

**THE CONCEPT OF ‘DIRECTED WEBSITE’ – A
JURISDICTIONAL PHENOMENON CLARIFIED?**

**CROSS-BORDER CONSUMER AND TORT VICTIM
PROTECTION IN LIGHT OF RECENT ECJ
JURISPRUDENCE**

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Introduction

In the beginning of December 2010, the ECJ delivered the much awaited judgment in the joined cases *Pammer* and *Hotel Alpenhof*² clarifying the erstwhile enigmatic jurisdictional concept of ‘directing activities’ with regard to websites offering cross-border goods or services in relation to the consumer protection provisions of the Brussels I Regulation.³ The same concept of ‘directing activities’ is also found in the Rome I Regulation⁵ in the sphere of applicable law, which means that the judgment is also important for the purposes of interpretation of the Rome I Regulation. The fact that the judgment was delivered by the Grand Chamber shows that the issue was considered to be of particular importance. Indeed, the concept of ‘directing activities’ was fiercely disputed during the legislative process by the EU’s Institutions as well as by various Member States without ultimately reaching a clear compromise. The wording of Article 15 of the Brussels I Regulation and Article 6 of the Rome I Regulation, which both concern consumer contracts, were therefore left rather deliberately vague and did not address the Internet specifically, thus shifting political responsibility for its interpretation to the ECJ. Article 15(1)(c) of the Brussels I Regulation provides that consumers may institute proceedings in their domestic courts when ‘the contract has been concluded with a person who [...] directs such [commercial] activities to that Member State [...] and the contract falls within the scope of such activities.’ Article 6(1)(b) of the Rome I Regulation provides similarly that in the absence of choice by the parties, the contract will be governed by the law of the country where the consumer has his habitual residence, provided that the professional ‘by any

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² Joined cases C-585/08 and 144/09 *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG* and *Hotel Alpenhof GesmbH v Oliver Heller* [2010] OJ C55/4.

³ Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1 (‘Brussels I Regulation’).

⁵ Regulation 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L 177/6 (‘Rome I Regulation’).

means, directs such activities to that country [...].⁶ Meanwhile, the European Institutions realised that the legislation on the issue was too vague to be interpreted harmoniously among the Member States and for that reason the Council together with the European Commission issued a joint statement on Articles 15 and 73 of the Brussels I Regulation,⁷ wherein they specified that for Article 15(1)(c) to apply, ‘it is not sufficient for an undertaking to target its activities at the Member State of the consumer’s residence [...] a contract must also be concluded within the framework of its activities.’⁸ In the context of the Internet, the joint statement stresses that:

[the] mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.⁹

Pammer and Hotel Alpenhof

Pammer and *Heller* confronted the ECJ with the phenomenon of ‘directing activities’ and provided the Court with an opportunity to outline a non-exhaustive list of criteria allowing national courts to appraise whether the website in question is directed to a certain Member State or not. *Pammer* involved a dispute over a contract for voyage by freighter, whereas in *Hotel Alpenhof*, the claim was based on a contract for accommodation. Both references raised the same question: whether the fact that the supplier’s website can be consulted on the Internet is sufficient to justify a finding that an activity is being ‘directed’ within the meaning of Article 15(1)(c) of Brussels I Regulation. The ECJ held, in accordance with the joint statement of the Commission and Council, that the mere accessibility of a website is not sufficient to trigger the application of Article 15(1)(c) of the Regulation.¹⁰ The Court went on to say that before any contract with a consumer is concluded, there must have been evidence demonstrating that the trader was envisaging

⁶ Where the parties have made a choice of law, such choice may not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law of the country where the consumer has his habitual residence.

⁷Joint declaration of the Council and the Commission on Articles 15 and 73 of Regulation No 44/2001, DG H III 14139/00, p. 5, <http://ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf> accessed 2 March 2011.

⁸ Ibid rec 10.

⁹ Ibid para 1(4).

