Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.


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Without the feedback from these professionals, we would have been missing a key support pillar for the findings and conclusions set out in this document.
1 EXECUTIVE SUMMARY

The project


As a result, conflict-of-law rules in this field are not harmonised at Community level, and the courts in the Member States continue to apply their own private international law.

Against this background, the European Commission asked MainStrat to make a comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.

The Commission is committed, under Article 30 of the ‘Rome II’ Regulation, to submitting, no later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. The present report will feed into the Commission’s study report.

The study is based on thorough legal research, and on feedback from national and European administrations, as well as professionals from many judicial and non-judicial sectors throughout the 27 Member States – e.g. general and specialised lawyers, judges, media and press associations, members of national administrations, and other public servants.

The feedback was collected during surveys carried out from mid September 2008 to mid October 2008, among a select group of over 10,000 professionals across all 27 EU Member States. One of the main features of this consultation has been the detailed quality of the comments by the interviewees.

Additionally, 27 national reports, based on our legal and contextual research on the ground, are set out in this Study.
Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.


The results

The situation at national level

Non-contractual obligations arising out of violations of privacy and rights relating to personality need to take into account all interests, whether private (such as the right to privacy) or public / mixed (e.g., in certain cases, the right of freedom of expression and of information).

The law on such fundamental rights as the right to privacy and to freedom of expression varies widely between the Member States. The reach and interaction of these two principles is evident in the jurisprudence of the Member States’ High Courts, showing a difficult and imprecise balance between the two. Also, the civil and/or penal nature of the harmful facts points to the divergent concepts of these aspects in national law, quite apart from the fact that some Member States already have mature rules of law in this respect, while others do not.

The common principles reflected in the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms, developed within the Council of Europe, are not sufficient to overcome the problems arising from divergences in national law.

Such divergence emphasises the importance of applicable law in cross-border cases. Determining which law is applicable in this type of case is of vital importance for stakeholders, since the final solution will depend on what protection the applicable law in the country in question gives to these rights.

In order to determine the applicable law, the jurisdictional authority handling the case will apply whatever conflict-of-law rules are available in that country. With the Rome II Regulation excluding non-contractual obligations arising out of violations of privacy and rights relating to personality, we now still have 27 conflict rules in the European Union.

Divergence

The various conflict-of-law rules are hugely divergent, and most countries make no special provision for conflict rules. Most national bodies of law include, within their general rules, the loci delicti commissi criterion. However, national common law still sometimes uses the double actionability rule. Then again, we can find substantial differences in the conflict rules of countries that make provision for the application of loci delicti commissi: there is a range of exceptions to the general rule, based on the residence or common nationality of the parties, on any limitations to free will, on the usual residence of the harmed party or on the existence of closer bonds with another country’s law.

Indeed, the very interpretation of the general rule of loci delicti commissi in national courts is not uniform. Violations of privacy by the press are, in many cases, distance violations, with harm being done simultaneously in a number of countries. This makes it difficult to have a uniform interpretation of loci delicti commissi and makes the situation of anyone involved in these relationships more insecure.

Convergence
Nevertheless, one point on which national conflict-of-law rules do converge is that most of them apply the criterion of *lex loci delicti commissi*, and not the criterion of the country of the publisher for determining the applicable law.

The criterion of *locus damni* might be a good starting point for establishing a unified conflict-of-law rule across the EU. However, during the negotiations on the Rome II Regulation, the positions of the stakeholders directly affected appeared to be totally opposed. Since this subject was excluded from the final Rome II Regulation, we have here tried to explore alternative ways of overcoming the current blocked situation, and the resultant legal void.

The Survey

After analysing the situation and the various ways forward, our strategy was to run a European Survey, addressed to national and European administrations, and to professionals from many judicial and non-judicial sectors (lawyers, media and press associations, judges, and other public servants) throughout the 27 EU Member States.

In drafting the survey questionnaire, we requested input and recommendations from various stakeholders, especially Press Associations, which tend to occupy a key position.

The final survey was sent to over 10000 professionals, yielding 371 valid answers. Detailed results are presented throughout this Study.

Violations of privacy involving the mass media are NOT frequent

The results clearly demonstrate the difficulty of reaching a consensus on unified conflict-of-law rules. In theory, the right to privacy should not prevail over the right to information or freedom of expression, and vice versa.

One interesting result is that cases like this are really not frequent. Asked about the number of such cases, involving the mass media, the interviewee knew about, over the past five years, 75.9% answered ‘none’, and the vast majority of the remaining 24.1% answered ‘from 1 to 4’.

On the question of which connection point any conflict rules should use, correspondents were divided, though the vast majority of them were in favour of allowing the damaged party to choose, based on the criterion of *locus damni*. Nevertheless, press and media associations are clearly in favour of taking as the criterion the country in which the publisher is established.

Achieving unified conflict-of-law rules will require Commission intervention
Given the difficulty of reaching a consensus among the various existing interests, we presented various models for conflict rules to a subset of specialised stakeholders, with a view to measuring their feasibility and degree of acceptance as a starting point for a future unified set of rules. None of the models achieved enough support to be labelled a feasible option. The model with most consensus was the first one: a set of conflict-of-law rules based on the general criterion of *lex loci delicti commissi*. The total favourable feedback was only 51.4% of the answers received. However, if we focus on all other answers and leave out those from press and media associations, we find that almost 82% of respondents consider these conflict-of-law rules to be either acceptable, appropriate or very appropriate.

In any case, the evident difficulty in reaching agreement on unified conflict rules does not mean that the best solution is to stay with the current situation. The survey results show clearly that the vast majority of professionals consider it necessary for the European Commission to do something on this issue. 85% of respondents are in favour of unified conflict-of-law rules for the whole European Union.

**Recommendation**

The survey results show that, in the absence of a minimum level of harmonisation of Member States' substantive laws, it will be hard to reach an agreement acceptable to all stakeholders on a single set of conflict-of-law rules. However, inaction on the part of the Community legislator would be wrong, as there is a majority voice calling for normative European action on this subject.

To overcome the current legal void we need to find a feasible way of building an agreement based on a meeting point of the various interests. The solution might be to adopt a Directive incorporating, on one hand, a material regulation of the minimum essential aspects (taking as a reference the justice parameters in the Charter of Fundamental Rights of the European Union and the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms) and, on the other, a self-limited rule (rule of extension) based on the criteria of the country in which the publisher is established. Only minimal material harmonisation, ensuring an adequate standard of protection in all Member States for people suffering harm from the mass media, would justify adopting the criteria of the country in which the publisher is established, which clearly works in favour of the perpetrators of the harm. Nevertheless, some Member States would still not accept EU intervention on the national substantive rules on freedom of press/defamation, given the limited competences of the EU in this area.

This solution, though, would have the virtue of occupying the middle ground between the key stakeholders. On the one hand, the law of the country in which the publisher is established will be the only one that the mass media will need to know and take into account. On the other, it will not be manifestly harmful to the plaintiffs, as whatever law is finally applicable, the standard of protection required by the Directive will be guaranteed.

The proposed solution is not presented here as being definitive and final. Adopting a harmonising Directive that would include a self-limiting rule, based on the criteria of the country in which the publisher is established, could be a first step towards the
subsequent negotiation of unified conflict-of-law rules based on *locus damni*. The two alternatives are not mutually exclusive, but are seen as complementary measures that should coexist in a not too far distant future.
2 FRAMEWORK OF THE STUDY

2.1 CONTEXTUAL FRAMEWORK

The present study forms part of the action to be taken by the Commission under the Civil justice programme, which is in the process of being adopted by the European Parliament and the Council as part of the general Fundamental rights and justice programme (2007-2013).


As a result, conflict-of-law rules in this field are not harmonised at Community level and the courts in the Member States continue to apply their own private international law.

This situation differs from the Commission’s initial proposal, Article 6 of which set out the following specific conflict-of-law rules: ‘Violations of privacy and rights relating to personality: 1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information. 2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.’

Nevertheless, Article 30 of the Regulation contains a review clause, with Article 30(2) stipulating: ‘Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data’.

In addition, a Commission statement was published with the Regulation in the Official Journal to the effect that: ‘The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the ‘Rome II’ Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations
of privacy and rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.’

The purpose of the study was:

(1) to produce a comparative analysis of the situation in the 27 Member States as regards rules on the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; and

(2) to identify any practical difficulties arising from the national rules in force in the Member States or from the absence of harmonisation at Community level and to identify any possible solutions to these difficulties.
2.2 THE LEGAL BACKGROUND

2.2.1 Introduction

Under Article 2 of the Treaty on European Union, one of the EU’s objectives is to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of people is assured and European citizens can assert their rights, enjoying guarantees equivalent to those they enjoy in the courts of their own country.

In order to create a true European area of justice, in accordance with Articles 61 (c) and 65 of the Treaty establishing the European Community, the Community adopts measures for civil judicial cooperation as and where necessary for the proper functioning of the internal market. At its meeting in Tampere on 15 and 16 October 1999, the European Council acknowledged the mutual recognition principle as a cornerstone of the judicial cooperation that must be established in the Union. It called on the Council and the Commission to adopt a programme of measures to apply this principle by December 2000.

The joint Commission and Council programme of measures to implement the principle of mutual recognition of decisions in civil and commercial matters, adopted by the Council on 30 November 2000, states that measures relating to the harmonisation of conflict-of-law rules are complementary, and that they facilitate the application of the principle of mutual recognition of civil and commercial judgments. The fact that the courts of the Member States apply the same conflict rules to determine the law applicable to a practical situation reinforces the mutual trust in judicial decisions given in other Member States and is a vital element in attaining the longer-term objective of the free movement of judgments without intermediate review measures. The future Lisbon Treaty will reinforce this, broadening the Community scope of this sector.

This initiative relates to the Community harmonisation of private international law in civil and commercial matters that began in the late 1960s. On 27 September 1968, on the basis of the fourth indent of Article 293 (formerly Article 220) of the EC Treaty, the six founding states of the European Economic Community concluded a Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter the ‘Brussels Convention’). This was based on the idea, already described in the EC Treaty, that having a common market meant that a judgement given in one Member State could be recognised and enforced just as readily in another Member State. The Brussels Convention began by setting out rules identifying which Member State’s courts have jurisdiction to hear and determine a cross-border dispute.
The mere fact that there are rules governing the jurisdiction of the courts does not generate reasonable foreseeability as to the outcome of a case being heard on its merits. The Brussels Convention, and the 'Brussels I' Regulation that superseded it on 1 March 2001, contain a number of options that might make it possible for claimants to prefer this or that court. The risk is that parties will opt for one over another simply because the law would be more favourable to them. This phenomenon, known as ‘forum shopping’, is the result of an interaction between the international jurisdiction of State courts and the issue of applicable law. Since determining international jurisdiction takes precedence over determining applicable law, the first decision may determine the second insofar as the conflict rules applied by the potentially competent courts may be different.

This is why work began on codifying the rules on conflicts of laws in the Community in 1967. The Commission convened two meetings of experts in 1969, at which it was agreed to focus initially on questions having the greatest impact on the operation of the common market, that is, the law applicable to tangible and intangible property, contractual and non-contractual obligations, and the form of legal documents.

On 23 June 1972, the experts presented a first preliminary draft convention on the law applicable to contractual and non-contractual obligations. Following the accession of the United Kingdom, Ireland and Denmark, the group was expanded in 1973, and that slowed progress.

In the end, in March 1978, the decision was taken to confine attention to contractual obligations so that negotiations could be completed within a reasonable time and to commence negotiations later for a second convention on non-contractual obligations.

On 19 June 1980 the Convention on the law applicable to contractual obligations (the ‘Rome Convention’) was opened for signature, and it entered into force on 1 April 1991. As there was no proper legal basis in the EC Treaty at the time of its signing, the convention takes the traditional form of an international treaty. But as it was seen as the indispensable adjunct to the Brussels Convention, the complementarity being referred to expressly in the Preamble, it is treated in the same way as the instruments adopted on the basis of Article 293 (ex-220) and is an integral part of the Community acquis.

