case is not in itself an illegitimate interest. At the same time, as will be shown in the following chapters, forum shopping may negatively impact a range of human rights. Where the claimant acts with malicious intent or abuses his rights, such impact is likely to be exacerbated.

(ii) Forum shopping in defamation cases and related human rights risks

Anti-defamation laws are known to legal systems of all Council of Europe member states. They do not usually in themselves present a risk to freedom of expression when (a) meeting the 'quality of law' requirements, (b) pursuing legitimate aims, such as the protection of reputation and rights of others in line with Article 10(2) of the European Convention on Human Rights (ECHR, the Convention), and (c) when they are applied with due regard to the proportionality of interference, as interpreted by the European Court of Human Rights (ECtHR). It is often procedural aspects in application of these laws that may turn them against freedom of expression or other human rights, be it by inadvertence of courts, or as a result of the claimant's malicious intent.

Forum shopping is not a new development in itself. Court practice in the member states of the Council of Europe (hereinafter, CoE member states) contains a large number of examples of forum shopping cases². However, it appears that the tendency of claimants to actively choose a forum for their cases has become more frequent and more inventive relatively recently.³

This tendency manifests itself strongly in defamation cases, and it is not hard to see why. One reason is that globalisation facilitates word-wide circulation of services, persons, goods and money, while the internet and the global shift towards online media and communication services (such as blogs, social networks, video sharing platforms, etc.) make information available at any location and at any time. Any statement published online is likely to be seen by an unlimited number of persons, thus producing stronger impacts. A defamatory statement can therefore produce more significant damage, possibly in several states, resulting in complex international legal disputes.

² Mayer Pierre, Heuzé Vincent, *Droit International Privé*, Montchrétien, 10th edition, 2010, no. 32 and no. 266 et seq.

³ Forum Shopping: A Practitioner's Perspective. Anthony Fitzsimmons. The Geneva Papers (2006) 31, p.314–322 <https://link.springer.com/content/pdf/10.1057%2Fpalgrave.gpp.2510076.pdf>

Secondly, while the general readiness of courts to accept jurisdiction in defamation cases was already noticeable before, recent years have shown a growing tendency by courts in content-related disputes to exercise personal jurisdiction over internet companies that are located abroad.

As a result of the divergence of national defamation laws, of conflict-of-laws rules and rules on jurisdiction, as well as of rules on recognition and enforcement of foreign judgments, these developments have created a climate that is favourable to claimants in defamation cases, which also opens the door to possible abuse.

Forum shopping often makes it impossible for the defendant to predict where a defamation claim will be filed. In some cases jurisdiction may be chosen by the claimant because the defendant will not be able to appear before a foreign court to defend his or her case, or because the mere cost of procedure or the potential amount of damages award may have a dissuasive effect. Furthermore, the same allegedly defamatory statement may give rise to multiple claims brought against the defendant in several jurisdictions.

The acute lack of predictability of jurisdiction and the risk of being drawn into costly and time-consuming legal proceedings can create a climate of fear and self-censorship among all those who wish to avail themselves of the freedom of expression, especially journalists, other media professionals and academics. Ultimately, this leads to a chilling effect on freedom of expression and to the impoverishment of public debate, which is to the detriment of society as a whole.⁴ With the current shift to an increasingly digital, mobile, and social media environment these risks are particularly high for legacy media like broadcasters and newspapers whose traditional business models are being severely challenged, placing them in a vulnerable financial situation.⁵ Possible shutdowns of such media outlets as a result of involvement in numerous and high-cost defamation proceedings pose serious danger to media pluralism and diversity.⁶ Due to these important and direct impacts on freedom of expression, defamation proceedings can be intentionally misused by claimants to silence critical voices and to prevent media from

⁴ [Recommendation CM/Rec\(2016\)4](#) of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors, pts. 33-34.

⁵ Report on Challenges and opportunities for news media and journalism in an increasingly digital, mobile, and social media environment, Council of Europe, 2016.

⁶ See Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership and Declaration by the Committee of Ministers on the financial sustainability of quality journalism in the digital age (13 February 2019).

performing their ‘public watchdog’ role, and from informing the debate on matters of public interest.

Apart from the negative effects on freedom of expression (as guaranteed by Article 10 of the Convention), forum shopping also raises issues under Articles 6 and 13. By putting the defendant in a disadvantageous position compared to the claimant, it can disturb the equality of arms and compromise the fairness of the trial. While appeal is the obvious remedy against unfair proceedings, it will not always allow addressing all related wrongs, as in some jurisdictions, for instance, appeal on the sole ground of the amount of damages is not possible.

(iii) Attempts to address forum shopping and its negative effects

Forum shopping in defamation cases appears to be a matter of concern across continents and borders. Already in 2011, freedom of expression special rapporteurs/representatives of four major international organisations adopted a joint declaration⁷ suggesting harmonising the approach to jurisdiction in legal cases relating to internet content and narrowing the range of forums that can be seized, as a measure against forum shopping.

In 2012, forum shopping in defamation cases (also sometimes referred to as ‘libel tourism’⁸) was identified by the Council of Europe Committee of Ministers as a major challenge to free expression, access to information, and to media pluralism and diversity.⁹ The United Nations (UN) Special Rapporteur on the situation of human rights defenders in her 2013 report also expressed concern about the prevalence of defamation laws and the consolidation of sophisticated forms of impeding the work of human rights defenders, including through the

⁷ Joint Declaration on Freedom of Expression and the Internet by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.

⁸ Forum shopping in defamation cases, in particular in libel suits, has become widely known as libel tourism (the term first coined by human rights barrister Geoffrey Robertson). While certain conceptual distinctions can be drawn between the terms ‘libel tourism’ and ‘forum shopping in defamation cases’, for the purposes of this study both terms are used as synonyms, in line with the approach taken in [Declaration by the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation](#) (adopted on 4 July 2012, pt.5).

⁹ [Declaration by the Committee of Ministers on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation](#), 4 July 2012, pt.5-10.

misuse of the judicial system.¹⁰

At the EU level, a call for anti-SLAPP legislation to protect investigative journalists and independent media has been recently also voiced by members of the European Parliament before the European Commission.¹¹

2) The scope and methodology of the study

This study first analyses the rules on direct international jurisdiction and rules on recognition and enforcement of judgments that may contribute to the phenomenon of forum shopping in defamation law cases. It then reflects on rules on the choice of law as well as, where applicable, on civil and administrative defamation laws and legislation on jurisdiction and procedure matters in CoE member states. Throughout this analysis, good practices are identified that either mitigate the risk of forum shopping or help address the phenomenon in ways that limit negative impacts on freedom of expression.

Owing to the fact that rules on jurisdiction in criminal law cases are usually very closely linked to the territory of a state, this study focuses on private international law rules only.

Given the high volume of data and the limited scope of this study, not all legislative frameworks could be analysed in detail. Rather, a selection of EU member states (Germany, France, Italy, Ireland and United Kingdom) and non-EU member states (Switzerland, Turkey, Russia, Ukraine) was made to draw from experiences in different legal contexts. When addressing defamation cases, significant differences between common law and civil law systems have also been

¹⁰ See notably the [Report of the Special Rapporteur on the situation of human rights defenders](#), UN Doc. A/HRC/25/55, 23 December 2013, paras. 59 and 70.

¹¹ This proposal has been strongly supported by the Committee to Protect Journalists (“CPJ”) and was further upheld in an EU Parliament resolution that called on the Commission to propose an anti-SLAPP Directive that will protect the independent media from vexatious lawsuits intended to silence or intimidate them in the EU. Replying to a parliamentary question on the same subject, the European Commission, however, encouraged national level responses, stating that EU member states have a right to legislate against SLAPP originating in a jurisdiction outside the EU, and that they have a right to protect their nationals against SLAPP originating from within the EU as long as it is done in good faith and in line with declared public policy. See for instance press releases of 10 April 2010, «EU anti-SLAPP legislation all the more urgent», available at: <http://www.eppgroup.eu/press-release/EU-anti-SLAPP-legislation-all-the-more-urgent> ; of 22 February 2018, «CPJ welcomes call for EU directive against SLAPPs », available at: <https://cpj.org/2018/02/cpj-welcomes-call-for-eu-directive-against-slapps.php> ; of 13 June 2018 “EU Commission says no legal obstacle to introduce Anti-SLAPP legislation in Malta”, available at: <https://www.eppgroup.eu/how-we-make-it-happen/with-eu-countries/malta/news/no-legal-obstacle-to-introduce-anti-slapp-legislation> , and also European Parliament resolution of 3 May 2018 on media pluralism and media freedom in the European Union (2017/2209(INI)), pt.20.

pointed out and punctually documented throughout the study. Despite that, all observations are inspired by, and based on, findings that are relevant for all member states.

All data on case-law and legislation used for the purpose of this study are publicly available as of May 2019.¹² While this study is focused on the state of law in Council of Europe member states, references are made to non-European legal systems (such as case-law and legislative changes in the United States or Canada) where developments in addressing forum shopping in defamation cases may be relevant for future legal developments in Europe.

To the extent possible, this study relies on court practice to illustrate and show the main factors that may contribute to forum shopping. It is not meant to serve as a compilation of cases but rather intends to explore theoretical aspects of private international law that might not yet have been considered in courts but that may be relevant in addressing risks to freedom of expression stemming from forum shopping.