¹⁰ *Pammer* and *Hotel Alpenhof* (n 2) para 74.

doing business with consumers domiciled in other Member States, including the Member State of that consumer's domicile, in the sense that he was 'minded to' conclude a contract with those consumers.¹¹ However, further on the Court argued that it is not necessary to prove the fact that the trader purposefully directed his activity in a substantial way to other Member States, including the Member State of the consumer's domicile, since this would have the effect of weakening consumer protection.¹² This technically means that the direct intention of the trader is not required, but also that a purely accidental contract is not enough.¹³ At this juncture, the distinction between active and passive sales made in competition law becomes relevant.¹⁴ Theoretically, whereas active sales would lead to the application of Article 15(1)(c), passive sales would not, a position that mirrors the European Commission's view in its proposal for the Brussels I Regulation.¹⁵ However, Advocate General Trstenjak's Opinion in *Pammer* and *Hotel Alpenhof* stressed that the competition law concept of active/passive sales was of no significance to the cases at hand.¹⁶ The ECJ added that 'directing' in Article 15(1)(c) needs to be interpreted independently with reference to the system and objectives of the Regulation in order to ensure that it is fully effective.¹⁷ The test of the trader's state of mind therefore lies somewhere between the direct intention to sell in various Member States and a pure indifference towards sales to other jurisdictions, or an explicit stipulation to the contrary (disclaimer). The test appears to be subjective: the Court requires that it must be apparent from the actual websites and the trader's overall activities that the trader was envisaging doing business with

¹¹ Ibid para 76.

¹² Ibid para 82.

¹³ For example, a wholesaler who mostly operates in an upstream market and sells the absolute majority of his goods to distributors in his own Member State is approached by an individual (consumer) from a different Member State and enters into a contract with him. One must assume that distributorship agreements do not preclude dealings of this nature.

¹⁴ In the sphere of competition law, the European Commission defines 'active sales' as those sales arising when a trader actively approaches individual customers by for instance direct mail, including unsolicited e-mails, or visits, or actively approaches a specific customer group or customers in a specific territory through advertisements in the media on the Internet or other promotions specifically targeting customers in that territory. On the other hand, 'passive sales' arise when a trader responds to unsolicited requests from individual customers, general advertising or promotion. The use of the Internet to sell products is considered as a form of passive sales. Offering different language options on the website does not, of itself, change the passive character of these sales. See the European Commission Guidelines on Vertical Restraints [2010] OJ C 130/01, paras 51, 52.

¹⁵ Proposal of the Commission for a Council Regulation (EC) on civil jurisdiction and the recognition and enforcement of judicial decisions in civil and commercial matters, COM (2000) 689 final, p 6.

¹⁶ *Pammer* and *Hotel Alpenhof* (n 2), Opinion of AG Trstenjak, para 72.

¹⁷ *Pammer* and *Hotel Alpenhof* (n 2) para 55.

consumers domiciled in other Member States. It must be shown that the trader ‘was minded’ to conclude a contract with them.¹⁸

Furthermore, in order to help national courts, the ECJ provided a non-exhaustive list of what kind of evidence can establish that the trader’s activity is directed to the Member State of the consumer’s domicile. The evidence may consist of a clear expression of the intention to solicit the custom of that State’s consumers,¹⁹ the international nature of the activity at issue, the mention of telephone numbers with an international code, the use of top-level domain names (such as ‘.com’ or ‘.eu’), the description of itineraries from one or more other Member States to the place where the service is provided and the mention of an international clientele composed of customers domiciled in various Member States, for example by presenting accounts or reviews written by such customers. These factors may be taken into account individually or in combination with one another.²⁰ Also, if the website permits consumers to use a different language or a different currency, the language and/or currency can be taken into consideration and constitute evidence of the directed activity. Although *prima facie*, this runs contrary to the joint statement of the Commission and the Council, the ECJ explained that this is only in cases where the language and/or currency is different from the language and/or currency of the Member State where the trader is established (i.e. a website of a trader from Germany written in German is not necessarily directed to Austria or other German-speaking countries).²¹