Article K.1(6) of the Union Treaty (in the Maastricht version) classified judicial cooperation in civil matters in the areas of common interest to the Member States of the European Union. In its Resolution of 14 October 1996 laying down the priorities for cooperation in the field of justice and home affairs for the period from 1 July 1996 to 30 June 1998, the Council of the European Union stated that it intended to concentrate on certain priority areas, in particular the ‘launching of discussions on

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2 The consolidated text of the Convention as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, is published in OJ C 27, 26.1.1998, p. 34.
the necessity and possibility of drawing up ... a convention on the law applicable to extra-contractual obligations’.

In February 1998 the Commission sent the Member States a questionnaire on a draft convention on the law applicable to non-contractual obligations. The Austrian Presidency held four working meetings to examine the replies and found that all the Member States supported the need for an instrument. At the same time the Commission financed a GROTUS project presented by the European Private International Law Group (GEDIP) to examine the feasibility of a European Convention on the law applicable to non-contractual obligations, which culminated in a draft text.5

The Council’s ad hoc ‘Rome II’ Working Party continued to meet throughout 1999 under the German and Finnish Presidencies, examining the draft texts presented by the Austrian Presidency and by Gedip.

The Amsterdam Treaty, which entered into force on 1 May 1999, moved cooperation in civil matters into the Community context. An Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on creating an area of freedom, security and justice was adopted on 3 December 1998. It points out that such principles as certainty in the law and equal access to justice require ‘clear designation of the applicable law’ and states in paragraph 40 that ‘The following measures should be taken within two years after the entry into force of the Treaty: … b) drawing up a legal instrument on the law applicable to non-contractual obligations (Rome II)’.

On 3 May 2002, the Commission launched consultations with interested parties on an initial preliminary draft proposal for a ‘Rome II’ Regulation prepared by the Directorate-General for Justice and Home Affairs. The Commission received some 80 written contributions from the Member States, academics, representatives of industry and consumers’ associations.7 The written consultation procedure was followed by a public hearing in Brussels on 7 January 2003, which gave rise to a draft Proposal for a Regulation on the law applicable to non-contractual obligations.8

This preliminary proposal was replaced by a second amended version in which Article 6 — which referred to violations of privacy and rights relating to the personality — was removed from the scope of the future Rome II Regulation. The final text of the Rome II Regulation, recently approved and published in the Official Journal, therefore replaces Article 6 of the initial Proposal with Article 30, which urges the Commission to present a study to the Parliament, the Council and the European Economic and Social Committee no later than 31 December 2008 on the situation with regard to the law applicable to non-contractual obligations resulting from violations of privacy and rights relating to the personality, bearing in mind

4 Project No GR/97/051.
standards on freedom of the press and freedom of expression in the mass media, and issues on conflicts of law related to Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

This latter task became the specific objective of the research project presented below.

2.2.2 International Legal Jurisdiction. Regulation 44/2001

-Material scope of special jurisdiction

For delicts or quasi-delicts, there are three paths for choosing the court of jurisdiction: by virtue of Articles 2, 23 and 24 of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter R 44/2001), the competent courts are those of the Member State in which the defendant is domiciled or to which the parties have submitted, under the terms of Articles 23 and 24 of R 44/2001. Secondly, by virtue of Article 5.3 of R 44/2001 the competent courts are those of the place where the harmful event occurred, provided the defendant was domiciled in a Member State.

Thirdly, for a civil claim for damages or restitution based on an act giving rising to criminal proceedings, the competent court is the one which was seized of those proceedings, to the extent that the court has jurisdiction under its own law to entertain civil proceedings (Article 5.4 R 44/2001).

The choice is made by the plaintiff bringing the case. There is a risk of forum shopping and consequently also of law shopping, as the plaintiff’s choice may be guided by the law that is most favourable to him.

-Autonomous concept of matters of delict or quasi-delict in Article 5.3.

Though the European Court of Justice ruling of 30 November 1976 in Mines de Potasse d'Alsace referred implicitly to the need for an autonomous interpretation of matters of delict or quasi-delict, it was not until the ECJ ruling of 27 September 1988 in Kalfelis that this need was explicitly stated. The aim of establishing an autonomous interpretation of the concept of delict or quasi-delict is to ensure the efficacy of the 1968 Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters, and to guarantee a uniform solution in this regard, given the significant differences between the different Member States’ codes.

By virtue of an ECJ ruling of 17 June 1992, in Jackob Handte v. Mécano-Chimiques, the autonomous concept of matters relating to delict or quasi-delict includes ‘all actions which seek to establish the liability of a defendant which are not related to a contract’, this being where there is a freely agreed commitment made
Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.


by one party to another. Article 5.3 is thus of a residual nature, being applicable when an obligation is not included in Article 5.1 of R 44/2001.

The distinction between liability for contractual and non-contractual matters is clearly a fine one, and differentiating between them can cause difficulties. The ECJ has stated that the residual nature of Article 5.3 of R 44/2001 does not imply that the contractual forum is applicable to actions related to a contract but with a delictual basis.

-Legal qualification of the place where the harmful event or unlawful action against privacy occurred or may occur

Specifying the ‘place of harmful event’ presents some difficulties where the place where the harmful event originates differs from the place where the damage is sustained (in the case of remote unlawful acts) and in the event of harm occurring in different areas of a number of States (multiple places of harm).

Among the cases of multiple location of harm or where the unlawful act caused harm to the same victim in different places, the ECJ ruling of 7 March 1995 can be highlighted, in Shevill, Ixora Trading Inc; Chequepoint SARL, Chequepoint International Ltd. v Press Alliance S.A, related to unlawful invasion of a person’s privacy. In this case, the place of the harmful event was where the publisher of the newspaper was established, since that was the place where the harmful event originated, and from which the defamation was made known and circulated, and this court therefore had jurisdiction to hear the action for damages for all of the harm sustained due to the unlawful act.

This forum generally coincides with that of the domicile of the defendant, so to avoid rendering Article 5.3 of R 44/2100 meaningless the ECJ also recognises the jurisdiction of the courts of each of the States in which the defamatory publication was distributed to rule on the case, solely for damages suffered within their jurisdiction, given that they would not be competent to hear a case for damages suffered abroad either at the place where the harmful event originated or where the harm occurred. To avoid fragmentation of the lawsuit, the victim may focus all his actions on the court of the defendant’s domicile (Article 2 R 44/2001) or the courts of the State where the harmful event occurred (Article 5.3 R 44/2001).

By adopting this solution, the injured party loses the choice granted by Article 5.3 of R 44/2001, and more generally between the defendant’s forum and the place where the harmful event occurred, as these will in practice be the same. To avoid this inconvenience to the injured party and to guarantee him a real option of a favor damni jurisdiction, the courts of one of the places where the harmful event was manifested could have been considered competent with regard to damages suffered in other States too, by virtue of the fact that they are all connected to a same causal event. The causal relationship between the event and the damage, which is of a geographical rather than a legal nature, would justify both the global jurisdiction of the place of the event and that of any of the places of damage. The basic problem is that relaxing Article 5.3 R 44/2001 jurisdiction by choosing between the place where the event originated and the places where the harm
occurred may be an artificial one in unlawful violations of privacy, given the sheer difficulty of establishing the places of origin and harm. In a newspaper libel case, the place of origin of the event may be the place where the publisher is established, but also the place of publication or distribution. This latter, which may be different from the publisher’s establishment, could also be the place where the harm begins to materialise.

The situation becomes even more difficult when an invasion of privacy takes place over the Internet, given the incompatibility between territoriality inherent to exercise of jurisdiction and a reality in which physical space does not exist.

The permeability of event/harm categories in invasions of privacy and the artificial nature of a location based on these categories leads us to seek solutions more appropriate to whatever it is that is being protected. The proposal that enjoys greatest academic acceptance is that of the \textit{habitual residence} of the victim, insofar as it is the place where the unlawful act took place as a whole, that is, in its different constituent elements, regardless of the difference between event and harm, or as the place of harm. The place of harm is thus where the person suffers the harm, in the legal jurisdiction where the victim’s moral imbalance has occurred. By treating it as intangible damage to a person, it can only be located where the person is located.

The \textit{forum actoris}, however, has been ruled out by the ECJ and does not always result in solutions appropriate to the reality, where the person is not known in their State of domicile or the unlawful act has not caused harm there.

\subsection*{2.2.3 Applicable law}

International standards of law applicable in this regard are marked by the \textit{break-up} or atomisation of regulatory responses with regard to non-contractual obligations. As it is so difficult to define the material scope of non-contractual obligations and as there is not just one appropriate solution, comparative law currently tends to \textit{break up} the concept and to design a framework of standards of private international law for different events which, within each legal system, give rise to and support a legal relationship other than a contractual one. Hence the proposal for Community-level harmonisation, something that offers greater legal security to cross-border events in this regard.

Unlawful acts form a homogeneous and coherent whole that give rise to a single status, a delictual status governed by a single law (the law of the place where the causal event occurred). But diversification of the role of civil liability has given rise to special statuses for different activities that cause harm to economic and social life. There has been an atomisation of delictual obligation and a breakdown in the unity of the system, with the result that personal rights (interference in rights relating to the personality or privacy) fall through the net, either through conventional means or through internally produced standards for the material jurisdiction of the general regulation.
i. **The Rome II Regulation**

Regulation 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II), recently approved and published in the Official Journal of 11 July 2007, was anticipated in the Vienna Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (paragraph 40b) and in the Programme of Mutual Recognition (paragraph 11B3). The Hague Programme also urged further active work on conflict-of-law rules with regard to non-contractual obligations.

Rome II is intended to be a natural extension of the unification of the rules of private international law relating to obligations in civil or commercial matters in the Community. The main objective is to ensure that a legal situation is tried according to the same legislation, regardless of the judge hearing the case and the Member State in question, something which will help create a true European legal area. The Regulation should harmonise the conflict-of-law rules with regard to non-contractual obligations and to complement the instruments already in force, namely Regulation 44/2001 and the 1980 Rome Convention, and take us closer to the harmonisation of all private international law in terms of obligations, both contractual and non-contractual, relating to civil or commercial matters.

The Rome II Regulation combines both flexible rules on the applicable law and the material jurisdiction of particular unlawful acts. But the issue of concern to us is expressly excluded from its scope by means of Article 1.2.g, viz.

1.2. *The following shall be excluded from the scope of this Regulation:*

   g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation

This exclusion arises from an amendment made to the draft proposal, Article 6 of which addressed Violations of privacy and rights relating to the personality. The proposal followed the approach generally taken by the law of the Member States nowadays and classified violations of privacy and rights relating to the personality, particularly in the event of defamation by the mass media, as falling within the category of non-contractual obligations, rather than matters of personal status, except as regards rights to the use of a name.

But later, prior to the presentation of amendment 57 in the amended Proposal dated 21 February 2006, the Commission decided that since it was not possible to reconcile the text of the Council with that adopted at first reading by Parliament, the most acceptable solution would be to exclude all press and related offences from the amended proposal and delete Article 6 of the original proposal. Another factor in

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the decision to exclude this matter was undoubtedly the different material and conflictual regulations in the Member States.

For this reason, Article 6 of the Rome II Regulation was substituted by Article 30.2 in the final approved text, which states that:

‘Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data’.

By excluding these obligations from the scope of the Regulation, events that take place in the scope of material application will continue to be governed by conventional or internal rules of private international law already in force in the 27 Member States’ different codes. Hence the importance of studying their similarities and, essentially, the problems caused by differences in each country’s internal regulations.

**ii. Convention 108 of the Council of Europe on the Protection of Individuals with regard to Automatic Processing of Personal Data**

Convention 108 of the Council of Europe was approved on 28 January 1981 for the protection of individuals with regard to Automatic Processing of Personal Data, the first European convention to set out guidelines for a common model of data protection. It aims to extend the protection of fundamental rights and freedoms and, specifically, the right to privacy, bearing in mind the increased cross-border circulation of computerised personal data.

Chapter 2 of the Convention covers the basic principles of data protection: fairness, accuracy, purpose, ownership, non-abusive use, the right to ‘oblivion’, publicity, individual access, safety, prohibition of automatic processing of data that reveals racial origin, political opinion, religious conviction etc, along with data on health or sexual life, unless domestic law provides appropriate safeguards.

There is also a system of sanctions that remains in the hands of the States Party. The Convention leaves completely open the issue of the type of sanctions that may be anticipated and the sector of the law they fall within in each State.