II) FORUM SHOPPING AND RULES ON DIRECT INTERNATIONAL JURISDICTION, AND RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Applicable private international law rules may influence the occurrence of forum shopping from various perspectives: (1) through rules on direct international jurisdiction, and (2) through rules on recognition and enforcement of foreign judgments.

The rules governing direct international jurisdiction – also referred to as jurisdiction to decide – determine whether the courts of a certain state are permitted to rule on a legal dispute.¹³ Existing discrepancies between rules on direct international jurisdiction lead to occurrence of concurrent jurisdiction – a situation where two or more courts from different systems simultaneously have jurisdiction over a specific case. Such situation opens the possibility for the claimant to choose a forum to bring a case to and is therefore conducive to forum shopping.

The recognition and enforcement in one jurisdiction of judgments rendered in another (foreign) jurisdiction is another potential ‘entry point’ for forum shopping. The claimant in a forum shopping case may successfully sue in a jurisdiction that is foreign to the defendant, but to

¹² See in particular the IPI Media laws database(<http://legaldb.freemedia.at/legal-database/>) and the Comparative study on “Defamation and Insult Laws in the OSCE Region” released by the OSCE Representative on Freedom of the Media (<https://www.osce.org/fom/303181?download=true>).

¹³ Kropholler, Internationales Privatrecht, 4th edition 2001, p.365, 597

enforce such judgment he or she will need to turn to the state where the defendant is based or his/her property is situated. Where rules on recognition and enforcement of foreign judgments do not contain proper guarantees, e.g. for the protection of the enforcing states' public order and human rights as its inherent element, recognition and enforcement of judgments obtained as a result of forum shopping becomes easily accessible for the claimant.

At the European level, the Brussels regime¹⁴ governing the assignment of jurisdiction and the recognition and enforcement of foreign judgments is one of the most comprehensive responses to issues arising from possible overlap of jurisdictions. This important legal framework harmonises the approach across a range of EU and non-EU states. However, it does not cover the whole Council of Europe area.

This section will provide a general analysis of the CoE member states' legal frameworks in terms of applicable rules on jurisdiction and rules on recognition and enforcement of foreign judgements, highlighting the main factors which would be likely to influence the occurrence of forum shopping in defamation cases.

1) Rules on direct international jurisdiction and related risks of forum shopping

In EU member states, EU rules on direct international jurisdiction are directly applicable by courts.¹⁵ These rules have evolved overtime through the case-law of the ECJ. For some CoE member states rules on direct international jurisdiction are governed by the Lugano Convention,¹⁶ while in others there might be no specific provisions in relation to international disputes: the courts thus refer to national jurisdiction rules.¹⁷

It is, however, common for all legal frameworks that jurisdiction is determined on the basis of various factual elements (connecting factors) depending on the specific circumstances of each case. While the usual set of connecting factors is very similar across CoE member states,

¹⁴ The Brussels regime includes mainly three instruments: the Brussels Ibis Regulation (replacing the Brussels I regulation as of 10 January 2015), the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) and the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Please also see Chart 1 "States applying Brussels regime instruments".

¹⁵ For a brief summary of the current state of EU law regarding rules on direct international jurisdiction, please see Table 1.

¹⁶ Switzerland, Denmark, Norway and Iceland.

¹⁷ For instance, Turkish law on Private International and Procedural Law (Act no. 5718) states that international jurisdiction of the Turkish courts shall be determined by domestic rules on jurisdiction.

approaches to their application have undergone significant changes over time to adapt to the realities of the online environment.

(i) The domicile of the defendant and the *lex loci delicti* rule – a reminder

In private international law, jurisdiction over tort cases is usually governed by the rules *lex loci delicti* (law of the place where the tort was committed) and/or *lex domicili* (law of the place of domicile or habitual residence) of the defendant.

Under EU Regulations on jurisdiction and enforcement of judgments, the general rule states that defendants shall be sued before the courts and tribunals of the member state where they are domiciled.¹⁸ It is possible to sue defendants before the courts of other member states, but only under the conditions provided for by specific provisions of EU Regulations.¹⁹ Similar general rules would apply under Russian, Ukrainian or Turkish law.

Within the EU, and pursuant to the Brussels Ibis regulation²⁰, in matters relating to tort, delict or quasi-delict the defendant may be sued in the courts for the place where the harmful event occurred or may occur. This rule is common to both assertion of jurisdiction and determination of the applicable law²¹, and exists also in non-EU countries' legal frameworks²².

(ii) Complex tort issue – general considerations

In tort cases, as outlined above, the claimant usually (and in particular - under the EU rules) has the choice between the courts of the member state where the defendant is domiciled and the courts of the place where the harmful event occurred or is likely to occur. The choice of forum, however, may be even wider in the case of complex tort.

The concept of complex tort refers to cases where the harmful event has cross-border effects in several states. In such circumstances it may be difficult for a court to clearly identify the location where the harmful event occurred. As a result, alternative connecting factors apply.

In order to address complex tort issues, the ECJ has adapted its approach regarding rules on

¹⁸ See article 4(1) of the Brussels Ibis Regulation and article 2(1) of the Brussels I Regulation.

¹⁹ See article 5(1) of the Brussels Ibis Regulation and article 3(1) of the Brussels I Regulation.

²⁰ See article 7(2) of the Brussels Ibis regulation and article 5(3) of the Brussels I Regulation.

²¹ See article 4(1) Rome II Regulation.

²² See, for instance, the Ukrainian International Private Law Act of 23 June 2005.

jurisdiction. In its *Mine de Potasse d'Alsace*²³ case the ECJ stated that when the place where the tortious event occurred and the place where that event results in damage are not identical, the claimant shall have the choice between the courts of the state where the damage occurred and the place of the event giving rise to it.

Similar approaches are also found in non-EU countries.²⁴

(iii) Complex tort issue in defamation cases and the approach of the ECJ

Complex tort situations are likely to occur in media-related defamation cases, since the country of publication and the country of distribution often differ. This is even more so in the case of online defamation since the internet makes information accessible instantaneously and around the globe.

The ECJ has adapted the EU rules on jurisdiction so as to encompass this multijurisdictional aspect of media-related cases. In its 1995 *Fiona Shevill* case²⁵, the ECJ ruled that the claimant has a choice between suing before the courts of the place of publication of an allegedly defamatory statement for the entire amount of damages, or before the courts of each jurisdiction where harm has been suffered, including the place of habitual residence of the claimant, but only for a limited amount of damages corresponding to the damage suffered in this jurisdiction. This approach was later called the “mosaic approach” due to the diversity of forums available for a claimant to start defamation proceedings.

Taking into account the cross-border nature of the internet and its implications for defamation cases, the ECJ further developed its approach in the case of *eDate/Martinez*.²⁶ In particular, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, it introduced another possibility for bringing an action in respect of all the damage caused, - before the courts of the EU Member State in which the claimant’s centre of interests is based. Provided that the centre of interests does not necessarily correspond to the

²³ ECJ, *Handelskwekerij G. J. Bier BV v Mines de potasse d'Alsace SA*, 30 November 1976, C-21/76

²⁴ For instance, the Turkish Code of Civil Procedure provides that courts of either (a) the place where the tortious act was committed, (b) the place where the effects of the tortious act occurred or are likely to occur, or (c) the place where the aggrieved person has its domicile shall have jurisdiction over the case.

²⁵ ECJ, *Shevill and Others v Presse Alliance*, 7 March 1995, C-68/93, see in particular point 33.

²⁶ ECJ, *eDate Advertising GmbH and Others v X and Société MGN Limited*, 25 October 2011, cases C-509/09 and C-161/10.

place of domicile or habitual residence²⁷, the ECJ has in fact reinforced its “mosaic approach” by allowing claimants an even wider choice of forums.

The “mosaic approach” poses particular challenges in terms of forum shopping risks, and serious concerns in this regard have been raised directly before the ECJ. In a recent case before the ECJ, Advocate General Bobek suggested that the “mosaic approach” developed by the ECJ does not satisfy the requirements of predictability and good administration of justice. Taking into account the degree of accessibility of information enabled by the internet, the “mosaic approach” could lead to harassment of the defendant by the applicant, since it allows the latter to begin proceedings before multiple forums within the EU, thereby increasing legal costs and uncertainty for the defendant. Moreover, legal uncertainty arises if injunctions are sought before the courts of different states, posing the question of harmonising different judgments granting injunctions and/or allocating damages, while the cumulative effect of such judgments can be unreasonably onerous for the defendant. To mitigate the risks stemming from the “mosaic approach”, the Advocate General suggested restricting the choice of forums for the applicant to two options: the courts of the state where the harmful event occurred (*i.e.* most likely the place where the publisher is established or has his/her domicile/habitual residence), or the courts of the state where the applicant has his/her/its centre of interests (which will presumably correspond to the applicant’s place of residence).²⁸.

The ECJ did not follow Advocate General Bobek’s opinion and reiterated its “mosaic approach”, restricting however the courts’ jurisdiction to hear claims for removal of defamatory content and for correction of wrong information only to courts with jurisdiction to rule on the entirety of an application for compensation for damage.²⁹

In jurisdictions outside of the EU, the ECJ’s mosaic approach does not apply.