Another point to consider is whether a trader uses a disclaimer to make it explicitly clear that he does not direct his activities to another Member State/s or that he directs his activities only to certain Member States. Being a hypothetical question, this was not addressed by the ECJ; however, Advocate General Trstenjak touched on this point in her Opinion. In her view, a disclaimer is theoretically possible as long as the trader in fact adheres to the statement. If the trader nevertheless concludes contracts with consumers from excluded Member States, he cannot rely on the disclaimer.²²

The concept of ‘directed website’ in tort jurisdiction

¹⁸ Ibid para 92.

¹⁹ Ibid para 80.

²⁰ Ibid para 83.

²¹ Ibid para 84.

²² *Pammer and Heller* (n 2) Opinion of AG Trstenjak, para 91-92.

While the concept of ‘directed website’ has been clarified by the abovementioned ECJ judgment, there are other pertinent problems to point out in relation to torts committed online by means of websites and, more specifically, the tort of defamation. As a special rule, Article 5(3) of the Brussels I Regulation provides that, in matters relating to tort, delict or quasi-delict, jurisdiction lies also in the courts for the place where the harmful event occurred or may occur. The ECJ, in the landmark judgment *Bier*,²³ ruled that the expression ‘place where the harmful event occurred’ covers both the place where the damage occurred and the place of the event giving rise to it.²⁴ In the 1995 *Shevill*²⁵ judgment, the ECJ dealt with a case of cross-border newspaper defamation. It based its considerations on the distinction between the place of the event giving rise to the damage and the place where the damage itself occurred, this being the very same distinction previously formulated in *Bier*. As a result of the *Shevill* judgment, Mrs. Shevill could sue the publisher, Presse Alliance, either before the courts of the Member State of the place where Presse Alliance was established, in which case the court would have had jurisdiction to award damages for all the harm caused by the defamatory publication, or before the courts of each Member State in which the newspaper was distributed and where Ms. Shevill claimed to have suffered injury to her reputation, which courts would have had jurisdiction solely in respect of the harm caused in the State of the court seised.²⁶

The *Bier* judgment created a solid foundation for resolving jurisdictional issues arising from a wide range of torts or delicts falling under Article 5(3) which was loyally followed in *Shevill*. A plethora of issues arise when attempting to apply these judgements to defamation allegedly caused by the contents of a website. Firstly, when information is posted online, it is immediately accessible all around the world. There is no territorial difference between the place where the harmful event occurred (in *Shevill* terminology: ‘the place of publication’) and the place where damage was caused to the interest being protected (namely the alleged victim’s reputation), since both happen in the same place where the webpage is downloaded and at the same time when the

²³ Case 21/76 *Handelskwekerij G. J. Bier B.V., of Nieuwerkerk Aan Den Ijssel (the Netherlands), and the Reinwater Foundation, having its registered office in Amsterdam, and Mines de Potasse d’Alsace S.A., having its registered office at Mulhouse* [1976] ECR 01735.

²⁴ *Ibid* para 24.

²⁵ C-68/93 *Fiona Shevill, Ixora Tradin Inc, Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* [1995] ECR I-00415.