**iii. Directive 95/46/EC**

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13 OSJ 15 November 1985.
14 The status of membership of this convention can be viewed at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=108&CM=1&DF=&CL=ENG.
On the strength of the principles set out in the above Convention, Directive 95/46/EC of the Parliament and of the Council was approved on 24 October 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data.\(^{15}\)

Directive 95/46/EC was approved out of a desire to approximate Member States’ legislation in the area of personal data protection. As stated in Recital 11, the principles of the protection of the rights and freedoms of individuals, notably the right to privacy, set out in the Directive give substance to and amplify those in the Convention.

Directive 95/46/CE on the protection of individuals with regard to the processing of personal data and on the free movement of such data contains general provisions guaranteeing that interested parties will be informed of their data protection rights.

These requirements appear in the following articles:

- Article 6(1)(a), which establishes that personal data must be handled ‘fairly and lawfully’;
- Article 10, which establishes the minimum information that must be provided to people from whom data are being collected directly;
- Article 11, which lists the minimum information that must be provided when the data are obtained from third parties;
- Article 14, which says that people must be informed before their personal data are passed to third parties.

The general requirements of the Directive differentiate between two types of information:

a) essential information: the identity of the information processor and of any representative; the aim of the data processing, except when the person concerned already has this information;

b) any ‘other information’, relating to the data recipients, the obligation to respond and the existence of access and rectification rights insofar as the additional information is necessary to guarantee that the data are handled fairly.

In a Commission report entitled ‘First report on the implementation of the Data Protection Directive (95/46/EC)’,\(^{16}\) the conclusion was:

‘The implementation of Articles 10 and 11 of the Directive showed a number of divergences. To some extent this is the result of incorrect implementation, for instance when a law stipulates that additional information must always be provided to the data subject, irrespective of the necessity test the Directive foresees, but also stems from divergent interpretation and practice by supervisory authorities’.

\(^{15}\) Later supplemented by Directive 2002/58/EC on privacy in electronic communications.

In fact, the laws of Member States differ considerably with regard to the type of information that must be provided, and how and when it must be provided.

There are also differences in the type of additional information that may need to be provided to guarantee fair handling. Some Member States repeat the examples given in the Directive, while others give slightly different examples and some give no examples at all. Although some Member States are adapting substantially to the requirements of the Directive, others are straying considerably from them.

In the technical analysis of the transposition of Directive 95/46 in the Member States annexed to the First report on its transposition, the Commission offers more detailed information on national legislation:

(http://europa.eu.int/comm/internal_market/privacy/lawreport/data-directive_en.htm)

For its part, the Flash Eurobarometer 2003 survey came to the following conclusions:

- need to promote conformity throughout the EU;
- need to improve public awareness with regard to data protection rights;
- need to present information with significant and adequate content with regard to the situation in which the data collection takes place;
- need to improve the quality of data protection from the point of view of the data subjects.

The interest in making progress on harmonisation of the law applicable to invasion of privacy and the private life of individuals, and to personal data protection, has been the subject of various meetings, e.g. in Berlin in March 2004, based on the Resolution of the 25th International Conference and the 26th International Conference on Privacy and Personal Data Protection held in Wroclaw (Poland) at which, in September 2004, research was presented showing the need for more user-friendly information on privacy and fair handling.

2.2.4 An ex-ante look at the problems of which rules of law apply.

There are specific provisions on respecting privacy and freedom of expression and information, including media freedom and pluralism, in the Charter of Fundamental Rights of the European Union and in the Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms. The Community institutions and the Member States are required to respect these fundamental values. The European Court of Human Rights has already given valuable pointers on how to reconcile the two principles in the event of defamation proceedings.

International conventions have helped to align the rules governing freedom of the press in the Member States, but differences remain as regards the practical application of that freedom. Operators attach the greatest importance to the foreseeableability of the law applicable to their business.
A study of the conflict rules in the Member States shows not only the diversity of solutions adopted but also the considerable uncertainty as to the law. In the absence of codification, many Member States still lack court decisions laying down general rules.

The connecting factors in the other Member States vary widely: the publisher’s headquarters or the place where the product was published (Germany and Italy, at the victim’s option); the place where the product was distributed and brought to the knowledge of third parties (Belgium, France, Luxembourg); the place where the victim enjoys a reputation, presumed to be his habitual residence (Austria). Other Member States follow the principle of favouring the victim, by giving the victim the option (Germany, Italy), or applying the law of the place where the damage is sustained, where the *lex loci delicti* does not provide for compensation (Portugal). The UK solution is very different from the solutions applied in other Member States, for it differentiates depending on whether the publication is distributed in the UK or elsewhere: in the former case the only law applicable is the law of the place of distribution; in the latter the court applies both the law of the place of distribution and the *lex fori* (‘double actionability rule’). This rule protects the national press, as the English courts cannot give judgment against it if there is no provision for this in English law.17

Given the diversity and the uncertainties of the current situation, harmonising the conflict rule in the Community will increase certainty in the law.

The content of any uniform rule must reflect the rules of international jurisdiction in the ‘Brussels I’ Regulation. The effect of the previously mentioned *Mines de Potasse d’Alsace* and *Fiona Shevill* judgments18 is that the victim may sue for damages either in the courts of the country where the publisher of the defamatory material is established, which have full jurisdiction to compensate for all damage sustained, or in the courts of each country in which the publication was distributed and the victim claims to have suffered a loss of reputation, with jurisdiction to award damages only for damage sustained in their own country. Consequently, if the victim decides to bring the action in a court in a country where the publication is distributed, that court will apply its own law to the damage sustained in that country. But if the victim brings the action in the court for the place where the publisher has his headquarters, that court will have jurisdiction to rule on the entire claim for damages: the *lex fori* will then govern the damage sustained in that country and the court will apply the laws involved on a distributive basis if the victim claims compensation for damage sustained in other countries.

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17 Some academic writers in England doubt, however, whether invasions of privacy are also covered by this rule.
In view of the practical difficulties in the distributive application of several laws to a given situation, the Commission proposed, in its draft proposal for a Council Regulation of May 2002, that the law of the victim’s habitual residence be applied. But there was extensive criticism of this during the consultations, one of the grounds being that it is not always easy to ascertain the habitual residence of a celebrity, and another being that the combination of rules of jurisdiction and conflict rules could produce a situation in which the courts of the country in which the publisher is established would have to give judgment against the publisher under the law of the victim’s habitual residence even though the product was perfectly in line with the rules of the publisher’s country of establishment and no single copy of the product was distributed in the victim’s country of residence.

In Fiona Shevill mentioned above, the Court of Justice ruled on the place where the damage was sustained in the event of defamation by the press, opting for the ‘State in which the publication was distributed and where the victim claims to have suffered injury to his reputation’.

The place where a publication is distributed is the place where it comes to the knowledge of third parties and a person’s reputation is liable to be harmed. This solution is in conformity with the victim’s legitimate expectations without neglecting those of media firms. A publication can be regarded as distributed in a country only if is actually distributed there on a commercial basis.

But the Commission has been sensitive to concerns expressed both in the press and by certain Member States regarding situations in which a court in Member State A might be obliged to give judgment against a publisher with its own nationality A under the laws of Member State B, or even a third country, even though the publication in dispute was perfectly in conformity with the rules applicable in Member State A. It has been pointed out that applying law B might be unconstitutional in country A as violating the freedom of the press. This emphasises the sensitive nature of this issue, in which the Member States’ constitutional rules diverge quite considerably.

The difficulties surrounding this issue hardened while the Rome II Regulation was being drafted and finally resulted in the removal from the Regulation of violations of privacy and rights relating to the personality.

An analysis of the similarities and practical difficulties within the 27 Member States should enable us to put forward possible solutions and consider the viability of harmonising the rules of law. The results of this analysis, together with an analysis of the feedback from hundreds of professionals, are presented in the next sections of this Study.
3 STUDY METHODOLOGY

3.1 METHODOLOGY

To measure the national differences and the differing views from all the professionals involved, we based our Study on two areas: an empirical analysis and a legal analysis, described below.

The first one is mainly concerned with gathering documents (legal research) and opinions (mass response campaigns) on the situation, at various levels and from different sources. The legal analysis looks at the different legal situations, national contexts, and points of view of leading academics.

3.1.1 Introduction

The comparative analysis commenced with a documentary analysis, and followed that up with the gathering of statistical data taken from interviews and questionnaires involving persons employed in the legal professions and associated directly with the subject of the study.

To this end, an initial selection was made of a set of individuals and institutions with expertise and knowledge of the law applicable to non-contractual obligations arising out of a violation of privacy or rights relating to personality, as well as the Directive and its application. This ensured that there would be reliable information for a genuine analysis of the comparative situation in the 27 Member States and the practical difficulties arising from the application of national rules or from the absence of harmonisation at Community level.

The comparative analysis analysed:

- the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, both private national and international law;
- the rules related to the freedom of the press and freedom of expression in the media;
- the conflict-of-law issues related to Directive 95/46;
- the practical difficulties arising from national rules or from the absence of harmonisation;
- possible solutions to these difficulties.

3.1.2 Methodological summary

The Study was divided into two areas:

- an empirical analysis of the current situation in the 27 Member States, and
Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.


- a legal analysis, including a description of the internal rules of all 27 Member States, with results and recommendations.

**Empirical Analysis**

- **WP 1 — Documentary Analysis:** Collecting and analysing legal reference documents: on national regulations, Community law, case law and legal doctrine.

- **WP 2 — Quantitative Analysis:** Gathering statistical data from courts and judges on the number of related court cases.

- **WP 3 — Qualitative Analysis:** Concerning the practical difficulties arising from the application of the law as it stands. Addressed in the form of questionnaires to several professional groups. Done across all 27 EU Member States. Over 10 000 people invited to respond. Over 370 replies received.

**Legal Analysis**

- Legal analysis of the working documents, of the quantitative results and of the survey conclusions.

- Creation of a Synthesis Report including a description and analysis of the national situations; identification of difficulties at Community level and proposals for solutions

A further description follows, for the empirical analysis:

**I. Empirical Analysis**

In order to identify the current situation in the Member States, we collected legal reference documents and statistical data, and conducted a survey.

**WP 1: Documentary Analysis (Collecting legal reference documents):**

We gathered legal material related to privacy and the rights relating to personality: regulations of private national and international law in each Member State, regulations of Community law, case law and existing legal doctrine on the subject. The search was carried out mainly through the database of Supreme Courts in the Member States, and from other sources of information. Our network of correspondents across the EU played a key role in this WP, providing us with the guidelines and references needed to optimise the research.

**WP 2: Quantitative Analysis (Collecting statistical data):**

We collected statistical data on the issues set out in the notice. We contacted the competent authorities regarding privacy and rights relating to personality and used our contacts and network of correspondents to address those countries that
have not yet delivered some of the contact data on competent authorities. We made all other reasonable efforts to obtain as complete a set of data as possible.

**WP 3: Qualitative Analysis (Conducting surveys)**

Surveys concerning personal data protection were conducted by interviews with the professionals.

- **Issues:**
  Identifying practical difficulties arising from the application of current law regarding privacy and rights relating to personality, including the application of Directive 95/46, and the cause and nature of these difficulties.

- **Selection of persons interviewed:**
  The selection of interviewees had to be representative and balanced, and was a key aspect in the survey methodology. Consequently, the professions involved in privacy and rights relating to personality protection were covered adequately and proportionally. They were:
  - Civil servants
  - Lawyers
  - Specialised lawyers
  - Judges
  - Data protection authorities
  - Media and press associations

We designed ways to ensure that the opinions of media and press associations would have a proportional impact on the survey response. Had we not done so, the total answers from Media and press associations might have adversely affected the average opinions (e.g. getting 200 answers from Media and press associations and only 100 from all other respondents combined). Thus, we made a random selection of Media and press associations across the EU. We gave a number to each association, and a random software facility made the selection of which ones to invite.

**3.1.3 The timing**

A formal kick-off meeting was held at JLS premises in Brussels on 22 April. We started our legal research in mid April, and the national reports in mid May. By the end of May, the final methodology for the project was issued.

By the beginning of July we already had a global view of the situation, and had completed the draft questionnaires to measure qualitative and quantitative aspects. In addition to the revision by the Project Officer, we also sent the first version of the main questionnaire to the European Data Protection Authority, and to sixteen Press and Media Associations and entities, for review, feedback and amendment.
We closed the comment period at the end of July, having received comments from the European Data Protection Authority, and from four Press associations (The European Publishers Council, the European Newspaper Publishers’ Association ENPA, the Society of Editors, and The European Federation of Magazine Publishers). We analysed all the feedback and comments, incorporating some of them in our final questionnaires. Most of the Press Associations’ feedback referred to the elimination of one specific question, and changes to another. Both suggestions were incorporated into the final questionnaire.