While determining jurisdiction in defamation cases, and especially in those concerning online content, depending on specific circumstances of the case, may require a flexible approach, from the ECtHR’s perspective such approach must focus on a strong connection between the tortious

²⁷ The ECJ affirmed in the Fiona Shevill case that “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”.

²⁸ See Advocate General Bobek’s conclusions in *Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB*, Case C-194/16, in particular points 73-90.

²⁹ ECJ, 17 October 2017, *Bolagsupplysningen OÜ Ingrid Ilsjan v. Svensk Handel AB*, Case C-194/16, in particular points 44 and 47-49.

situation and the forum state.³⁰ Strong connection between the case and the forum state triggers the forum state's obligation under Article 6 of the Convention to provide the applicant with an effective access to court, while at the same time ensuring sufficient foreseeability for the defendant regarding the jurisdiction where he/she can be sued.

Good Practice 1: Courts and tribunals have jurisdiction over a case if there is a strong connection between the case and the jurisdiction they belong to.

(iv) Rules on direct international jurisdiction under the Lugano Convention regime

Rules under the Lugano Convention³¹ are very similar to those laid down in EU law. Article 2 of the Lugano Convention provides that “persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State”. Article 5(3) provides for special rules on jurisdiction and stipulates that in matters of tort, delict or quasi-delict, a defendant can be brought before the court of the place where the harmful event occurred or may occur. It should also be borne in mind that, according to its Protocol 2 on the uniform interpretation of the Convention, the Lugano Convention must be construed in light of EU law instruments on jurisdiction. National courts apply the rules on jurisdiction enshrined in the Lugano Convention while taking into account the ECJ's case-law. Therefore the considerations outlined above in relation to complex tort in defamation cases are also relevant in respect of the Lugano Convention regime.

(v) The rules on direct international jurisdiction in the context of Brexit

Until the exit of the United Kingdom from the European Union (Brexit)³², the rules of the Brussels Ibis Regulation will remain applicable in the UK. However, as from the Brexit date, UK national rules on jurisdiction will apply to all legal proceedings brought after this date, provided that no other international agreement is concluded.

³⁰ See ECtHR, *Arlewin v. Sweden*, no. 22302/10, 1 March 2016, §§65, 72-73.

³¹ The Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 16 September 1988, as amended in 2007 by a “new” Lugano Convention that entered into force on 1st January 2010. The objective of the Convention is to unify the rules on jurisdiction in civil and commercial matters and expand the applicability of the Brussels I regulation to the relations between the EU Member States and Norway, Iceland and Switzerland. The Brussels I regulation also applies in the Kingdom of Denmark under a separate agreement.

³² As matters currently stand, the exit of the United Kingdom from the European Union is scheduled to take place on 31 October 2019.

To address, in particular, the issue of enforceability of the choice of forum clauses in commercial contracts after Brexit, the UK has deposited a ratification instrument to accede to the 30 June 2005 Hague Convention on the choice of courts agreements (the “Hague Convention”). The Hague Convention’s scope of application is very limited as it does not encompass any jurisdictional rules in tort cases. In respect of the tort of defamation and in the absence of any other international agreement³³, only national rules on jurisdiction would therefore be applied by UK courts.

While the UK rules on jurisdiction³⁴ at first glance do not substantially differ from the EU law rules arising from the Brussels Ibis regulation, it should be noted that the UK Supreme Court in the recent case of *Four Seasons Holdings Incorporated v. Brownlie*³⁵ has broadened the notion of “damage” so as to include indirect or consequential harm. Even where tort has been committed outside the UK and direct harm has been suffered abroad, UK courts have jurisdiction insofar as indirect harm is claimed to have occurred in the UK. Such a broad meaning of “damage” bears the risk of allowing claimants to forum shop.

However, the majority of the UK Supreme Court judges considered that courts should have robust discretion to decide whether to allow a claim. UK courts indeed have some discretion when deciding on whether to allow a claim. A claimant is first required to satisfy the “good arguable case” test to start legal action in the UK.³⁶ Additionally, evidence to show that the UK is the proper forum must be provided under the *forum non conveniens* doctrine.³⁷

2) Forum shopping and the rules on recognition and enforcement of foreign judgments

EU and non-EU states have different sets of rules governing the recognition and enforcement of judgments. EU rules on recognition and enforcement of judgments are defined in the

³³ Some EU member states, such as France, Austria, Italy and others, had previously concluded bilateral agreements with the UK which have not been formally invalidated by the entry into force of the 1968 Brussels Convention and later - the Brussels I and Brussels Ibis regulations. While it is uncertain whether the practice of concluding such agreements will be revived, it should be noted that their scope is usually very limited and would not cover issues related to torts of defamation (e.g. the 1934 agreement between France and the UK).

³⁴ Please note that where references are made to UK courts or to the UK in this sub-section, the rules referred to are limited to those applicable in England and Wales. Scotland, Northern Ireland and Gibraltar, in particular, may have different applicable rules.

³⁵ Please see *Four Seasons Holdings Incorporated v. Brownlie*, 2017, UKSC 80.

³⁶ Please see *Canada Trust Co v. Stolzenberg (No 2)* [1997] EWCA Civ 2592.

³⁷ Please see chapter III section 10 for more details.

1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, which has later been amended by the Brussels I Regulation and the Brussels Ibis Regulation. EU rules on recognition and enforcement of foreign judgments are applicable insofar as factual circumstances of a case show a cross-border situation involving several EU member states, which is often the case in defamation litigations.

It should also be recalled that EU rules have been devised in accordance with the general principle of trust and “mutual recognition” between EU member states. Under the Brussels Ibis Regulation, and contrary to Brussels I and the 1968 Brussels Convention regimes, there is nowadays no recognition and enforcement procedure (*exequatur* procedure) for judgments rendered by courts of another EU member state.³⁸ Parties to a defamation case can, however, still invoke a limited number of reasons, as set out below, to object to the recognition and enforcement of a judgement rendered by another EU member state (hereinafter, EU judgment).

Nevertheless, where a foreign judgment was rendered by a court of a country which is not member of the EU (hereinafter, third country judgment), courts apply their own national rules on recognition and enforcement of foreign judgments. In some CoE member states, such as Ukraine or Russia, similarly to the case of direct international jurisdiction, recognition and enforcement of foreign judgments depends on the existence of an international agreement setting forth relevant rules. In the absence of such international agreement, no foreign judgment may be recognised or enforced.

This was, for instance, the case in Russia, up until the case of *Rentpool B.V. v. Podjemnye Technologii*³⁹, which provided clear evidence that foreign judgments can be recognised and enforced in Russia in accordance with the principle of reciprocity (*i.e.* a foreign judgment shall be recognised and enforced in Russia to the extent that Russian judgments may also be enforced and recognised in that foreign country). The reciprocity principle is also enshrined in the Ukrainian Code of Civil Procedure.

While recognition and enforcement of foreign judgments is essential in CoE member states in order to ensure, notably, the right to a fair trial (Article 6 ECHR) and to effective remedies

³⁸ Please note that national rules on enforcement and recognition of foreign judgement however remain applicable in respect of judgments rendered by non-EU courts.

³⁹ Case no BAC-12688/09, 7 December 2009, cited in Olga Vorobieva, *Private International law in Russia*, Wolters Kluwer, 2012, p. 172.

(Article 13 ECHR), it does not go without limitations. A party may object to recognition and enforcement of a foreign judgment on a limited range of grounds, e.g. if it considers that his or her human rights are violated by the judgment at issue. In cross-border disputes therefore, not only the court which has direct international jurisdiction over the case, but also the court before which recognition or enforcement of the judgment is sought has an important role in mitigating the risks of forum shopping and protecting the parties' human rights.

In the same line, courts and tribunals should recognise foreign judgments that are declaratory (i.e. judgments defining the rights and status of litigants that do not require any action to be taken) insofar as such judgements are clearly aimed at preventing or stopping abuse of legal procedure or any other action by the claimant that could be qualified as forum shopping.⁴⁰

Good Practice 2: Courts and tribunals seek to identify and recognise foreign declaratory judgements that are clearly aimed at preventing or stopping abuse of legal procedure or any other action by the claimant that could be qualified as forum shopping.

(i) The public order exception

Public order usually refers to crucial, imperative and underogable principles, norms and standards that constitute fundamental values of a society. Private international law scholars sometimes also use the term public policy as an equivalent to public order. A court may resort to the public order exception to refuse recognition and enforcement of a foreign judgment if it determines that this would contradict the public order of the state.⁴¹

Under EU rules on recognition and enforcement of foreign judgements, the public order exception is a legal basis for refusing recognition and enforcement of an EU judgment.⁴² While this is not the case for uncontested claims where enforcement procedure is further simplified,

⁴⁰ Beyond the boundaries of the CoE member states, the United States SPEECH Act (Securing the Protection of Our Enduring and Established Constitutional Heritage Act) , enacted in 2010, presents an example of legislation that is aimed at preventing, in particular, the chilling effect of forum shopping on publishers. The Ehrenfeld v. Mahfouz case, which prompted the adoption of the SPEECH Act, is a classic example of a forum shopping case where an academic was sued for publishing a book that unmasks processes of terrorism funding. Although there have not been many cases based on the SPEECH Act so far, the provisions contained therein provide strong guarantees for persons residing in the US and facing enforcement procedures in respect of foreign judgments.