²⁶ *Ibid* para 33.

information is understood by the reader.²⁷ At first sight, the *Bier* mechanism distinguishing between two different places does not seem to apply. Secondly, if it were to apply, the problem of forum shopping would emerge as a blatant threat. It is not desirable for the courts of all the Member States to constitute a viable option for a plaintiff, since the very idea of the Brussels I Regulation is to limit the number of available fora to those where a link between proceedings and territory of the concerned Member State exists.²⁸ Moreover, alternative grounds for jurisdiction must be based on a close link between the court and the action or order to facilitate the sound administration of justice.²⁹ Jurisdiction on the basis of mere accessibility of the webpage is to be ruled out since it runs contrary to the objectives of the aforementioned Regulations.³⁰ On the other hand, a complete exclusion of Article 5(3) of the Brussels I Regulation on the grounds of impracticality would render that provision ineffective and meaningless. The ECJ held in *Shevill* that this is unacceptable – the plaintiff must have a choice. The effectiveness of Article 5(3) was the main argument for the extension of jurisdiction to Member States where the defamatory newspaper was distributed, although the proportion of distributed copies in the Member State at issue was relatively tiny in contrast with the bulk of all the copies printed.³¹

In Spring 2010, the *Tribunal de grande instance de Paris* lodged a reference for a preliminary ruling in the case of *Martinez,z* where a question on jurisdiction under the Brussels I Regulation in the case of defamation on the Internet was raised for the first time.³² The *Tribunal* asked whether Articles 2 and 5(3) of the Brussels I Regulation must be interpreted to mean that a court or tribunal of a Member State has jurisdiction to hear an action brought in respect of an infringement of personal rights allegedly committed by placing information and/or photographs on an Internet site

²⁷ Graham Smith submits that ‘the English courts have so far held that publication takes place where the statement is downloaded, regardless of any question of targeting,’ in Graham Smith, ‘Here, There or Everywhere? Cross-border Liability on the Internet’ [2007] CTLR 41, 47.

²⁸ The ECJ ruled that “[the Brussels I Regulation] provides a collection of rules which are designed *inter alia* to avoid the occurrence...of concurrent litigation in two or more Member States and which, in the interest of legal certainty [...] confer jurisdiction upon the national court territorially best qualified to determine a dispute” in Case 38/81 *Effer v SpA v Hans-Joachim Kantner* [1982] ECR 00825, para 6.

²⁹ Brussels I Regulation (n 3) rec 8 and 12.

³⁰ In a German case [2003] I.L. Pr 17, the Hamburg District Court explicitly took jurisdiction on a mere availability basis. This was highly criticised, among others, by Graham Smith cited below. The ECJ rejected the mere accessibility basis as sufficient for ‘directing’ in the sphere of consumer protection in *Pammer and Heller* (n 1), para 74.

³¹ *Shevill* (n 25) para 27.

³² Reference for preliminary ruling from the *Tribunal de grande instance de Paris* C-161/10, *Olivier Martinez, Robert Martinez v MGN Ltd*, OJ 2010/C 148/33.

published in another Member State by a company domiciled in that Member State or elsewhere within the EU:

- on the sole condition that the Internet site can be accessed from the first Member State (accessibility basis);
- on the sole condition that there is a link between the harmful act and the territory of the first Member State, a link which is sufficient, substantial or significant (substantial connection basis).

In that case, the Court was asked to identify whether the link can be created by:

- the number of hits on the webpage at issue from the First Member State (in absolute numbers or in proportion);
- the residence of the persons concerned;
- the language in which the information at issue is broadcast;
- any other factor which may demonstrate the site publisher's intention to specifically address the public of the first Member State, the place where the events described occurred and/or where the photographic images placed online were taken, or other criteria.³³

It is obvious that several issues raised by the *Tribunal* are interlinked with issues discussed in *Pammer* and *Hotel Alpenhof*, mainly the criteria of accessibility, language and connections to various Member States.³⁴ It is also clear that in order to decide *Martinez* in a practical way, the ECJ must come up with some limiting factor to prevent all the dangers of forum shopping and legal uncertainty of defendants, while maintaining the effectiveness of Article 5(3) of the Brussels I Regulation. One such solution is attractively at hand, namely the concept of 'directed website' which has now been extensively clarified by the Court. The Regulation itself in Recital 13 of the Preamble highlights that weaker parties should be protected by rules of jurisdiction more favourable to their interests than the general rule contained in Article 2, that is the defendant's domicile. It is generally perceived that victims of tort fall under the category of involuntary creditors and as such are in a weaker position and could be considered to require more favourable treatment. Indeed, some scholars have suggested that 'directing' might be adopted in tort jurisdiction under the Brussels I regime. Graham Smith submits that 'an approach that is more enlightened than country of receipt and more achievable than country of origin is directing and targeting.'³⁵ He goes on to argue, as has now been confirmed in

³³ *Ibid.*

³⁴ In other words, some kind of directing.