We created three questionnaires for our survey:

- Qualitative Survey: [http://www.opinion.eu.com/Privacy](http://www.opinion.eu.com/Privacy) (the general qualitative survey for most users)
- Qualitative Extended Questionnaire: [http://www.opinion.eu.com/Privacy_VIP](http://www.opinion.eu.com/Privacy_VIP) (same as the Qualitative one, but including a special long question and sent only to selected expert users)

Then we translated all questionnaires into six languages (English, German, French, Spanish, Greek and Italian), and programmed the on-line versions accordingly, which were available online at our Survey platform [www.opinion.eu.com](http://www.opinion.eu.com) by the beginning of September.

On 15 September we launched the on-line Surveys, in the form of invitation e-mails (over 10,000) with a link to our website.

On 25 September we started a telephone Survey campaign to boost the number of completed questionnaires.

Our intention was to submit the Quantitative Survey to European judges only, but in response to our Project Officer’s indication, we also submitted it, in a second phase, to all other professionals, to cover cases which have been settled entirely out of court.

Although the initial deadline for the receipt of answers was 22 September, we received many requests from Media and Press Associations for a deadline extension. So, just for them, we extended the deadline to 10 October. This had an impact on our internal schedule for the delivery of the Final Report, but we accepted it so as to be able to ‘hear all the voices’. Also, some Media and Press Associations requested the questionnaires as a document, instead of answering them online, so we made special PDF versions of the questionnaires, in several languages, to facilitate the answering process.
3.1.4 The Results

The Study was designed principally around gathering the opinions of professionals involved in this subject area: questionnaires filled in by professionals, and one-to-one telephone interviews.

An invitation to participate was sent to over 10 000 professionals in the central authorities of Member States, lawyers, judges, media and press associations, and members of other relevant professions. The Survey was carried out from mid September to mid October 2008. Our target was to achieve 250 completed answers. In fact, 371 completed answers were obtained. The raw, uncommented answers are in Annex II of this Report, and commented and analysed answers at Section 4 below. The detail on their distribution is:

3.1.4.1 Distribution of answers

Quantitative Survey

203 valid answers (208 in total, minus 5 invalid). Total invitations sent: 4 958

Profile of respondents

![Chart showing the distribution of answers by profession]

- Attorney: 55.2%
- Judge: 33.5%
- Member of national administration: 1.0%
- Other professions: 9.3%
- No answer: 1.0%
Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.


Country of origin

- Germany: 27.1%
- United Kingdom: 7.9%
- Spain: 7.4%
- France: 5.9%
- Ireland: 5.9%
- Sweden: 5.4%
- Italy: 3.9%
- Finland: 3.4%
- Austria: 3.4%
- Belgium: 3.4%
- Slovenia: 2.5%
- Hungary: 2.5%
- Portugal: 2.5%
- The Netherlands: 2.0%
- Czech Republic: 2.0%
- Estonia: 2.0%
- Lithuania: 1.5%
- Cyprus: 1.5%
- Poland: 1.0%
- Greece: 1.0%
- Romania: 1.0%
- Slovakia: 0.5%
- Malta: 0.5%
Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.

Qualitative Survey

168 valid answers (131 in total, minus 4 invalid). 127 valid answers for the normal qualitative survey, and 41 for the Extended Qualitative Survey (14 of them from Media and Press Associations). Total invitations sent: 8 288

Country of origin

- Germany: 25.6%
- Spain: 17.3%
- France: 6.5%
- Austria: 5.4%
- Belgium: 4.8%
- Italy: 3.6%
- Slovenia: 3.6%
- United Kingdom: 3.0%
- Estonia: 3.0%
- Greece: 3.0%
- Ireland: 3.0%
- Sweden: 3.0%
- The Netherlands: 2.4%
- Lithuania: 2.4%
- Luxembourg: 2.4%
- Slovakia: 1.8%
- Czech Republic: 1.2%
- Poland: 0.6%
- Finland: 0.6%
- Bulgaria: 0.6%
- Hungary: 0.6%
- Latvia: 0.6%
- Malta: 0.6%
Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.


Profile of respondents

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attorney</td>
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<tr>
<td>Judge</td>
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<tr>
<td>Press &amp; Media Associations</td>
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<td>Data protection agency</td>
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<tr>
<td>Member of national administration</td>
<td>1.8%</td>
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<tr>
<td>Other professions</td>
<td>25.6%</td>
</tr>
<tr>
<td>No answer</td>
<td>3.6%</td>
</tr>
</tbody>
</table>

3.1.4.2 Information-gathering procedure

The following procedure was followed:

1. Creation of Questionnaires in six languages (English, German, French, Spanish, Italian, and Greek). The final, on-line questionnaires are available at [http://www.opinion.eu.com/Privacy](http://www.opinion.eu.com/Privacy) (the general – qualitative – survey for most users); [http://www.opinion.eu.com/Privacy-Judges](http://www.opinion.eu.com/Privacy-Judges) (the quantitative short survey, addressed mainly to judges); and [http://www.opinion.eu.com/Privacy_VIP](http://www.opinion.eu.com/Privacy_VIP), the extended version of the qualitative questionnaire, addressed to selected experts. Also, samples of the English versions are provided as Annex III to this document.

2. Invitations sent to the entire sample for on-line completion at our website.

3. Telephone survey campaign. A parallel telephone campaign was conducted, to get more answers and feedback. Over 300 telephone calls were made, and over 100 surveys completed by phone.

4. Monitoring the submission of on-line answers. This was done mainly via e-mail, with reminders, and by accessing our internal answers encrypted database: daily evolution, by country and by profile.

5. Receipt and consolidation of data. No corrective factor was applied for country or profession. All answers fed into the final result and had equal influence or weight on the final result.

3.1.5 Interactions with Media and Press Associations

In such a high-profile study, it was extremely important to make sure that all opinions and points of view were taken into account, and to give special
consideration to the position of Press & Media Associations, since they represent one of the main stakeholders.

We therefore sent the first (non-public) version of the main survey questionnaire to sixteen Press and Media Associations and entities, in order for them to review it, pre-launch, and provide feedback and suggested amendments. We also sent it to the European Data Protection Authority for review.

We closed the receipt of all comments at the end of July, having received comments from the European Data Protection Authority, and from four press associations (The European Publishers Council, the European Newspaper Publishers’ Association ENPA, the Society of Editors, and The European Federation of Magazine Publishers). We analysed all the feedback and comments, incorporating some of them into the final questionnaires. We also received more feedback after the deadline, and still took it into account and incorporates whatever we considered relevant. Most of the Press Associations’ feedback,19 referred to the elimination of one specific question, and the modification of another. Both suggestions were incorporated into the final questionnaire; additionally, some concepts were softened, and new aspects were incorporated into the questionnaire texts.

Changes made to the initial questionnaires

Most of the feedback came from the European Publishers Council, the European Newspaper Publishers’ Association (ENPA), the Society of Editors, The European Federation of Magazine Publishers, and Lagardère.

All of them concurred on the need to remove the initial question No 9 from the qualitative survey, referring to the possible creation of a European Press Ethical Code. Their objection was that the possibility outlined in this question went beyond the competences of the European Commission and of the objectives of our Study. We disagree with this view, our understanding being that an independent company like ours should explore all possible ways of enhancing the quality of our study. Nonetheless, we decided to remove the question from the questionnaire. We initially included it to see what scope there was for harmonising certain general principles on press and communication EU-wide that might have a positive impact on the situation. Going into detail:

- The European Federation of Magazine Publishers (FAEP) were against European harmonisation on the subject covered by our study. Their position was that the European Press were opposed to EC intervention on this subject, and thought that the EC had no legal powers to intervene. They concluded that our

19 We would like to thank the following Press and Media Associations for their participation: The European Publishers Council, the European Newspaper Publishers’ Association (ENPA) and the Society of Editors, Union Española de Prensa, European Federation of Journalists, The European Federation of Magazine Publishers (FAEP), MTV, Verband Deutscher Zeitschriftenverleger (VDZ), and the European Broadcasting Union. We would also like to thank the European Data Protection Authority for its input.
comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.


The qualitative questionnaire went too far and could lead to unacceptable outcomes for the freedom of press, and was an attack on the principle of proportionality.

- **The European Federation of Magazine Publishers** suggested removing questions 9 and 11 from the qualitative questionnaire. Question 9 was removed, but not 11 (question on the Internet), since even accepting that the issue of getting news through the Internet is already covered in a Directive, we thought this was a particularly sensitive field in terms of violation of privacy, and there had to be some reconciliation between the Directive and any future conflict rules on this matter.

- **The European Federation of Magazine Publishers** and Lagardère wanted question 2 removed from the qualitative questionnaire, on the grounds that it would lead to partial and confusing answers. We did not agree with that suggestion, as we felt that this question encapsulated the dilemma addressed by our study.

- **The Society of Editors**, the **European Publishers Council**, and the **European Newspaper Publishers’ Association** all considered that our qualitative questionnaire should be drafted in a more ‘neutral’ tone. ENPA requested the addition of ‘alleged’ after ‘in case of’ at questions 1, 2 and 3. The **European Publishers Council**, the **European Federation of Magazine Publishers** and Lagardère all asked for ‘victim’ to read ‘plaintiff’. Both requests were taken into account and reflected in the final questionnaires.

The **European Data Protection Authority (EDPA)** also sent us some feedback, and we took special note of their comments. Indeed, one of the Study objectives was to observe the similarities and possible connections with Directive 95/46/CE. As we were working on the Study, analysing its nature and the state of transposition of the Directive in the various Member States, the idea took shape of following a similar path, i.e. bringing together national laws concerned with violations of privacy and rights relating to personality. Therefore, and taking into account the EDPA’s suggestions, we eliminated question 10 and added a new one (which became No 12 in the final questionnaire) which seemed to reflect this more closely.

**Collecting the replies to the final questionnaires**

We analysed in depth the replies received from Media & Press Associations. To give the Media & Press Associations maximum opportunity to express their opinions, we extended the receipt deadline specially for this group, from 22 September to 10 October. This impacted on our internal schedule for the delivery of the Final Report, but we accepted it for the sake of being able to ‘hear all the voices’. Also, some Media and Press Associations asked for the questionnaires as a document, instead of answering them online, so we made special PDF versions of the questionnaires, in several languages.

**The position of Media & Press Associations**
In some cases, Media & Press Associations also sent in reports and documents on their position during the Rome II negotiations. We have taken into account the reports submitted by FAEP, ENPA, European Publishers Council, Verband Privater Rundfunk und Telekommunikation (VPRT), British Media, and the European Federation of Journalists.

Most of these documents express the view that the subject matter of this Study goes beyond the EU's powers, that the case has not been made for the need for the European Institutions to take measures, and that there is no obvious section of the EU Treaty which could be taken as the authority. They further state that basing any harmonisation of the conflict rules on Article 65 does not draw sufficient connection between the EU's powers and the subject matter of this Study.

Despite this, they propose certain common European criteria, since all of them agree that any regulation of the applicable law concerning non-contractual obligations should not adversely affect the exercise of fundamental rights and, in particular, rights related to freedom of expression and the independence of journalists and the press, which is obviously their concern. They are therefore opposed to establishing the victim's place of residence as the point of connection for determining the applicable law in violations of personality rights, and support the law of the publisher's place of residence.

Generally, they also consider that each Member State has its own traditional concept of freedom of the press, often developed within specific press law, and that this right continue to be developed at a national level, in conformity with each country's specific morality, and historical, legal, religious, political, and traditional values. In short, journalists prefer to follow their national law, and do not want to be forced to be aware of the press law of any other Member State.

This was confirmed from our study of national law. We were indeed able to confirm that there is a different degree of development and protection on this subject by different national laws. That is precisely one of the reasons that led us to foresee and conclude that it would be very difficult to reach a consensus on which specific conflict rules would be the most appropriate.