⁴¹ The public order exception does not apply to the rules on jurisdiction, except for where exclusive rules on jurisdiction and weak parties' specific rules exist. Under EU law, specific provisions exist to protect weak parties' rights, which are deemed to be the insured, workers and consumers.

⁴² Please see article 45 of the Brussels Ibis Regulation.

it appears unlikely that defamation cases resulting from forum shopping would fall under the scope of the Regulation (EC) no. 805/2004 of 21 April 2004 on uncontested claims.⁴³ Where recognition or enforcement of a third country's judgment is concerned, national rules also generally allow courts to refuse such recognition or enforcement on the grounds of public order.

Rules and values that form part of public order may vary from one state to the other, and may evolve over time, including through court practice. The concept of public order usually encompasses two dimensions: a substantial dimension (whereby public order refers to substantive law values and rules) and a procedural dimension (due process requirements). The ECtHR's case law and the Council of Europe standards play an important role in shaping the concrete meaning and content of public order in the CoE member states and making respect for human rights and freedoms an integral part.

In this sense, public order exception is possibly the most effective and direct tool for protecting the defendant from the negative effects (including the chilling effect on the freedom of expression) stemming from the enforcement of a judgment obtained as a result of forum shopping. In particular in defamation cases, public order exception may be invoked to refuse recognition or enforcement of decisions that award a disproportionate amount of damages or to grant an injunction that manifestly violates the defendant's human rights. In certain legal frameworks punitive damages may be seen as contravening the state's public order. A foreign judgment may also be rejected on public order grounds if procedural rights of one of the parties, and in particular the right to a fair trial and to equality of arms, as guaranteed by Article 6 ECHR, have been violated before foreign courts (for example, if the defendant was not

⁴³ Regulation (EC) No 805/2004 of 21 April 2004 creating a European Enforcement Order for uncontested claims allows for judgments rendered in one EU member state to be directly enforced in another EU member state, provided that the conditions (in particular conditions related to the servicing of proceedings) are met, despite the fact that, as the case may be, the defendant has not appeared or has not been represented in court after having initially contested the claim. In accordance with recital 5 of the Regulation, the notion of "uncontested claims" covers "all situations in which a creditor, given the verified absence of any dispute by the debtor as to the nature or extent of a pecuniary claim, has obtained either a court decision against that debtor or an enforceable document that requires the debtor's express consent, be it a court settlement or an authentic instrument". Pursuant to article 3 of the Regulation, a claim would be directly enforceable (and refusal to enforce an EU judgment would be limited to exceptional cases such as the circumstance where a previous judgment on the same subject matter and between the same parties exists within the requested EU member state) only if the debtor has expressly acknowledged the debt or has not contested it, and provided that such lack of contestation amounts to tacit acknowledgment of the creditor's claim.

allowed to prove the truth of his or her statement in a defamation case because of some procedural limitations⁴⁴).

Good Practice 3: Courts and tribunals generally refuse, on the basis of the public order exception, to recognise or enforce foreign judgments that grant manifestly disproportionate damages awards, or that were rendered in breach of due process of law, or as the result of an abuse of rights.

(ii) The hypothesis of fraudulent behaviour

The general principle of law expressed through the formula *fraus omnia corrumpit* (fraudulent behaviour invalidates any legal act or action) can be applied in both conflict of law and conflict of jurisdiction cases. By virtue of this principle, where a person has succeeded to obtain a judgment in his or her favour on the basis of deception, malicious intent or dishonesty, discovery of such fraud is a sufficient ground for refusing enforcement. In the context of defamation, such a situation may arise, e.g. where the claimant wrongly asserts his/her centre of interests to be in a certain state. At the stage of recognition and enforcement of judgments, cases falling under the exception of fraudulent behaviour may at the same time fall under the more general public order exception.

(iii) The *res judicata* exception

As a general principle of law, if the decision of which recognition or enforcement is sought before the addressed state's court appears to be irreconcilable with another decision from another state's court on a case involving the same cause of action and between the same parties, such decision shall not be recognised nor enforced in the addressed state. The *res judicata* exception may play an important role where the "mosaic approach"⁴⁵ has been applied, resulting in several, possibly irreconcilable, decisions in several states. A consistent approach to application of the *res judicata* exception across CoE member states may therefore provide another effective tool for addressing the issue of forum shopping.

Good practice 4: Courts consistently apply the *res judicata* exception when asked to recognise and enforce a foreign judgment that is irreconcilable with another decision from another state's court on a case involving the same cause of action and between the same parties.

⁴⁴ See, for instance, *Steel and Morris v. the United Kingdom*, no 68416/01, 15 February 2005.

⁴⁵ Please see chapter II section 1(iii) for more details.

III) IDENTIFYING FACTORS THAT MAY INFLUENCE THE OCCURRENCE OF FORUM SHOPPING IN DEFAMATION CASES

To choose the forum where his or her case may have the best prospects of success, a claimant will take into consideration objective features of different legal frameworks - embedded both in law and practice and bearing both procedural and substantive nature, - and will assess the advantages and disadvantages that they potentially present for the outcome of the case. Such factors may therefore influence the occurrence of forum shopping by making one jurisdiction more claimant-friendly and attractive than another.

There may be objective factors that affect the choice of forum and subjective ones. These motives may be legitimate or illegitimate in nature (e.g., to receive the highest possible award for damages, or to harm the defendant, or to silence critical voices contributing to open debate on matters of public interest), the latter potentially amounting to an abuse of rights.⁴⁶ In this respect, attention should also be paid to the role of legal counsels who bear ethical responsibility to discourage forum shopping where the claimant is not acting in good faith. While this study will not delve into further analysis of lawyers' professional ethics, this aspect should be considered when addressing the issue of forum shopping and its impact on the freedom of expression from a broader policy perspective.

While the scope of this study does not allow for an in-depth analysis of all CoE member states' legal frameworks, this section will attempt to discern the most common factors that matter for the choice of forum and that therefore may influence the occurrence of forum shopping. It should be noted that such factors may be to some extent interrelated and that some of them may be found cumulatively in one legal system or framework.

1) Limitation periods

Limitation periods are timeframes for the claimant to bring his or her case before a court. In defamation cases, the longer the limitation period, the higher is the risk for the author of a statement to fall victim to forum shopping.

In determining whether a case is foreclosed or not, courts usually refer either to the law of the forum state (in common law countries limitation periods are deemed to be a procedural law issue governed by *lex fori*), or to the law applicable to the merits (in civil law countries

⁴⁶ Please see chapter III section 9 for more details.

limitation periods are generally considered to be a substantive law issue, therefore governed by *lex causae*). The claimant may therefore seek the benefit of favourable provisions applicable to limitation periods in different jurisdictions.

While their length may vary from one member state to another, limitation periods applicable to defamation cases are usually short. By way of example, under the Ukrainian Civil Code, the limitation period for starting a defamation action is one year as from the date of publication or dissemination of the defamatory statement, or from the date when the claimant learned or could have learned about its dissemination in mass media. One-year limitation periods are provided for under Russian law and under Turkish law. Similar timeframes are found in the UK laws on defamation⁴⁷ and in the Irish Defamation Act 2009⁴⁸.

However, such short limitation periods may generally be lifted by courts where good reasons are invoked in justifying inaction. The possibility for courts to lift and extend limitation periods is an important tool for judges to strike a fair balance between the claimant's and defendant's respective rights to a fair trial and to effective remedies, as guaranteed by Articles 6, 8 and 13 ECHR, in light of the specific circumstances of each case.

The starting point in time for calculating limitation periods is another important factor to consider. Relevant implications can be best illustrated with the example of the UK.

Under the UK Defamation Act 1996, not only the first publication of a statement can be considered as the starting point of the limitation period in respect of a defamation action, but also every instance of (re-)publishing or downloading. With the growing role of the internet, which makes information accessible at any time and from various locations, serious concerns have accrued about the effects of this provision, prompting a reform of UK defamation laws.

⁴⁷ Defamation Act 1996 amending Limitation Act 1980 shortened the limitation period in relation to defamation claims to one year (in contrast to the generally applicable six-years limitation period for torts) as from the date of publication of an alleged defamatory statement. The said piece of legislation nevertheless allows for some flexibility in the application of limitation periods since UK courts and tribunals retain their discretionary powers to lift limitation periods if this is justified in light of the circumstances of a case.

⁴⁸ Pursuant to section 38(1) of the Defamation Act 2009 (amending section 11 of the Statute of Limitations 1957), one year limitation period is set, but can be extended to a maximum of two years upon decision of a court if the interests of justice so require and if the prejudice suffered by the claimant would outweigh the prejudice of the defendant (if the limitation period is extended), taking into consideration the reasons why the defamation action could not be brought within the one year limitation period.

As a result, the UK Defamation Act 2013 introduces a single publication rule, which requires that the limitation period for a defamation action brought before UK courts and tribunals be calculated from the date of the first publication only. Subsequent publications are not considered relevant in this respect, except where they substantially differ from the initial publication. This single publication rule is also intended to prevent defamation actions from being brought in the UK when the contested statement was initially published in another state and has been re-published some time later in the UK.