³⁵ *Smith* (n 27) 42.

Pammer and *Hotel Alpenhof*, that ‘one characteristic of a well-constructed targeting test is that an online actor can be only found to have targeted a country if he has engaged in positive conduct towards it.’³⁶

The ‘directing test’, or ‘directed website test’, particularly after having been described in detail by the ECJ a few months ago, could therefore rein in plaintiffs’ absolute freedom to choose a forum, while also providing plaintiffs with a choice under Article 5(3) which protects them from the jurisdictional advantage of alleged wrongdoers. It is, however, this author’s strong belief that this temptation should be firmly resisted.

³⁶ *Ibid* 42.

Shortcomings of the ‘directed website test’

Although advantageous in certain ways, the adoption of the ‘directed website’ test in the area of tort jurisdiction would, in this author’s opinion, unnecessarily complicate the otherwise desirable swift and effective resolution of questions of jurisdiction by courts first seised of a dispute. Whereas in consumer claims, a quick and more-or-less objective review of a few components of the webpage is enough (currency, language, means of delivery etc.), assessing whether a webpage as a whole or in part serves as a vehicle of tort and is directed to a certain Member State would require a detailed analysis of the contents of the page in question. In a defamation case, a thorough scrutiny of the text or photographic image itself is necessary. Moreover, depending on the *lex fori*, an assessment of what qualifies as defamatory may vary greatly between different Member States.³⁷ This assessment involves substantive considerations and could therefore interfere with the discretion of the court which will be finally called upon to settle the dispute in question. Youseph Farah submits that ‘a jurisdiction enquiry should not examine the case on its merits; however there must be *prima facie* evidence of some damage which occurred in the Member State.’³⁸ The demarcation line between jurisdictional assessment and review of the substance of the case is often unclear. Interference with substantive analysis could undermine the mutual trust cultivated between the national courts of the Member States - a cornerstone that the Brussels I regime is built upon.³⁹

A detailed procedure analysing the content of the site might significantly prolong the proceedings and increase costs. While with consumers, this is required and balanced by the public need for their protection, the status of victims of torts remains unclear. The Brussels I Regulation in its Preamble does not explicitly recognize that victims of torts should be protected by a special jurisdictional regime other than that envisaged in Article 5(3). The adoption of a ‘directing test’ by analogy from the provisions on consumer contracts is therefore rather problematic and the ECJ has already decided that ‘rules on special jurisdiction must be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged by the [Brussels I Regulation].’⁴⁰ Another problem arises in connection with

³⁷ C-68/93 *Fiona Shevill, Ixora Tradin Inc, Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* [1995], ECR I-00415, Opinion of AG Darmon, paras 11 and 12. AG Darmon in fact concluded that due to substantive differences between the tort and delict laws of the Member States, the assertion of jurisdiction in favour of one forum as against another is not a neutral matter.

³⁸ Youseph Farah, ‘Jurisdictional Aspects of Electronic Torts, in the Footsteps of *Shevill v Presse Alliance SA*’ [2005] CTRLR 2005, 199.

³⁹ Brussels I Regulation (n 3) rec 16.