We have listened to, analysed, and tried to meet the requirements of all stakeholders. However the European Media and Press Associations are not the only such stakeholders. The various proposals we have made in the course of this Study reflect the need to take into account all views and opinions.
3.2 **THE TEAM FOR THE STUDY**

For this project, **MainStrat** created a Legal Team, enlisting the expertise of legal specialists from the **University of the Basque Country**, and the international law firm **CUATRECASAS**.

In particular, the Legal Team was able to call on **Professor Juan José Alvarez**, supported by Ms Nerea Magallón and Iñigo Iruretagoiena, from the Enterprise Law Department of the University of the Basque Country. From CUATRECASAS, the Team had Nicolás Morcillo and Raquel Salinas, from the Spain (San Sebastian) office, plus on-off collaboration from other European branches.

This Study relied on their valuable expertise, comprising profound legal knowledge, access to information and professionals throughout the EU, and most importantly, their support during the analysis of the feedback, and the formulation of legal conclusions and recommendations.

Project management and international survey services were provided by MainStrat members.
4 STUDY FINDINGS

4.1 ‘CURRENT INTERESTS’: PERSONALITY RIGHTS VERSUS FREEDOM OF EXPRESSION

Respect for privacy, on the one hand, and freedom of expression and information, including freedom of the media and its pluralism, on the other, are subject to special provisions and regulations in a multitude of international pacts, conventions and agreements.

Freedom of expression appears, for the first time, in 18th-century Constitutions in the United States and France. And it now features in Article 19 of the Declaration of Human Rights adopted by the General Assembly of the UNO. The Council of Europe, in the European Convention on the safeguarding of the Rights of individuals and fundamental freedoms, makes provision, in Article 10.1, for freedom of expression and, as a part of it, freedom of opinion and freedom to receive or to communicate information or ideas without interference by the public authorities.

Alongside the right of freedom of expression there is the right to privacy. In fact, the majority of incidents of a cross-border nature that generate disputes relating to the protection of the private life of individuals occur in or use the vehicle of the mass media, and so the two rights frequently end up in conflict with one another. This makes it difficult to decide which must have precedence. Respect for private life is also included in Article 2 of the Declaration on the Rights of the individual and of the citizen.

Both the right of and respect for private life and the right of freedom of expression are included in the Convention on the rights of the individual in Articles 8 and 9. At the European level we have the Charter of Fundamental Rights of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe. These are fundamental rights which the Community institutions and the Member States must not only respect but are required to promote in whatever action they take.
Sometimes it is not easy to draw a line between the freedom of the press and crimes of personality, such as offences against private life, intimacy or defamation. The difficulty lies in promoting protection and achieving a balance of interests in such a way that safeguarding the one does not undermine the other. The European Court of Human Rights has had occasion to lay down important guidelines with respect to the reconciliation of these two principles in the case of a formal complaint for defamation.20

The right to a private life includes many other rights that either accompany it within the constitutional framework or complement it with various legal instruments intended to protect it. A comparative analysis of the legal systems of the Member States brings out the considerable variety of aspects connected with the right to a private life. The concept of private life is strongly linked with the cultural and social order of each State, and each set of legal provisions establishes its own concept in this respect. In principle, we can say that the right to a private life is subject to the right to intimacy. And the right to intimacy may be considered to be the most essential part of personality rights. But intimacy is frequently mixed with the right to honour, to protect one’s personal reputation and the inviolability of the home.

The national differences in respect of crimes against the personality are reflected in the fact that while many legal systems consider them specifically in their Constitutions, some do so very generically, and others deal with them only in rules of a lower ranking. The Constitutions that include the right to a private life as a constitutional guarantee provide it with a stable legal basis which facilitates the interpretative task of the Courts and their consequent protection. By not including it explicitly in their Constitutions, others make it necessary to seek other ways of ensuring its efficacy.

The Spanish Constitution mentions expressly in its Article 18.1 the right to personal and family intimacy; this is combined with the right to honour and the right to the protection of personal reputation. In addition, sections 2, 3 and 4 of Article 18.1 develop the aforesaid right and include the inviolability of the home, the privacy of postal, telegraphic and telephone communications, and restrictions on the use of

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information technology. The Spanish Constitution on the notion of private life includes the right to intimacy and as a connected notion the right to family life, but other Constitutions treat these separately. For its part, the right to freedom of expression appears in Article 20 of the Spanish Constitution.

Similarly, in Belgium the right to a private life is a right that is recognised for each individual. The relevance that the Belgians attach to this right can be seen from its introduction as a fundamental right in Article 22 of the Belgian Constitution of 1994. The same applies in the case of Article 9 of the Greek Constitution which, in its first section, refers to private life and family life as an inviolable individual right. The Portuguese Constitution likewise considers [offences against] personality rights as fundamental offences. For the Greeks the right to life, the integrity of the individual, personal identity and the development of personality, the right to defend one’s reputation, and the right to privacy are treated as rights protected expressly by the Constitution. The Constitution of Latvia includes in Article 96 the protection of private life, the home and correspondence.

In Denmark the Constitution establishes the right to intimacy in its Article 72 and, in Article 77, freedom of expression. The same applies to the Dutch Constitution of 1983, which directly acknowledges the right to intimacy in its Article 10, and the Constitution of Estonia which, in its Article 26, refers to the inviolability of the right to private, personal and family life. Article 15 of the Constitution of Estonia includes the right to moral and material compensation caused by an illicit act.

In the German Constitution of 23 May 1949, there is no precept directly acknowledging the right to personal and/or family intimacy. However, provision is made for the protection of human dignity and the guarantee of the free development of the personality; the inviolability of the person is also acknowledged. Notwithstanding this, paragraph 10.1 alludes to the privacy of letters and the privacy of communications, and paragraph 13 establishes the inviolability of the home. With regard to the protection of data privacy, it is important to bear in mind the judgment of the German Federal Court of 15 December 1983, incorporating the grounds and basic elements of the right to the protection of data of a personal nature.
German jurisprudence has developed the notion of personality rights. A basic decision on the matter was the ‘reader’s letter’ Supreme Court judgment of 1954, which ruled that the Constitution, by means of the express acknowledgement of the right to consider human dignity at Article 1.1, and the right to the free development of personality, guarantees personality rights as fundamental rights. Since then personality rights have been recognised as fundamental rights, and the Supreme Court has repeatedly confirmed their existence (e.g. in the Soraya case).

But the content and scope of personality rights have not been finally determined. It is considered as a unitary and indivisible right, from which any individual may derive the protection of the personality in the event of a given act. Personality rights include the right to the free development of the personality, the right to protection against indiscretions and the right to the protection of one’s own reputation.

Alongside universal personality rights there are also the right of freedom of opinion and of the press, constitutionally guaranteed in Article 5 of the German Constitution, which states that each person has the right to externalise and freely disclose his opinion in verbal form, in writing and in images and to communicate through general sources that are freely accessible. The freedom of the press and the freedom of information via the radio and the cinema are guaranteed, and censure is not permitted. These rights find their limits in the general laws and in jurisprudence, which constantly explores and interprets their meaning. From all of this it can be seen that in order to know whether a press publication adversely affects the personality rights of an individual, we have to have recourse to the jurisprudence, which must seek an interpretation reconciling the various interests.

The situation is similar with the Italian Constitution of 27 December 1947, in that no express mention is made of intimacy as a right, though it does include manifestations of the same, acknowledging correlatively the inviolability of the home (Article 14) and the privacy of communications (Article 15).

Article 30 of the Constitution of the Polish Republic of 2 April 1997 refers to dignity as something that is inherent in and inalienable from any person, and which constitutes a source of rights and freedoms of the citizens. The Supreme Court
Judgment of 2007 (II CSK 269/07) establishes that the inherent and inalienable dignity of the person is inviolable, and the individual’s respect and protection is an obligation of the public authorities. This obligation must be satisfied by the public authorities above all in any cases in which the State acts as *imperium*, by means of repressive actions that may not lead to greater restrictions of human rights and dignity than those resulting from protection itself. Furthermore, Article 41.1 of the Polish Constitution establishes that inviolability and personal security must be ensured for each individual. Any privation or limitation of freedom can be imposed only in accordance with the principles and under the procedures specified by the statute. Article 42.2 ensures the freedom and privacy of communications. And under Article 51 nobody is obliged to provide information on any individual.

In Article 6 of the *Magna Carta of Sweden* the inviolability of the home and the privacy of communications are the subject of an express proclamation; however, this is not the case with the right to intimacy. The same applies in the Hungarian Constitution, which acknowledges, in Section 54, that everyone has the right to life and to human dignity, and refers, in Section 59, to personal reputation and privacy of the home and personal data. Section 61 of the Hungarian Constitution also acknowledges freedom of expression and freedom to distribute public information.

Neither does the French Constitution expressly address the right to intimacy and private life. In France the only national text that refers to the right to private life is Article 9 of the French Civil Code introduced by the Law of 17 July 1970: ‘Everyone has the right to a private life’. This article is oriented more towards respect for private life than the ‘intimacy of private life’. In order to differentiate the two terms in France, it must be emphasised that the right to intimacy refers not to private life but to the control of information of a personal nature; in French the right to intimacy must be understood as the ‘secrecy of private life’. In this context the Constitutional Council has included in its jurisprudence a notion of privacy which is directly related to the notion of intimacy.

As we have observed, the level of constitutional protection varies, and although there are countries where personality rights are protected explicitly through their Constitutions, either in part or in all aspects, there are others where personality rights are not even considered. However, despite the variety arising from the
various constitutional provisions on the protection of private life, the fact is that the Member States’ legal systems are tending to align their constitutional interpretation techniques and are increasingly adopting similar approaches as they enact jurisprudence.

The phenomenon of Europeanisation is progressively establishing specifically European constitutional and common values throughout the Member States. The creation of a trans-national constitutionalism is reflected in the jurisprudence of the European Court, which takes a uniform view when interpreting fundamental rights, among which we would put the stress on personality rights.
4.2 COMPARED VISION OF THE PERSONALITY RIGHTS OF THE MEMBER STATES OF THE EU (SUBSTANTIVE FORMATIVE REGULATION IN THE LEGAL SYSTEMS OF THE MEMBER STATES)

One of the problems with the diversity and heterogeneity of substantive provisions in terms of offences against personality rights affecting the intimacy or dignity of individuals is how to qualify (or categorise) such offences. The first complex question is whether they are of a criminal or civil nature. And the debate hinges on whether it is necessary to ensure the legitimacy and protection of personality rights, to consider this class of offences as crimes.

In International Privacy Law the need for an independent interpretation of the concept of delinquent and quasi-delinquent is of fundamental importance. The question is not a new one, and was raised in relation to the Brussels Convention of 1968 on judicial competence and acknowledgement and execution of judicial and non-judicial decisions in civil and mercantile cases, in the judgments of 30 November 1976, Mines de Potasse d’Alsace and in the STJCE [Judgment of the Supreme Court of Justice of the European Union] of 27 September 1988 in the Kalfelis case.

The differences between the national legal systems are clear. In the majority of them offences against personality rights are qualified as crimes, and in their system of International Privacy Law they fall within the criminal statute. It is included within the criminal statute, for example, by Italian Law and by the Portuguese Civil Code:

Art. 24.1 LDIP 'l'esistenza ed il contenuto dei diritti della personalità sono regolati dalla legge naturale del soggetto...'

Art. 27.1 Civil Code 'Aos directos de personalidade no que respeita à sua existência e tutela e as restricoes impostas ao seu exercicio é tambem aplicável a lei pessoal'.

Certainly any offences against the right to a private life are still retained in many Criminal Codes of national European legal systems. In the French Criminal Code, for example, offences against the private life of a third party without his consent are
punished with one year’s imprisonment and a fine of €45,000. However, what often happens is that subsequently the concept of privacy is determined not by law, but by jurisprudence, and this tends to leave out of this category offences against private life committed by the media.

In the German Criminal Code (Strafgesetzbuch) chapter 15 is dedicated to personal privacy and confidentiality and, within this, paragraph 202a carries the title «Data Espionage». Within the framework of illegitimacy, German jurisprudence normally refers to Article 193 of the Criminal Code, which removes criminal liability from the press when the press has acted in the exercise of legitimate interests.