The absence of such single publication rule in national legal frameworks may encourage multiple and multijurisdictional litigations and thereby foster forum shopping. Apart from the UK, a single publication rule also exists in France.

Good Practice 5: Specific and reasonably short limitation periods for defamation actions are set out clearly in national law.

Good Practice 6: A single publication rule clearly determines in law the starting date of limitation periods for defamation cases.

Good Practice 7: Courts and tribunals can lift limitation periods upon request by one of the parties, provided that objective and clearly defined conditions, as set out in relevant legislation, are met.

2) The burden of proof and the standard of proof

An important factor for choosing a forum is whether the burden of proof lies on the claimant or on the defendant. While in criminal proceedings where the defendant is protected by the presumption of innocence⁴⁹, the burden of proof in civil proceedings may be distributed differently in different jurisdictions. As a general rule in civil matters, it lies on the claimant. However, CoE member states tend, as an exception in defamation cases, to shift the burden of proof on the defendant.⁵⁰ The claimant is only required to prove that the defendant has

⁴⁹ The presumption of innocence is provided for by law in all CoE member states in which defamation remains a criminal offence.

⁵⁰ For instance, while under Ukrainian law the burden of proof is usually on the claimant, in defamation cases it is for the defendant to prove his/her statement true. Under Russian law, while good faith is presumed in civil cases, the Presidium of the Supreme Court of the Russian Federation, in a statement dated 16 March 2016, clarified the distribution of the burden of proof in defamation cases as follows: whilst the claimant must prove the fact of dissemination of information by the defendant, and the discrediting nature of this information, the defendant is responsible for proving that information disseminated by him or her is true. Similar approaches are found in the current Irish laws on defamation and in the UK laws on defamation. German law too tends to shift the burden of proof on the defendant.

disseminated the allegedly defamatory information or has made the allegedly defamatory statement. It is thus for the defendant to prove that his or her statement is true or legitimate.⁵¹

Usually the defendant has a set of available defences⁵² (e.g., a possibility to reverse the onus of proof on the claimant). However, these may vary from country to country, including in terms of accessibility: in some member states the reversal of the onus of proof is more difficult than in others. Such discrepancies may be a serious factor for forum shopping.

While putting the burden of proof on the defendant is not per se contrary to the defendant's human rights⁵³, the ECtHR has clearly stated that procedural fairness and the equality of arms, as guaranteed by Article 6 ECHR, must be ensured in defamation cases when the burden of proof lies mainly on the defendant⁵⁴. In light of this requirement, CoE member states should ensure that the defences available to defendants are not too limited in scope.

Another element to consider in this regard is the standard of proof. The concept of standard of proof refers to the level of certainty and the degree of evidence required to prove a legal claim. Where the burden of proof lies on the defendant, and the standard of proof is so high that it is unlikely that the defendant will be able to prove truth or legitimacy his/her statement, this may be conducive to forum shopping. Conversely, where the standard of proof is high and the burden of proof is on the claimant, the claimant may be discouraged from starting a legal action.

The standard of proof may vary from one jurisdiction to another. The primary standards of proof in civil proceedings are 'preponderance of the evidence' (also known as the 'balance of probabilities') and 'clear and convincing evidence', the latter being higher. For instance, under Irish and English law the standard of proof is usually the 'balance of probabilities'. Some

⁵¹ By contrast, in the United States, the so called "Reynolds defence" can be invoked, in particular by media organisations, whereby the burden of proof that the statement complained of is false is on the claimant.

⁵² For further information about available defences please see Tarlach McGonagle "Freedom of expression and defamation – a study of the case law of the European Court of Human Rights" (p.43-47), CoE, 2016

⁵³ See *McVicar v. the United Kingdom*, no. 46311/99, ECHR 2002-III, where the courts stated that it was not in principle incompatible with Article 10 ECHR to place on a defendant in libel proceedings the onus of proving the truth of defamatory statements.

⁵⁴ See *Steel and Morris v. the United Kingdom*, 15 February 2005, no 68416/01, where the Court held that under the UK law on defamation at the time, the fact that the applicants had the choice either to withdraw the leaflet (directed towards a powerful corporation such as McDonald's) and apologize to McDonald's or bear the burden of proving, without legal aid, the truth of the allegations contained in it, resulted in procedural unfairness, thereby breaching Articles 10 and 6 ECHR.

jurisdictions rely on other criteria. For instance, Russian legislation refers to the 'inner conviction of the court'⁵⁵.

Good Practice 8: Where the burden of proof is on the defendant, available defences should not be of the kind to impede the reversal of the onus of proof on the claimant or to make such reversal unreasonably difficult.

3) Negative declaratory action

Negative declaratory action allows a party to seek a court declaration that a claim asserted by a counterparty does not exist. Such an action allows the party to pre-empt an action by the counterparty and to secure an advantageous place of jurisdiction. Negative declaratory actions are common in competition law and in patent law.

At the same time, the practice of filing negative declaratory actions generally and in defamation cases in particular, is not widespread in CoE member states. While under Swiss or Dutch law, for instance, negative declaratory action is allowed, French, Russian, Ukrainian or Turkish law do not allow for such action.

Where available, negative declaratory action can enable defendants in foreseeable defamation cases to anticipate foreign proceedings initiated by the counterparty and to secure a convenient jurisdiction (e.g. their place of habitual residence), thereby limiting the risk of forum shopping. While scholars in private international law tend to see this type of action as unduly favouring one party and encouraging the so-called "forum running"⁵⁶, it could be argued that this consideration is counterbalanced in defamation cases by the aim of protecting the right to freedom of expression. Interestingly, some jurisdictions have expressly acknowledged that securing a favourable place of jurisdiction is a sufficient interest in an action for a negative declaratory judgment⁵⁷.

⁵⁵ See the Russian Code of Civil Procedure.

⁵⁶ Conceptually, "forum running" differs from "forum shopping". "Forum running" refers to the fact that the court first seized has priority over other courts seized thereafter to determine whether it has jurisdiction over the case.

⁵⁷ A recent judgment of the Federal Tribunal of Switzerland (14 March 2018, 4A 417/2017) decided that under the Swiss law of procedure, there is a legitimate interest for a party to seek a negative declaratory action in Switzerland in order to secure the jurisdiction of Swiss courts. This ruling is intended to protect Swiss parties from being brought before foreign courts in international disputes.

At the same time, it should be noted that negative declaratory actions are only effective insofar as foreign jurisdictions recognise both (i) the existence of international litispendence⁵⁸ in such cases, and (ii) the enforceability of foreign negative declaratory judgments. Such court practice already exists.⁵⁹

4) Default judgment

A default judgment (or judgment *in absentia*) is a binding judgment issued by a court in favour of the claimant when the defendant fails to respond to a court summons or fails to appear in court. Such cases are usually decided solely on the elements provided by the claimant. Across the CoE member states default judgments are typically available both in civil law⁶⁰ and in common law countries⁶¹.

The claimant may purposefully start defamation proceedings before an unexpected forum where it is difficult and costly for the defendant to appear and defend his or her case. This risk is even higher where default judgment procedures are available, but the servicing of proceedings abroad (i.e. proper notification of the defendant about the case brought against him or her) is either not guaranteed or not effective.

Insufficiently strict conditions for allowing such default judgments in defamation cases may foster forum shopping. In order to mitigate the risks of forum shopping such conditions should

⁵⁸ International litispendence refers to rules that apply when courts in different jurisdictions are simultaneously seized with the same dispute (between the same parties, with the same cause of action). Under national, EU law or international law, the litispendence rule usually is: where two (or more) courts have been seized with regard to the same matter, the court first seized shall have jurisdiction to rule on the case.

⁵⁹ Although the scope of this study does not allow for a broader analysis, it should be noted that under the Brussels Ibis Regulation or the Lugano Convention in particular, there is no formal restriction on recognition of foreign judgments, on litispendence or on courts' jurisdiction in respect of negative declaratory actions. See, for instance, Cour de cassation, chambre commerciale, 28 October 2008, no 07-20103 - a case between a French company and a Dutch company where the French Court stated that although negative declaratory action may not be available under French law, French courts shall stay proceedings if a foreign court was first seized with an negative declaratory action.

⁶⁰ For instance, under the Ukrainian Code of Civil Procedure, if the defendant was duly informed about and served with the proceedings but did not respond to a summons, default judgement is allowed. Similarly, under Russian law, if the defendant has been duly informed and served with the proceedings but did not appear in court and did not provide any good reason to postpone the hearing or did not ask that the hearing be conducted in his or her absence, then the court may render a judgment in his absence. In other CoE member states, such as France, judgments *in absentia* are also available, provided that similar conditions are met.

⁶¹ A well-known example of a default judgment is the *Ehrenfeld v. Mahfouz* case (Queen's Bench Division, 3 May 2005, [2005] EWHC 1156 (QB)) where the claimant was awarded £110,000, including attorneys' fees, since the defendant had failed to appear in court.

aim to protect the defendant's right to freedom of expression, while at the same time ensuring the claimant's right to access to justice and to effective remedies. To the extent possible, the conditions of availability of default judgments should be harmonised throughout CoE member states so as to prevent discrepancies between national rules. Furthermore, courts and tribunals must ensure, before rendering any default judgment, that the defendant has been properly serviced with and informed about the defamation proceedings against him or her. Where courts and tribunals fail to comply with the latter requirement, a specific ground for refusal of enforcement or recognition of a foreign judgment is usually available.