⁴⁰ C-189/08 *Zuid-Chemie BV v Philippo’s Mineralenfabriek NV/SA* [2009], ECR I-06917, para 22.

disclaimers, whereby a publisher of a website would purport to exclude certain Member States from its activities. While a disclaimer is in principle possible in the trader-consumer relationship⁴¹ and thus, together with the list of evidence provided by the ECJ in *Pammer* and *Hotel Alpenhof*, presents a safe harbour for traders in order to avoid cross-border litigation, provided any such disclaimer is adhered to in practice, neither disclaimers nor adherence to certain precautionary measures would save a wrongdoer from being subject to the jurisdiction of a court seised. The only safe harbour in torts is simply not committing torts at all. Defamation and arguably other torts such as trademark infringement would thus call for the adoption of a substantially different kind of 'directing test', thus rendering all the achievements of *Pammer* and *Hotel Alpenhof* redundant.

Meanwhile, the Court's reasoning in *Shevill* points towards a different but effective limiting device which could safeguard possible tort defendants from excessive forum shopping while at the same time offering plaintiffs the opportunity to choose from a variety of available fora. As aforementioned, according to *Shevill*, the plaintiff, in cases of cross-border defamation by newspapers, can sue the publisher either before the courts of the Member State of the place where the publisher is established, which has jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Member State in which the newspaper was distributed and where the plaintiff claims to have suffered injury to her reputation, which has jurisdiction solely in respect of the harm caused in the State of the court seised.⁴² The adoption of this approach in the area of Internet defamation would pose cost/benefit considerations when plaintiffs consider before which courts to institute proceedings. In practice, this means that a plaintiff can choose the courts of any Member State where he believes he can establish a good arguable case and where he can claim damages in that Member State that are sufficient to cover the costs of litigation. Peter Mankowski submits that '[this] mosaic principle provides a very effective counter-incentive against forum shopping by supposed or alleged victims and thus effectively safeguards the legitimate jurisdictional interests on the alleged wrongdoer's side.'⁴³ The 'directed website test', on the other hand, would burden both plaintiff and wrongdoer with excessive uncertainty about jurisdiction and would create extra costs if both sides engage in what is tantamount to judicial ping-pong. Between theoretical model

⁴¹ *Pammer* and *Heller* (n 2), Opinion of AG Trstenjak, para 92.

⁴² *Shevill* (n 25) para 33.

⁴³ Peter Mankowski, 'Jurisdiction and Enforcement in the Information Society' in Nielsen, R, et al. (eds.), *EU Electronic Commerce Law* (Djøf 2004) 141.

situations 1) ‘uncertain court + uncertain claim’ (directed website approach) and 2) ‘certain court + uncertain claim’ (*Shevill* approach), the ECJ should, in this author’s opinion, choose the latter for the sake of the legal certainty of parties, lower costs and speedy proceedings. The ECJ should, however, ensure that courts only have jurisdiction where the plaintiff can establish a good, arguable *prima facie* case that some harm was really suffered in the jurisdiction of the court seised.

Conclusion

As has been outlined above, it is this author’s view that if applied to cases of online defamation, the ‘directed website test’ creates legal uncertainty and delves into a substantive analysis. The so-called ‘mosaic principle’ applied in *Shevill* may be followed in scenarios similar to that which arose in *Martinez* to good effect and could also be applied, albeit cautiously, in other tort cases in the future.⁴⁴ Realistically, proceedings will be centralised in the courts of Member States where the publishers of websites are established and where plaintiffs may ask the court to award full damages. By following the reasoning adopted in *Shevill*, the ECJ would strengthen the *Bier* line of case law. In view of the above, it has been submitted that:

if one considers the philosophy behind the law of tort, one may strongly argue that the *Shevill* approach motivates website owners to safeguard from inflicting harm on other, an activity which performs a social function and underpins the *raison d’être* of the law of tort.⁴⁵

This approach would also safeguard the legal certainty and predictability which is so desired by Recital 11 of the Preamble to the Brussels I Regulation, while retaining the effectiveness of the element of choice provided by Article 5(3).

⁴⁴ See *Farah* (n 38) 199.

⁴⁵ *Ibid* 200.