The crime of defamation is regularly to be found among the offences linked with personality rights in the European Criminal Codes. For instance, in the Greek Criminal Code the insult and the offence are included in Article 361.1 and are liable to a maximum prison sentence of one year and/or a fine of €150 to €15,000; and defamation, by virtue of article 362, to a maximum of two years imprisonment. And in the German Criminal Code insults and defamation are considered in Section 185ff, while freedom of expression and opinion are protected by Section 193. In the Dutch Criminal Code the Second Book of Title XVI is dedicated to crimes of defamation.

The Criminal Codes of the Czech Republic, Denmark, Finland, Ireland, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Estonia, Spain and Malta also include defamation in their clauses.

In recent years, however, several Member States have taken steps to reform crimes of defamation with the idea of decriminalising them or making the criminal penalties less severe.

This is the case, for example, in Bulgaria where, despite the Bulgarian Criminal Code including the crime of defamation in Articles 146 to 148, the amendment of 1998 changed the penalty for these crimes from imprisonment to criminal fines determined by the Court and which, in accordance with Article 78 of the Criminal Code, frequently become administrative fines. On 22 July 1999 the Parliament amended the Criminal Code to eliminate imprisonment as a penalty for insult and defamation. Six months later, the Parliament decided to substitute prison sentences
Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.


by fines of 5 000 to 30 000. However, President Petar Stoyanov vetoed the levels of these fines, on the grounds that they were too high considering the salaries of the journalists. Consequently, insult and defamation are still crimes, but they are no longer punishable by prison sentences.

In Cyprus defamation was decriminalised in 2003, except with reference to foreign heads of state and foreign officials, as well as the National Guard. In Estonia too defamation was decriminalised in 2002, except when the offence takes place against state authorities and persons enjoying international immunity and the official insignia of the Republic of Estonia, in which case it is punishable by a maximum prison sentence of two years. In Portugal this type of crime is likewise in the process of being decriminalised, and in the Czech Republic from 2003 the penalties for defamation were reduced appreciably.

In practice, the majority of the Member States do not apply criminal penalties for defamation. In some countries to the situation with defamation is that recourse to criminal law may only apply if other appropriate remedies do not exist. However, some Member States continue to use criminal law regularly in the area of defamation, in particular against journalists. The European Court of Human Rights, in the Judgment Castells v Spain (1992), insists on the importance of not adversely affecting freedom of expression and that the media should not be discouraged from expressing their opinions for fear of any criminal sanctions that may result from their actions.

In the United Kingdom defamation is a crime, but it may only be used when it is justified in the public interest. A civil lawsuit for defamation is very common. The law stipulates that the truth and the public interest may be relied on in defence against accusations of defamation.

There are other aspects connected with personality rights that are protected through the Civil Codes. It is becoming more common to use this sphere in offences against personality rights by the media. In some countries, particularly those that have decriminalised defamation, journalists are faced with civil proceedings and, in certain cases, there are very high levels of compensation for damages and losses.
The European Court of Human Rights, in the judgment Tolstoy Miloslavsky -v- the United Kingdom, accepts that national laws on the calculation of damages and losses for damage to a person's reputation in the civil sphere cover a considerable variety of situations. It therefore calls for a certain degree of flexibility in allowing judges to evaluate damages and losses based on gearing the specific facts to the particular case.

The Greek Civil Code makes provision, in Article 57, for the right of a person to demand that any infringement against his/her personality must cease, without excluding the right to appropriate compensation. And Article 59 makes provision for the possible moral redress of the victim.

The Dutch Civil Code includes defamation in Article 162, and the Civil Code of the Republic of Latvia (Civillikums) makes provision for liability for offences against morality in its Article 1635 and against the reputation and dignity of an individual in its Article 2352.

In Slovakia defamation, in addition to being a crime in the Criminal Code (Law No 140/1961), is also regulated in the Civil Code (Law No 40)(1964). A person whose personal rights have been unjustifiably violated according to Article 13 of the Civil Code may request that the said violation cease and that the consequences thereof be eliminated, in order to obtain appropriate satisfaction. In cases where such satisfaction is insufficient, because in the case in question the dignity and social standing of the person has been considerably diminished, he/she will be able to demand compensation for non-pecuniary damages.

In the German Civil Code the protection of personality rights is in Article 823, which concerns illicit activities. Illicit conduct or activities in the meaning of Article 823 includes illicit intervention in or interference with the protected rights of a third party. The fundamental personality right derives from the 'reader's letter' judgment as 'another right' according to the established meaning of the rule. A claim by virtue of Article 823 actually means that interference with personality rights is illicit. The illicitness does not occur when the externalisation or manifestation has taken place under Article 5.1 of the Constitution. Therefore, here too it is necessary to weigh up the attendant interests.
Under Article 823 of the German Civil Code in offences against personality rights committed by the media, the most frequent claim is of omission. The effect is to avoid any repetition of information that adversely affects personality rights. Under strict conditions, prohibition is considered to be effected by the prevention of publication. Only false declarations of facts are liable to be prohibited. These are, according to consistent jurisprudence, all the circumstances, events, tasks, situations or conditions that may be accredited by means of evidence.

In Poland Article 23 of the Civil Code of 23 April 1964 establishes that the personal interests of an individual, in particular health, freedom, honour, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of residence, creative, scientific or artistic activity of the inventor, are protected by civil law notwithstanding the protection provided by other regulations. The Supreme Court judgment of 11 May 2007 (I CSK 47/07) establishes that the degree of protection concerning the private life of a public person may be discussed, if the allegations are connected with his/her public function. For its part the Appeal Court Judgment in Katowice of 4 April 2007, (I ACa 139/07) establishes that if a given person violates the personal interests of other individuals, such as the right to intimacy, own image, undisturbed use of freedom and private property, he may not subsequently demand the protection of his own personal interests if at the same time he is the perpetrator of the said violation permitting (or coercing) other persons to engage in such behaviour.

Article 24 of the Polish Civil Code establishes that any person whose personal interests are threatened by another may take appropriate steps to demand the termination of the action, unless that action is not illegal. In the event of a violation, he may also demand that the violator take the necessary steps to prevent its effects, in particular a statement of appropriate content in the proper form; he may also demand pecuniary satisfaction or that the appropriate sum be paid for a stated public purpose.

If, as a result of the violation of his personal interests, damage occurs, the injured party may demand that the damage be remedied in accordance with general principles. This was established in the Supreme Court judgment of 24 January 2008.
Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.


(I CSK 338/07) which sustained that a defendant accused of the violation of personal interests cannot rely on the exclusion of the illicit act if the publication is based solely on official documents and its author did not intend to enter into contact with the person who was criticised. And the Supreme Court judgment of 12 September 2007 (I CSK 211/07) [...] based on justified action in the public interest or sensationalist offences carried out by the press, [...] held that false facts cannot be published.

In Spain, in addition to the criminal system, defamation protection is provided by Constitutional Law 1/1982 on civil protection of the right to honour, personal and family intimacy and one's personal reputation. This law protects this right against illicit interference. Article 7 makes specific mention of: the imputation of value judgements by means of actions or expressions that adversely affect the dignity of another person, diminishing his reputation or an offence against his self-esteem. Under Article 9.2 of the Civil Code, this civil protection consists of an order to pay compensation for the damage caused, and Article 9.3 states that there is a presumption of the existence of damage whenever illicit interference is proven. The compensation will be extended to moral damage, according to the circumstances of the case and the seriousness of the damage that has effectively occurred. This will require account to be taken of the circulation or the audience of the mass media communication.

There are considerable differences in the degree of protection of personality rights in the Member States connected with the normative development of legal systems in this sphere. Some countries have special laws directly relating to the protection of private life (Luxembourg), and others have special laws relating to the press (Greece, Austria, Latvia, Poland, Sweden and Malta).

Thus, for example, in France a Commission Nationale de l’informatique et des libertés CNIL [National Commission for Data Processing and Liberties] exists, the purpose of which is to ensure the protection of personal data and private life. In fact, Germany, Sweden and France were the first countries to establish a law for the protection of private life in the information technology sphere.
In Romania there is something similar to the Consejo Nacional Audiovisual (‘CNA’) [National Audiovisual Board] which functions in the domain of the audiovisual media and is regulated by Audiovisual Law No 504, as an autonomous public authority subject to the control of Parliament, an exclusive regulating authority operating in the domain of audiovisual programme services. The CNA issues decisions, instructions and recommendations that have individual or regulatory characteristics. It acknowledges infringements and ensures that penalties are complied with: fines, withdrawal of the audiovisual licence and the obligation of the radio broadcaster to broadcast only the content of the penalty decision during certain hours.

In Luxembourg a special law is dedicated to the protection of the private life of individuals, the Law of 11 August 1982, concerning the protection of private life and a Law of 8 June 2004 on freedom of expression in the media.

Belgium also has extensive regulatory and jurisprudential development in this connection. On the one hand there is the Law of 8 December 1992 on the protection of private life in connection with processing data of a personal nature (law on private life); and on the other we would emphasise the decisions: Royal Decree of 13 February 2001 concerning execution of the Law of 8 December 1992 on the protection of private life in relation to the processing of data of a personal nature, and the Royal Decree of 17 December 2003, which fixes the formalities relating to the composition and functioning of certain sectorial committees established within the Commission for the protection of private life.

In Austria 1328a of the Civil Code (ABGB) stipulates that anyone who infringes the intimacy of another person and does not respect the obligatory diligence must pay compensation, as well as supplementary compensation for moral damages. But this article does not apply if the infringement is caused by the media, as these cases are regulated under the Austrian Communications Act (MedienG), which is lex specialis.

Section 6 of the MedienG states that a person who has suffered an offence or who has been defamed, ridiculed or insulted by the media will be entitled to compensation, except if the infringement occurred in parliamentary, local or national
debates, if the content of the publication is true, or the public interest in covering the information has precedence.

In Germany Law on art and authorship includes the right to one’s self esteem as a constitutionally guaranteed right. Article 22 of the rule regulates the rights of the author in respect of graphic artwork and photography, as well as authors’ rights. Images may be disclosed or published for exhibition only with the consent of the subject shown in the image.

The main exception to the requirement for consent in relation to damage to personality through press publications is contained in Article 23.1.1 of the German Law and affects images or portraits included within the ‘scope of contemporary history’. In order for the image to be published without the subject's consent, it must be presented as ‘an image of contemporary history’.

To simplify the way this precept is handled, German jurisprudence has in the past had recourse to the legal figure of ‘the person of contemporary history’. A distinction is made between absolute persons of contemporary history and relative persons of contemporary history. Absolute persons are those persons in public life who, through their exposed social position (e.g. politics) or their distinguished service or merit attract media attention (e.g. scientific, artistic or leading sports persons). These persons are normally required to tolerate the publication of their images. The ‘relative persons of contemporary history’ are, on the other hand, persons having a public interest exclusively by reason of their relationship with an event in contemporary history (for example, the survivors of a catastrophe).

This schematic division of individuals of contemporary history has become outdated — specifically since the decision of the European Court of Human Rights concerning Caroline of Monaco on 24 June 2004 on the violation of intimacy of certain photographs of Caroline of Monaco and her family taken by the press. It established that their publication had no public interest to justify publication. The decision contradicts another decision of the Supreme Court of Germany in 1993 which, in connection with the same case, established that the Princess was a ‘contemporary historic person’ and obliged the acceptance of publication of
photographs of her and her family taken in public places, with the exception of her minor children.

Another important individual element about reporting or information damaging personality rights is the claim for rectification. Rectification is regulated in the laws of each Land (federal state). Accordingly each Land has its own press law. The 16 Länder have approved their own press and media laws, increasing German diversity on this subject.

Poland also has its press law: the Act of 26 January 2004. Article 31 establishes that at the request of a natural person the editor in chief of a daily newspaper or periodical must publish, free of charge, 1) negation and normal substance relating to false or inaccurate news, 2) the normal contesting of any statement that threatens personal interests.

The Supreme Court judgment of 6 October 2006 (V CSK 151/06) establishes that a personal interest is violated solely by a press publication if, according to a media consumer (the reader) of such material, the information violates a specific personal interest of the individual. If the injured party referred to in Article 39 of the Press Law has not requested the editor in chief to publish a rectification, he may not ask the court to order the editor in chief to publish it. The Appeal Court Judgment in Poznań of 27 September 2005 (I ACa 1443/03) refers to the obligation of the writer. According to this decision, the editor in chief and the author of the press material are not obliged to apologise for violating personal interests caused by the publication of the material within the meaning of Article 378.2 of the Civil Procedure Code. The press law does not require the author, before publishing an article featuring unfavourable information on certain people, to contact the person(s) concerned.