Good Practice 9: Courts and tribunals deliver default judgments only when proper servicing of international proceedings is effectively guaranteed.

5) The kind and amount of damages

It should be noted from the outset that in all CoE member states examined for the purposes of this study, a claimant is entitled to seek not only equity remedies (e.g. removal of the statement, prohibition of publication, publication of defendant's apologies, etc.), but also compensation of pecuniary and non-pecuniary damages.⁶² Additionally, punitive damages may be available under certain legal frameworks.

The amount of damages available in a specific legal order may influence the occurrence of forum shopping where (i) the claimant seeks to start legal action before the court which is most likely to award the highest amount of damages among other possible forums, and/or (ii) the claimant seeks to threaten the defendant with a potentially high amount of damages. As demonstrated in previous Council of Europe studies on defamation, such threats may entail a detrimental chilling effect on the freedom of expression⁶³, in particular by preventing the author of an alleged defamatory statement from disclosing information or by coercing the defendant to enter into settlement agreements (which would usually include non-disclosure clauses). In this respect, the ECtHR has on many occasions held that an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.⁶⁴

⁶² For instance, the Russian Civil Code specifies that along with the refutation of defamatory information or the publication of his answer to it, the claimant is entitled to seek damages and compensation for moral harm caused by the dissemination of such information.

⁶³ See for instance Tarlach McGonagle, Freedom of expression and defamation, Council of Europe, 2016.

⁶⁴ See, for instance, ECtHR, *Steel and Morris v. the United Kingdom*, no. 68416/01, 15 February 2005, §§ 96-98.

While under several jurisdictions among CoE member states a certain level of guidance is found in the law, the amount of damages is usually not limited and depends on the evaluation of the harm suffered by the claimant on the basis of objective criteria.⁶⁵

Where trial by jury is available in defamation cases⁶⁶, proper guidance for the jury is an important guarantee against unreasonable and disproportionate damages. An example of such guarantee can be found in the Irish legal system where a specific provision of the 2009 Defamation Act sets out an obligation for courts and tribunals to provide the jury with proper guidance as to the kind and the level of damages that may be awarded⁶⁷. As another safeguard, the Irish 2009 Defamation Act allows for an appeal on the sole basis of the amount of damages awarded (bearing in mind that appeal proceedings are in principle conducted without a jury).

Appeal on the sole basis of the amount of damages may also be available in jurisdictions where juries are not involved in defamation cases at the first instance level, notably under French, Russian, or Ukrainian law. This measure may be seen as counterbalancing the lack of strict guidance on the amount of damages.

Punitive (or *exemplary*) damages are typically awarded at the court's discretion, when the defendant's behaviour is found to be especially harmful. Punitive damages are considered punishment and are awarded in addition to compensatory damages.

There are very few CoE member states that allow for punitive damages. These are those with common law traditions⁶⁸, the UK and Ireland⁶⁹. Therefore in the majority of CoE member states, punitive damages are not available.

Where punitive damages are allowed, claimants may be incentivised by the possibility to be awarded a sum exceeding the harm suffered. While availability of punitive damages appears likely to encourage the occurrence of forum shopping, concrete effects highly depend on the established court practice and the professionalism of judges.

⁶⁵ See for instance article 151 of the Russian Civil Code.

⁶⁶ In civil law countries, civil defamation cases are usually not tried in the presence of a jury. Under Ukrainian law, for instance, since 2012 trial by jury is possible, but only in criminal litigations. In Russia trial by jury also exists in criminal proceedings, but it is not allowed for criminal defamation cases.

⁶⁷ See sections 31 and 32 of the Irish Defamation Act 2009.

⁶⁸ John Y. Gotanda, "Damages in Private International Law (Volume 326)", in *Collected Courses of the Hague Academy of International Law, The Hague Academy of International Law*, Martinus Nijhoff, 2007, p. 334.

⁶⁹ See for instance the Irish Defamation Act 2009 at section 32.

Good Practice 10: The amount of damages granted by court in defamation proceedings is strictly proportionate to the harm suffered by the claimant.

Good Practice 11: Punitive damages, where available under the member states' legal framework, are only allowed if strict and clearly defined in law conditions are met.

Good Practice 12: Appeals solely based on the amount of damages are in principle allowed.

6) The cost of proceedings

The cost of proceedings in defamation cases can constitute an important obstacle for either the claimant or the defendant in the exercise of their rights under Article 6 and/or in protecting their rights under Article 10 ECHR, especially where the claimant or the defendant is a natural person or a small media organisation with scarce financial resources. Procedural costs, as well as lawyers' fees, should therefore be taken into account and monitored when addressing the issue of forum shopping.⁷⁰ The ECtHR case-law shows that the high cost of proceedings may under certain circumstances lead to a breach of the right to freedom of expression.⁷¹

While the claimant's financial situation should be taken into account in order to protect effectively his or her right to access to court, court fees⁷² can also be seen as a deterrent against excessive claims without reasonable grounds. At the same time, due attention should also be paid to the availability of legal aid in line with the ECtHR case-law.⁷³

While the scope of this study does not allow for a comprehensive analysis of different procedural costs typically payable in each of the CoE member states, they can vary significantly, which plays a role for the occurrence of forum shopping.

⁷⁰ In the UK, while the cost of proceedings and its effect on the occurrence of forum shopping had been debated prior to the enactment of the UK Defamation Act 2013⁷⁰, the issue unfortunately has not been clearly dealt with. Reforms have however been introduced into English law, notably in relation to the new opt-in choice for trial by jury set out under section 11 of 2013 UK Defamation Act.

⁷¹ See ECtHR, *MGN Ltd v. United Kingdom*, 18 January 2011, no. 39401/04, paras.281-220.

⁷² In some countries the amount of fees payable to start legal proceedings in defamation cases can be relatively small. Under Ukrainian law, the claimant is required to pay court fees which are proportionate to his claims (from 1% to 10% from the total amount of the claim). Under Russian law the court fee for starting an action for protection of honour, dignity or business reputation is RUB 300 (i.e. approx. Euro 4) for individuals and RUB 6,000 (i.e. approx. Euro 78) for legal entities. It should also be noted that under Russian law, it is not mandatory for any of the parties to be represented by a professional lawyer.

⁷³ See, for instance, ECtHR, *Airey v. Ireland*, 9 October 1979, no 6289/73 and ECtHR, *Steel and Morris v. the United Kingdom*, 15 February 2005, no 68416/01.

7) Third party funding

Third party funding refers to the possibility for a party to a dispute to have the costs of legal proceedings (including legal counsel fees) funded by a third party which is not involved in the dispute. Third party funding is a practice first introduced in Australia in 1980s/1990s, which was recognised in Australian procedural law by the so-called *Fostif* decision.⁷⁴

Third party funding may be offered with the aim of receiving a financial return (i.e. the third party would receive an agreed percentage from the total amount of damages granted by the court) or without any lucrative interest. It can therefore be seen either as an investment or, if no financial return is expected, as a way of achieving higher goals (*e.g.* protection of a discriminated group, protection of environment, protection of free press, etc.).

Third party funding can serve as a mechanism for mitigating the effects of forum shopping stemming from possible financial inequalities between parties to a defamation dispute. It can allow an economically sustainable party (an individual or a company), or an NGO to financially support the defendant (either a natural person or a legal person, such as a small media organisation) in the litigation, especially in international proceedings where legal costs and other expenses are significantly higher. By enabling a financially weaker party to effectively defend the case in court, third party funding may therefore be seen as fostering the right to a fair trial, thus promoting the protection of other rights.

Of course, one cannot exclude that in some circumstances this mechanism might also be used to achieve malicious purposes, *e.g.* to produce a chilling effect on the freedom of expression. Legal regulation and court practice therefore plays an important role in preventing abuse and in turning third party funding into a tool for good.

The practice of third party funding is rapidly increasing, especially in relation to arbitration proceedings, in various countries, such as the United Kingdom, Switzerland, Germany or France⁷⁵. For the time being CoE member states tend not to respond with regulation.

⁷⁴ *Campbells Cash and Carry Pty Ltd c/ Fostif Pty Ltd*, 2006, 229 CLR 386.

⁷⁵ See Omblin Ancelin and Marguerite de Causans, « Les prémices du Third Party litigation funding en France. Ou l'introduction progressive du financement de procès par un tiers », *La Semaine Juridique Entreprise et Affaires* n° 45, 5 November 2015, p. 1527 ; see also Katia Boneva-Desmicht, « Le Third Party Funding », *La Semaine Juridique Entreprise et Affaires*, n° 35, 1 September 2016, p. 672.

While under Turkish, Russian or Ukrainian law there is no specific provision dealing with third party funding, courts in France have had the opportunity to examine the legal nature of financing agreements between third party funders and the party to the dispute⁷⁶, but so far no regulation has been introduced. EU law also does not provide for a harmonised legal framework for third party funding.