As we have seen, the internal legal systems of the Member States operate at different levels in the area of personality rights in all their aspects. Some of the differences arise from their being considered as fundamental rights and their introduction into the Constitutions of the Member States. A second aspect is the progressive decriminalisation of crimes such as defamation and the different treatment given to them in the respective Legal Codes. And finally there are
considerable differences between the Member States re-emerge in terms of the levels of normative development in this connection.

We have highlighted the plurality in the legal systems of the Member States in relation to non-contractual civil obligations in connection with personality rights. This diversity is accentuated when it comes to cross-border disputes where each country may apply different legal responses. In effect, the material diversity leads to uneven and not very satisfactory results in terms of guaranteeing the proper functioning of the internal market. The existing normative diversity carries with it a high degree of legal insecurity and uncertainty and higher transaction costs than with domestic disputes, adversely affecting the proper functioning of the internal market.

To counteract this, various initiatives have been introduced, leading to the ‘Europeanisation’ of civil liability law and the idea of establishing what might be called a ‘European law on non-contractual civil obligations’.
4.3 THE GRADUAL HARMONISATION/UNIFICATION OF NON-CONTRACTUAL OBLIGATIONS IN THE EUROPEAN UNION

Faced with normative attempts to establish a ‘European law on non-contractual civil obligations’ we are presented with several options. Efforts over recent years to draw together the national legal systems in this connection and reduce the existing level of normative atomisation and heterogeneity derive from various initiatives. We might mention the action of the Community institutions in the form of harmonising instruments and, equally, the initiatives encouraged by connected organisations and professionals, mainly in the academic field, with a view to establishing key integrating regulations and assisting the proper functioning of the internal market, or at least not disrupting it.

Action aimed at harmonising non-contractual civil obligations rights can be directed towards two objectives. Since the ultimate purpose is to overcome the obstacles arising from the diversity in the national legal systems, what we need are measures of a harmonising or even a unifying nature. Having established this objective, we can ascertain whether the measures are directed towards achieving a substantive harmonisation of the Member States' legal systems or a unification of the conflict rules, i.e. their systems of Private International Law.

In recent years the idea of harmonising national legal systems from a substantive viewpoint has been gathering force, for the purpose of establishing a ‘European Civil Non-contractual Obligations Law’, common to all the Member States. This, encouraged by various initiatives from academic sources, comes as no surprise in that it could perfectly readily be included in a hypothetical ‘European Civil Code’. Accordingly, as part of moves towards a ‘European Privacy Law’ consideration is also being given to unification in connection with non-contractual civil obligations. The creation of a European Privacy Law would replace the rules of the national legal systems by the Community level. And the non-existence of differing regulations would guarantee uniform legal responses, at least in intra-Community situations.
Among the groups and measures working towards creating a European obligations law which will include non-contractual civil liability, we might mention the Study Group on a European Civil Code and the European Group on Tort Law, known as the ‘Gandolfi Project’, the ‘Common Nucleus of European Private Law’ group, the Society for European Contract Law (Secola) and the Acquis Group. We should also bear in mind the work being done within the framework of the UNIDROIT, where the ‘Principles of European Law of Contracts’ of 2001 were prepared, established by the Lando Commission.

However, creating a complete European Privacy Law is not easy and, despite the efforts of the Court of Justice of the European Communities, the legislative approach is complex in relation to matters which the Member States consider to be closely connected with their national and cultural identity. This is where the second possibility is gaining support, geared to preparing a set of uniform rules of conflict-of-law and unifying the national systems of Private International Law in relation to non-contractual civil liability. This solution gives more legal security to cross-border relations, and there is a foreseeability element which will enable individuals to cope better with the difficulties arising from the diversity of the legal systems.

This was the objective of Regulation (EC) No 864/2007, concerning the law applying to non-contractual obligations (which we will refer to hereinafter as Rome II). This is connected with Article 61. c) of the Treaty of the European Community concerned with creating a ‘European area for justice in civil matters’, which ensures the correct functioning of the internal market.

We therefore find ourselves with two possible approaches to mitigating these obstacles to the proper functioning of the internal market. The two options must, despite the fact they have come to be considered as incompatible, be considered as complementary.

It is complex and difficult to achieve the objective of a non-contractual Civil Liability Law that is uniform throughout the EU. We are far from achieving this. Furthermore, the definitive and complete substantive unification of non-contractual civil liability in the national legal systems would make the system less flexible. This would get rid of the underlying positive elements and the diversity, and for the
present it does not appear to be a viable option. However, given that the two approaches share a related purpose, it would be more convenient to use them as alternatives, by means of a procedure that combines their potential joint benefits for the internal market. Therefore, when we consider the possibility of applying conflict-rules standardisation, we are thinking of combining the conflictual and material approach by seeking concordance.

In this connection we can take as a model the Commission Communication of 11 July 2001, concerning European Contractual Law, which opts for combining the material and conflictive legislative solutions.\(^{21}\)

Combining substantive harmonisation and conflictive harmonisation in a key integrator has already been used in specific areas of non-contractual civil liability. A good example of this, in different stages, is Directive 85/374/EC on liability for damage caused by defective products, constituting the principle of a series of measures aimed at harmonisation, which at the present time is culminating in the introduction of this subject matter in Article 5 of Rome Regulation II.

The limits inherent in substantive harmonisation are substituted by techniques of International Privacy Law. However, we must remember that the correct functioning of International Privacy Law requires minimum convergence of the substantive rules. The two techniques must be used as parallel processes, each supportive of the other.

4.4 EUROPEAN PRIVACY LAW AND ALLEGED INFRINGEMENTS OF PERSONALITY RIGHTS

4.4.1 International judicial competence of the courts of the Member States

4.4.1.1 Substantive scope of the jurisdiction of special competence

When we consider the question of which courts are competent in a case of non-contractual civil liability, the first point we have to deal with is the substantive scope of the jurisdiction. In the case of non-contractual obligations, there are three alternative ways of selecting the competent court.

By virtue of Articles 2, 23 and 24 of Regulation 44/2001 concerning judicial competence and acknowledgement and execution of judicial and extra-judicial decisions in civil and mercantile matters (R 44/2001), the courts of the domicile of the defendant or the courts to which the parties have submitted pursuant to Articles 23 and 24 R 44/2001 will be competent. In the second instance, by virtue of Article 5.3 of R 44/2001, the courts of the place where the damaging act has occurred will be competent, provided that the defendant is domiciled in a Member State.

In the case of actions for damages and losses or for well-founded restitution in relation to an act, taking place in a criminal proceeding, the court hearing the case will be competent to the extent that, in accordance with its law, the same court is able to hear the civil action (Article 5.4 R 44/2001).

The place of jurisdiction will depend on the plaintiff when the claim is lodged. The possibility of electing a domicile which acknowledges the plaintiff brings with it the risk of forum shopping and hence law shopping, as the plaintiff may be guided by whichever law is most favourable.

4.4.1.2 Autonomous concept of criminal or quasi-criminal subject matter of Article 5.3. R 44/2001

Though the judgment of 30 November 1976, Mines de Potasse d’Alsace, makes explicit reference to the need for an autonomous interpretation of the criminal or quasi-criminal subject matter, it is in the judgment of 27 September
1988, Kalfelis, where explicit mention is made of such a necessity. The point of having an autonomous interpretation of the criminal and quasi-criminal concept is to ensure the efficacy of the Brussels Convention of 1968 on judicial competence and acknowledgement of judicial and extra-judicial decisions in relation to civil and commercial matters, thus guaranteeing a uniform solution despite the differences existing between the Member States’ legal systems.

By virtue of the judgment of 17 June 1992, Jackob Handte –v- Mécano-Chimiques, the autonomous concept of criminal or quasi-criminal subject matter includes ‘all claims lodged demanding liability on the part of a defendant and which are not related to contractual subject matter’, this being a situation in which an obligation exists freely assumed by one party vis-à-vis the other. Accordingly, Article 5.3 is residual in nature as it is applicable when an obligation is not included in Article 5.1 R 44/2001.

As we can see, the line of distinction between liability for contractual and non-contractual substance is very fine, and its differentiation sometimes presents serious difficulties. The Court has declared that the residual nature of Article 5.3 R 44/2001 does not imply that the contractual jurisdiction applies to claims relating to a contract, but rather on the basis of a crime.

4.4.1.3 Legal qualification of the place where the damaging act occurs or could occur and illicit acts against private life

Confirming the ‘place of the damaging act’ as the jurisdiction throws up certain difficulties where the place of the generating act differs from the place of the damage (in the case of illicit acts at a distance) and in cases of damage located in different territories of various Member States (various locations of damage).

Of the cases involving various locations of damage or where the illicit act causes damage to the same victim in various places, we would emphasise the judgment of 7 March 1995, Shevill, Ixora Trading Inc; Chequepont SARL, Chequepoin Internacional Ltd. –v- Presse Alliance S.A, relating to illicit interferences in the private life of an individual. In this case the place of the causal act is that of the place of establishment of the publisher of the disputed publication, to the extent that it constructs the place of origin of the damaging act, where the defamation
manifested itself and was published, and this court is also competent to hear the action for reparation of all the damage caused by the illicit act.

As the said jurisdiction generally coincides with the domicile of the defendant, in order not to detract from the content of Article 5.3 R 44/2001, the Court acknowledges the competence of the courts of each of the countries where the defamatory publication was published to hear exclusively the damage caused within the territory of their jurisdiction, as the damage suffered abroad is not connected with their jurisdiction or the place of the damaging act. To avoid atomisation of the litigation, the victim may concentrate all his/her claims on the court of the domicile of the defendant (Article 2 R 44/2001) or before those of the country of the place of the damaging act (Article 5.3 R 44/2001).

With this solution the injured party loses the option facilitated by Article 5.3 R 44/2001 as well as between the jurisdiction of the defendant and that of the place of the damaging act, given that in practice these will coincide. To avoid these inconveniences to the injured party and to ensure the injured party has a real option of competence a favor damni consideration could be given to the courts of one of the places where the damaging act was manifested, including in relation to the damage sustained in the other Member States, given that they are all connected with the same generating act. The relationship of causality between the act and damage that is not geographical but juridical in nature would justify both the overall competence of the place of the act and the competence of any of the places of the damage. The root problem is that the flexibility of jurisdiction provided by Article 5.3 R 44/2001 for opting between the place of the causal act and the place of the damage could be complicated in the case of illicit acts against private life, due to the difficulty of determining the places of the act and of the damage. In the case of press defamation, the place of the causal act can be the place of establishment of the publisher, but also the place of publication or diffusion. This latter place, which may differ from the place of establishment of the publisher, could also be the place where the damage begins to materialise.

However, greater difficulty arises when the interference in private life takes place via the Internet, due to the incompatibility between the consubstantial
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The permeability of the act/damage categories in interferences in private life and the artificial nature of a location based on those categories lead us to search for more appropriate solutions to the singularity of the protected asset. The proposal that enjoys the greatest doctrinal acceptance is for the **usual place of residence** of the victim. The place of the damage is therefore the place where the person suffers the damage, in the legal space where the moral imbalance of the victim occurred. As this is a case of intangible damage connected with the individual, it can only be located where that individual is located.

The **forum actoris**, however, has been laid aside by the Court, and this does not always lead to solutions adapted to reality, when the person is not known in the State of his domicile or the illicit act has not caused damage to him.

### 4.4.2 The law applying to non-contractual obligations deriving from acts against personality rights. The conventional European and Community rules in the area of non-contractual civil liability

Non-contractual civil liability is a normative area that has had less regulatory weight in Community law than in the contractual sphere.

The Founding Treaty of the European Community refers to non-contractual obligations in Article 288, paragraph 2.

> ‘In matters of non-contractual obligations the Community must redress damages caused by its institutions or agents in the exercise of their duties in accordance with the general principles common to the Laws of the Member States’

Accordingly, the Treaty refers us to the common principles of the Member States and their coordination by the European institutions.

In the search for these common principles for all the Member States the Court of Justice of the European Communities plays a prominent role. In the judgment of 29 September 1982, in case 26/82, **Olecifici Mediterranei v. EEC**, it was provided that:
Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.