In common law countries, the Champerty doctrine (a doctrine that prohibits a third party from financing proceedings in exchange for a certain percentage of the damages eventually recovered by the financed party) is usually viewed as preventing third party funding. The Irish Supreme Court has expressly invoked this doctrine to prohibit it.⁷⁷

8) Court injunctions and the offence of contempt of court

Court injunctions may be characterised as stringent legal measures of interim or permanent nature that impose restraint on publication. Where such measures are available, courts may expeditiously order a media organisation not to make public some pieces of information to protect Article 8 rights of individuals or legal entities. Failure to comply with such court's injunction may trigger a sanction for contempt of court. At the same time, the cumulative effect of easily available (super-)injunctions and strong contempt of court sanctions (especially criminal sanctions) may unduly restrict freedom of expression and undermine freedom of the media, while at the same time fostering forum shopping.

In most CoE member states, legal provisions exist that allow courts to issue orders or injunctions to prevent harm or to protect the rights of the claimant.⁷⁸ In some legal frameworks relevant proceedings are adversarial⁷⁹, while in others they are not (e.g. like super-injunctions

⁷⁶ See Court of Appeal of Versailles, 1 June 2006, No. 05/01038, where the court considered that third party financing contract should be characterised as *sui generis*. See also Cour de Cassation, 1re civ., 23 November 2011, no 10-16.770, where the French court of cassation ruled that the remuneration of the third party, in the specific context of successions, should not be excessive.

⁷⁷ See *Persona Digital Telephony Ltd & ors v The Minister for Public Enterprise & ors* [2017] IESC 27, 23 May 2017.

⁷⁸ For instance, under the Ukrainian Code of Civil Procedure courts may prohibit certain actions and may issue injunctions imposing some obligations to act. Similarly, under Russian Civil Code, courts may also issue orders to protect one's rights.

⁷⁹ For instance, under the French Code of Civil procedure, in case of urgency, a claimant may ask the courts to issue an order (*ordonnance de référé*) to prevent a serious risk of harm from happening (e.g. a court may order the removal of a statement or video from a webpage). *Ordonnances de référé* are adversarial - although proceedings are expeditious, both parties are duly notified to enable them to defend their case and to appear in court.

in the UK⁸⁰).

A criminal offence of contempt of court for non-compliance with a court's injunction (or order), apart from the UK law, does not exist in the analysed CoE member states (e.g., in Ukraine, Turkey, Russia or France). Nevertheless, non-compliance with courts' orders is often sanctioned by a fine.⁸¹

9) Abuse of rights

Abuse of rights may be generally defined as exercising one's right either for an end different from that for which the right was created, e.g. to cause harm, or in a way which impedes the enjoyment by others of their own rights.

The concept of abuse of rights is widely present in the legal frameworks of CoE member states. Prohibition of abuse of rights is now enshrined in civil legislation of a number of countries, e.g. in the Ukrainian Civil Code, in the Russian Civil Code, under French law⁸² and Turkish law.

Prohibition of abuse of rights is also enshrined in Article 17 of the ECHR stating that:

«Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention».

Depending on the circumstances of the case, forum shopping may constitute abuse by a party of his or her rights to access to justice and to effective legal remedies, as guaranteed by Articles 6 and 13 of the ECHR. Express prohibition of abuse of rights by law, and/or coherent application of this concept in court practice can serve as an effective tool to fight against, or at least to limit the effects of forum shopping on the freedom of expression protected by Article 10 ECHR. And vice versa, the absence of such prohibition or reluctance by courts to rely on the concept of

⁸⁰ Please see The New York Times, Ravi Somaiya, British Law Used to Shush Scandal Has Become One, 26 April 2011, available at : <https://www.nytimes.com/2011/04/27/world/europe/27britain.html>.

⁸¹ For instance, under Russian law non-compliance with courts' non-pecuniary judgments is sanctioned by administrative fines of up to RUB 2500 (approx. Euro 32) for individuals and up to RUB 50 000 (approx. Euro 655) for legal entities.

⁸² See Cour de Cassation, req., 3 August 1915, Coquerel c/ Clément-Bayard, no 00-02.378, and notably article 1240 et seq. of the French code civil (civil code) and article 32-1 of the French code de procédure civile (civil procedural code). Article 32-1 of the French Code of Civil Procedure expressly provides that anyone who acts in justice in a dilatory or abusive manner may be sentenced to a civil fine of a maximum of Euros 10,000, without prejudice to any damages that may be claimed.

abuse of rights may contribute to the phenomenon.

In CoE member states the prohibition of abuse of rights is usually a public order element which can be *ex officio* raised by national courts. Where national law does not contain an express prohibition of abuse of rights, courts of CoE member states should be able to rely on the ECHR directly to guarantee effective protection of human rights and fundamental freedoms enshrined therein.

Good practice 13: Courts consistently rely on the prohibition of abuse of rights to address the cases of manifest forum shopping.

10) *Forum non conveniens* doctrine

The *forum non conveniens* doctrine was developed as a judicial response to active choice of forum by litigants. It is originally a common law principle which refers to the court's discretionary power to decline to exercise its jurisdiction where another court may more conveniently hear the case.

Under this doctrine, a range of factors is usually taken into account for identifying the court best placed to deal with a particular case. Such factors may include: (i) personal connections of the parties to the countries where courts have jurisdiction over the dispute; (ii) the place where the events giving rise to the dispute occurred; (iii) location(s) of the witnesses, documents or other evidence; (iv) the applicable law; (v) whether the matter would receive a fair trial in another jurisdiction; and other factors.⁸³

While it could be argued that, to a certain extent, a courts' discretion can introduce an element of unpredictability (or lack of foreseeability, as referred to in the ECtHR's case law⁸⁴), the *forum non conveniens* doctrine should be seen within the wider context of the common law system. Its doctrine of precedent (whereby a court shall be bound by and follow previous rulings of same-level courts or upper level courts), increases foreseeability of the *forum non conveniens* doctrine, as the criteria for asserting or declining jurisdiction set out in previous case law are usually upheld, except where a case can be clearly distinguished from existing precedents.

⁸³ For a recent example of the *forum non-conveniens* doctrine being applied in a defamation case, please see *Haaretz.com v. Goldhar*, 2018 (SCC 28). Although this judgment has been rendered by the Supreme Court of Canada, it has a strong persuasive authority (as opposed to binding) for courts and tribunals in common law countries, and in particular in Ireland and in the United Kingdom.

⁸⁴ See, for instance, *Margareta and Roger Andersson v. Sweden*, 25 February 1992 (Series A no. 226-A, p. 25, § 75) and *S.W. v. United Kingdom*, no 20166/92, 21 November 1995, §§ 34-36

Therefore, the influence of the *forum non conveniens* doctrine on the occurrence of forum shopping highly depends on the quality of criteria developed in the case law and on the professionalism of judges. In the context of a professional and effectively functioning court system this doctrine has the potential to help mitigate the risks and detrimental effects of forum shopping through scrutinising the relevant factual elements of the case, while identifying the forum best placed to hear it.

Bearing in mind that the ECJ's 'mosaic approach'⁸⁵ is widely applied in defamation cases, in the *forum non conveniens* analysis due account should be taken of the intent of the claimant in narrowing the scope of his claim (e.g. to the amount of damage suffered in specific jurisdiction) - to impede any manifest forum shopping cases.

Civil law countries (including France, Russia, Turkey or Ukraine), as a rule, do not apply the doctrine of *forum non-conveniens*. However, the *forum non-conveniens* doctrine may be applied in Ireland (insofar as the Brussel Ibis Regulation does not apply) or in the UK, in particular after Brexit since the Brussel Ibis rules on jurisdiction will cease to apply⁸⁶.

Good Practice 14: Where applicable, courts scrutinise under the *forum non conveniens doctrine* the relevant factual elements of the case, while identifying the forum best placed to hear it.

11) Conflict of laws rules

When the factual circumstances of a case allow linking it to at least two different legal orders, the so-called 'conflict of laws' arises. Conflict-of-laws rules usually refer to national and/or international legal provisions that determine which law and rules are applicable to a particular legal issue. Relying on the conflict-of-laws rules specific to their legal order, judges of the court seized with the case assess which connecting factors are relevant to determine the applicable law.

Unlike rules on jurisdiction, there are for the time being no international or supra-national conflict of laws rules specific to defamation cases. At the EU level, the conflict-of-law rules laid down in Article 1(2)(g) of the Rome II Regulation are not applicable to "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation".

⁸⁵ Please see chapter II section 1(iii) for more details.

⁸⁶ Please see chapter II section 1 subsection (v) for more details.

While the connecting factor usually applicable under most of the CoE member states' legal frameworks is the *lex loci delicti* (i.e. the place where tort was committed), another layer of complexity emerges where the tortious act has been committed in one place but the harm occurred in another. In today's interconnected environment this occurs with increasing frequency. Approaches in the CoE member states vary.

Under French conflict-of-laws rules, courts originally affirmed that the law of the place where the damage occurred and the law of the place where the tortious event occurred can both be held applicable.⁸⁷ With time, however, court practice has shifted towards the proximity principle which provides that the applicable law shall be the law which has the strongest connection with the tortious situation.⁸⁸

In comparison, the Russian Civil Code provides that the law applicable to torts shall be either (i) the law of the place where the tort has been committed; or (ii) if, as a result of such tort or other circumstance, harm has occurred in another country, the law of that country may be applied if the harm-bearer foresaw or should have foreseen the occurrence of harm in that country. Under Turkish conflict-of-laws rules, the law of the state where the damage has occurred shall be the exclusive applicable law.⁸⁹

Conflict-of-laws rules may also provide for other specific connecting factors. For instance, the Russian Civil Code states that where both parties have (a) their residence or, in respect of legal entities, their principal place of business, in the same country, or (b) have the same nationality, the law of the state of common residence, place of business or nationality shall apply. In any event, under Russian law, parties are entitled to agree on the law applicable to the case.

Also, in England and Wales defamation is governed by common law and the "double actionability rule" applies.⁹⁰ This rule was retained after pressure from media organisations who were fearful of the application of oppressive foreign laws. However, this rule is subject to

⁸⁷ See Cour de cassation, Civ. 1^{ère}, 14 January 1997, D. 1997, p. 177.

⁸⁸ See Cour de cassation, Civ. 1^{ère}, 11 May 1999, JDI 1999, p. 1048.

⁸⁹ See the Turkish law on Private International and Procedural Law (Act no. 5718).

⁹⁰ The "double actionability rule": a tort is only actionable in England and Wales if it is civilly actionable under the foreign law of the jurisdiction in which the act occurred (usually publication) and, if the act had occurred in England and Wales, it would be civilly actionable under English law.

an exception: where another country has a more significant relationship with the tortious act and the parties, the law of that jurisdiction will apply instead.⁹¹

Where parties have not agreed on the choice of law and it appears otherwise impossible to determine the applicable law, CoE member states' conflict of laws rules usually refer to the proximity principle.⁹²

Good Practice 15: The proximity (strong connections) principle applies in determining the law applicable to a defamation case.

⁹¹ https://e-justice.europa.eu/content_which_law_will_apply-340-ew-en.do?member=1#toc_2_5

⁹² See, for instance, the Russian Civil Code and the Turkish law on Private International and Procedural Law (Act no. 5718). This would also be the case under the common law rules applicable in the UK or Ireland.

CONCLUSION

This study has explored the occurrence of forum shopping in the application of civil and administrative defamation laws in Council of Europe member states. Owing to the increasing globalisation and inter-connectedness of modern societies, the phenomenon is gaining in frequency.

While claimants have an established right to choose the court where they launch a defamation lawsuit, the deliberate choice of a jurisdiction that is likely to be favourable to the claimant can have a significant chilling effect on the freedom of expression. In an environment where virtually any court in any country where content is accessed online may be chosen to launch a libel suit, defendants (whether individuals or legal entities, such as media) face heightened levels of unpredictability, which may in turn influence their expression.

Although the scope of this study is limited and does not allow a comprehensive analysis of the specific features of legislative frameworks in all Council of Europe member states, the study has shed some light on the way that forum shopping in defamation law cases is experienced and addressed by member states. Most Council of Europe member states have developed some legal tools to mitigate negative implications for the freedom of expression. The study points to the legislative frameworks and practice of seven states from common law and civil law traditions that are referred to by way of example and without providing a holistic analysis of their relevant case law.

With a view to supporting efforts of member states to limit the negative effects of forum shopping in defamation law cases, the study identifies 15 good practices developed in member states:

Good Practice 1: Courts and tribunals have jurisdiction over a case if there is a strong connection between the case and the jurisdiction they belong to.

Good Practice 2: Courts and tribunals seek to identify and recognise foreign declaratory judgements that are clearly aimed at preventing or stopping abuse of legal procedure or any other action by the claimant that could be qualified as forum shopping.

Good Practice 3: Courts and tribunals generally refuse, on the basis of the public order exception, to recognise or enforce foreign judgments that grant manifestly disproportionate damages awards that were rendered in breach of due process of law or as the result of an abuse of rights.

Good practice 4: Courts consistently apply the *res judicata* exception when asked to recognise and enforce a foreign judgment that is irreconcilable with another decision from another state's court on a case involving the same cause of action and between the same parties.

Good Practice 5: Specific and reasonably short limitation periods for defamation actions are set out clearly in national law.

Good Practice 6: A single publication rule clearly determines in law the starting date of limitation period for defamation cases.

Good Practice 7: Courts and tribunals can lift limitation periods upon request by one of the parties, provided that objective and clearly defined conditions, as set out in relevant legislation, are met.

Good Practice 8: Where the burden of proof is on the defendant, available defences should not be of the kind to impede the reversal of the onus of proof on the claimant or to make such reversal unreasonably difficult.

Good Practice 9: Courts and tribunals deliver default judgments only when proper servicing of international proceedings is effectively guaranteed.

Good Practice 10: The amount of damages granted by court in defamation proceedings is strictly proportionate to the harm suffered by the claimant.

Good Practice 11: Punitive damages, where available under the member states' legal framework, are only allowed if strict and clearly defined in law conditions are met.

Good Practice 12: Appeals solely based on the amount of damages are in principle allowed.

Good practice 13: Courts consistently rely on the prohibition of abuse of rights to address the cases of manifest forum shopping.

Good Practice 14: Where applicable, courts scrutinise under the *forum non conveniens doctrine* the relevant factual elements of the case, while identifying the forum best placed to hear it.

Good Practice 15: The proximity (strong connections) principle applies in determining the law applicable to a defamation case.

In addition, in most Council of Europe member states apply concepts of abuse of rights or apply a public order exception to refuse the recognition or enforcement of foreign judgments that are

considered disproportionate. Most member states also set out in law specific and short limitation periods for defamation cases.

Other aspects may require further strengthening, however. Procedural costs, as well as lawyers' fees, should be taken into account and monitored when addressing the issue of forum shopping.

At present, across CoE member states there is no legal instrument addressing the phenomenon of forum shopping in defamation law cases. Targeted awareness should be raised amongst relevant stakeholders on the existence and ensuing risks of this growing phenomenon for the freedom of expression and media freedom, which may eventually be addressed through the enactment of specific anti-SLAPP measures at national or international level.

TABLES AND CHARTS

CHART 1. States applying Brussels regime instruments

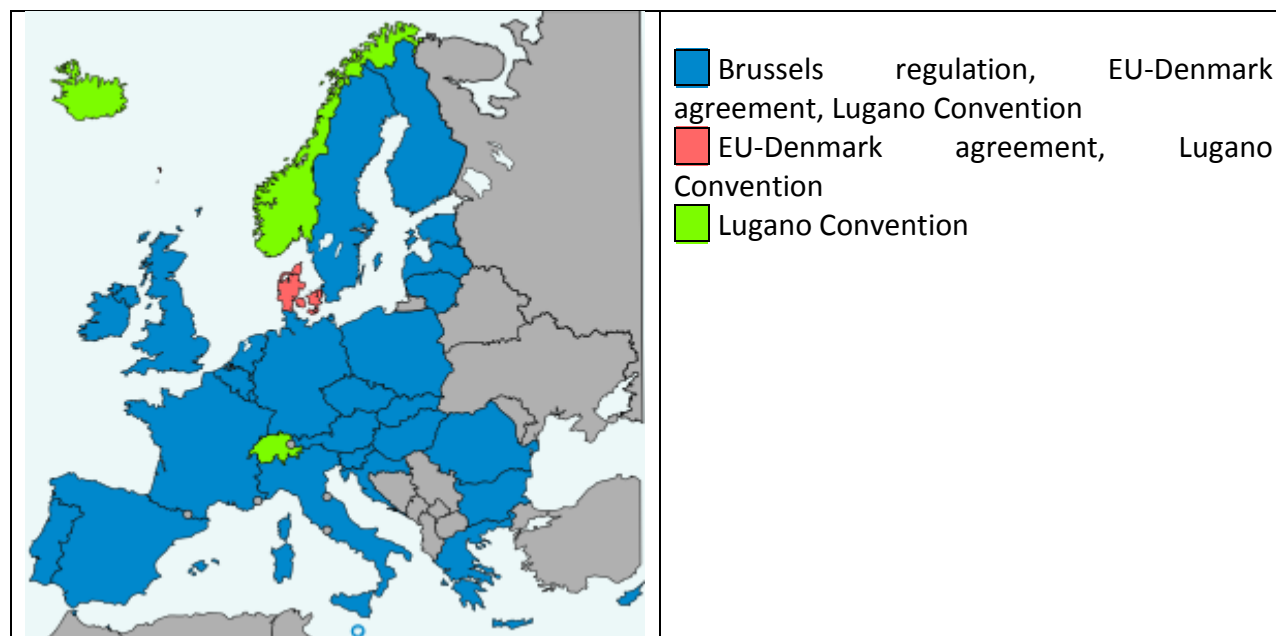


TABLE 1. The current state of EU law regarding rules on direct international jurisdiction

Under the current EU law rules on jurisdiction as construed by the ECJ, a claimant in a cross-border defamation case (either online or off-line) has the choice between bringing a claim for compensation for the entire amount of damages either before the courts and tribunals of the state where the author of the allegedly defamatory statement is domiciled, or before the courts and tribunals of the member state where the claimant has his or her centre of interests, or for a limited amount of damages before the courts and tribunals of the member states where the information is or was accessible.

In respect of other types of legal actions, such as actions to seek injunctions to remove defamatory content or to correct some inaccurate or wrong information, only courts and tribunals that have jurisdiction for the entirety of damages can render a judgment.

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