“Non-contractual obligations of the Community for the damage caused by Institutions pursuant to paragraph 2 of article 215 of the Treaty (now 288), may only arise if a number of requirements are met in relation to the illegality of the imputed behaviour, the reality of the damage and the requirement for a relationship of causality between the illicit behaviour and of the damage caused”

This decision has subsequently been complemented by others which build up a Community jurisprudence in the area of non-contractual civil obligations, fixing uniform criteria of interpretation. Among these we would emphasise the judgment of 14 October 1999, in the matter C-104/97, P. Atlanta -v- Commission; of 9 September 1999, matter C-257/98, P. Lucaccioni -v- Commission, of 4 July 2000, matter C-352/98, Bergardem and Goupil -v- Commission, and of 8 October 1996 in the cumulative matters C-178, C-179, C-1184, Dillenkofer; of 5 March 1996, cumulative matters 46/93 and 48/93, Brasserie du pecheur SA.

Alongside the halting steps of the Court of Justice of the European Communities there has been a scant measure of development of Community rules. The first question in terms of legislative action by the Community institutions within the sphere of non-contractual civil obligations is the legal basis that sustains it. In the Treaty various precepts can be chosen for this purpose, which can be referred to for the purpose of unifying or harmonising the subject matter. These are Articles 61 and 65, 94 and 95, 153 or 308.

The normative activity to date consists of a set of sectorial measures governed by a series of Directives dedicated to very particular aspects of non-contractual civil obligations. Accordingly, prior to the promulgation of Rome Regulation II we had a fragmented and incomplete panorama of very limited scope.

The first field approached by the Community institutions through Directive 85/374/EEC of 28 July 1985 was the approximation of legal, regulatory and administrative provisions of the Member States in relation to liability for damage caused for defective products. The Court has had occasion to pronounce with respect to its content in the cases Commission of the European Communities -v- French Republic, Commission of the European Communities -v- Greek Republic and María Victoria González Sánchez -v- Medicina Asturiana SA, by means of their

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respective judgments of 25 April 2002. We should also mention the more recent judgment of 10 January 2006, in the case Skov AEg -v- Bilka Lavprisvarehus A/S and in Bilka Lavprisvarehus A/S -v- Jette Mikkelsen, Michael Due Nielsen.


In connection with consumer protection there is Directive 2005/29/EC of 11 May 2005, relating to unfair commercial practice on the part of companies in their relations with consumers in the internal market; and together with this, Directive 98/27/EC of 19 May 1998 relating to acts of cessation in connection with protection of the interests of consumers.\(^{24}\)

And in relation to damage caused by means of transport, mention should be made of Regulation 2027/97 of 9 October 1997 concerning the liability of airline companies in the case of an accident,\(^{25}\) amended by Regulation (EC) No 889/2002, of 13 May 2002.\(^ {26}\)

We should also mention Directive 2000/31/EC of 8 June 2000 relating to certain aspects of the Information Society, in particular electronic commerce,\(^{27}\) and Directive 2006/123/EC concerning services in the internal market,\(^{28}\) which relates to Articles 43 and 49 of the Founding Treaty of the European Community.

But civil obligations concerning the processing of personal data is clearly the thing that has awakened most interest in the Community. This is a sector that has evolved as technology has advanced and which reflects the whole issue of non-contractual civil obligations in relation to personality rights. We will therefore take a

\(^{23}\) OJ No L143/56, of 30 April 2004.
\(^{24}\) OJ No L 166 of 11 June 1998.
\(^{26}\) OJ No L140 of 30 May 2002.
\(^{27}\) OJ No L178 17 July 2000.
\(^{28}\) OJ No L376 of 27 December 2007.
closer look at what has been done in this regard, with the stress on Agreement 108 of the Council of Europe and Directive 96/46/EC.

4.4.2.1 Agreement 108 of the Council of Europe

This is the agreement of 28 January 1981 approving Convention No 108 of the Council of Europe on the protection of individuals in relation to the computerised processing of data of a personal nature, the first European norm that laid down the standards of the common model of data protection. The Convention sought to extend protection of fundamental rights and liberties, and, specifically, the right to respect for private life, taking into account the intensified cross-border circulation of data of a personal nature subject to computer processing.29

The second chapter of the Convention set out the basic principles of data protection: loyalty, accuracy, purpose, relevance, non-abusive use, right to oversight, publicity, individual access, security, prohibition of automatic processing of data that reveals racial origin, political opinions, religious convictions or of any other type, or data relating to health or sexual life, unless domestic law provides adequate guarantees.

The penalty system is in the hands of the Participating States. In effect, the Convention leaves completely not only the type of penalties for which provision may be made, but also the legal sector in which they may be included in each State.

4.4.2.2 Directive 95/46/EEC

In pursuance of the principles laid down in the Convention, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free circulation of such data was passed.30

Directive 95/46/EC was passed to bring the national legislation of the EU Member States on personal data protection into line. As Recital 11 states, the principles of the protection of the rights and freedoms of individuals, notably the

29 Countries which have signed up to the Convention are at: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=108&CM=1&DF=&CL=ENG.
right to privacy, which are contained in this Directive, give substance to and amplify those contained in the earlier Convention.

Recital 10 states that the purpose of the Directive is to harmonise the level of protection offered by the Member States and thus to ensure ‘a high level of protection in the Community’ or an ‘adequate level’. Pursuant to this objective, and Article 32 of the Directive, Member States had three years to transpose the Directive into their national legislation (by 2008).

The Directive contains general provisions to ensure that interested parties are informed of their rights with regard to data protection, viz.

- Article 6(1)(a), which establishes that personal data shall be processed ‘fairly and lawfully’;
- Article 10, which establishes the minimum information that must be provided to the data subject when the data has been obtained directly from that individual;
- Article 11, which sets out the minimum information that must be provided to the data subject when the data has not been obtained directly from that individual;
- Article 14, which establishes the requirement to inform the data subject before personal data are disclosed to third parties.

The general provisions of the Directive draw a distinction between two types of information:

a) Essential information: the identity of the controller and of his representative, if any; the purposes of the processing for which the data are intended, except where the data subject already has that information;

b) Any ‘further information’ relating to the recipients of the data, whether replies to the questions are obligatory or voluntary; the existence of the right of access to and the right to rectify the data in so far as such further information is necessary, having regard to the specific circumstances in which the data are collected, to guarantee fair processing in respect of the data subject.

A report from the Commission entitled ‘First report on the implementation of the Data Protection Directive’ concluded that:

The implementation of Articles 10 and 11 of the Directive showed a number of divergences. To some extent this is the result of incorrect implementation, for instance when a law stipulates that additional information must always be provided to the data subject, irrespective of the

31 COM (2003) 265 final]
Indeed, the laws of the Member States differ considerably regarding the type of information and how and when it must provided.

There are also differences on the type of additional information that may be necessary to ensure fair processing. Some Member States repeat the examples given in the Directive, while others give slightly different examples and some no example whatsoever. Although some countries meet the requirements of the Directive to a large extent, others are a far off fulfilling them. The technical annex to the Commission’s first report on the implementation of Directive 95/46/EC provides more detailed information on national legislation.32

For its part, the 2003 Flash Eurobarometer survey on violation of privacy and protection of the private life of people and data circulation stressed:

• the need to facilitate conformity throughout the EU
• the need to improve public awareness on issues of data protection
• the need to give meaningful information on the situation in which the data are collected
• the need to improve the quality of data protection from the point of view of data subjects

The importance of increased harmonisation of how violation of individual privacy and private life and personal data protection are regulated has been raised at a number of symposia, such as the workshop held in Berlin in March 2004, which brought together public and private sector experts interested in building on the 25th International Conference Resolution, and the 26th International Conference on Privacy and Personal Data Protection, held in Wroclaw (Poland), at which, in September 2004, research was presented demonstrating the need for warnings on privacy and fair processing to be readily understandable.

Its area of application is delimited by Article 3, Section 1 of which states that its provisions shall apply to the processing of personal data wholly or partly by

automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system’.

Article 4 of Directive 95/46/EC deals with the applicable law. The first paragraph refers, by way of a self-limiting choice-of-law rule, back to the national provisions adopted by the Member States in order to transpose and apply the content of the Directive. The Member States are thereby required to enforce the law they have passed transposing the Directive into their national legislation, when the processing is part of the activities of an establishment of the controller on the territory of the Member State.

In accordance with Directive 95/46/EC, we can say that the applicable law will be that of the country in which the controller of the personal data is established, i.e. the country of residence of the controller of the file regardless of the place of processing of the data (lex loci delicti commissi) and of the nationality or residence of the victims of that processing. The connecting factor is therefore the ‘country of location of the controller of the file’ and, obviously, in an international event, it may not necessarily be the court of that country that is hearing the matter.

As we can see, Directive 95/46/EC does not apply the general rule on non-contractual responsibility, which is the lex loci Delicti Commissi, or the law of the country where the illicit processing of the data takes place. It thereby sidesteps the problems derived from data being processed in different countries and the consequent concurrence of various national laws, as frequently happens with companies that use information technology to process personal data. This all goes to show that it is intended to facilitate the activity of this type of company and to promote the free circulation of data within the Community area.

Taking the law of the country of establishment as a criterion is intended to reduce costs for companies. The choice of this connecting factor is therefore marked by an ‘economic argument’ which does not take into account the law of the country with the closest ties, but rather pursues a given material result that is favourable to IT companies operating in the industry, regardless of the country in which the company performs its activities. It does not take into account the principle
of proximity that supposedly underlies any choice-of-law rule and rejects such criteria as nationality or residence of the subject affected or the nationality or residence of the controller of the file or the country of physical location of the file.

By doing so, Directive 95/46/EC (Recital 18) seeks to ensure that individuals are not deprived of the protection to which they are entitled under this Directive, by submitting any processing of data by any person (regardless of his nationality or the place in which the activity is carried out) acting under the authority of a controller who is established in a Member State to the law of that country. This ensures that companies do not have to be abreast of all the laws of whichever countries they might carry out their activity in.

On the other hand, individuals whose rights are violated are obliged to litigate in accordance with the law of the place of establishment of the controller of the file and in accordance with a jurisdiction with which they are probably not familiar. Economic considerations and free circulation of data in the European area therefore take precedence over protection of individual privacy. In order to prevent distortions in the domestic market a balance must be struck between all participants.

However, to prevent companies getting round the applicable legislation of the countries in which they operate and to guarantee the level of protection pursued by the Directive, if the controller of the file is established, either by way of a branch or a subsidiary, in various Member States, he must guarantee that each of his establishments complies with the legislation of the country in which it is located. Likewise the activities carried out in each establishment will be governed by the law of the country of residence of the establishment (Recital 18 and Article 4.1 of the Directive).

Then again, when the establishment responsible for the file is not located in a Member State but in a country in which the law of a Member State is applied, in accordance with the standards of International Public Law, the legislation of the said country will likewise apply (Article 4 b. Directive 95/46/EC).

Similarly, to ensure that all activities carried out within the European area furnish the same level of protection to the persons covered by the Directive, when
the controller is not established in a Member State but for purposes of processing personal data makes use of equipment situated on the territory of a Member State, unless such equipment is used only for transit purposes, the law of that country will apply (Recital 20 and Article 4 c) Directive 95/46/EC).

Likewise, to ensure the protection laid down in the Directive on the transfer of personal data of Community citizens to non-Community third countries (insofar as lex loci delicti commissi would apply) the national authorities may reject that transfer when it considers that the country does not offer ‘an adequate level of protection’ of privacy (Article 25 Directive 95/46/CE).

And, finally, when data are processed by a third country in an EU Member State, the criterion of location of the file is not used, but Article 4.1 c) of the Directive might apply, referring to the applicable law of the Member State in which the processing has been carried out (law of the place of gathering of the data, law of the place of its classification, dissemination, etc.). So in the case of a third country making use of a Member State for processing data, the lex loci delicti commissi does apply.

Lastly, the Judgment of the Court of Justice in Case C-73/07, 16 December 2008, defines the relationship between data protection and the freedom of the press, and notes that the Member States should, while permitting the free flow of personal data, protect the fundamental rights and freedoms of natural persons and, in particular, their right to privacy, with respect to the processing of those data. In order to reconcile the protection of privacy and the right to freedom of expression, the Member States are required to provide for a number of derogations or limitations in relation to the protection of data and, hence, in relation to the fundamental right to privacy. They must be made solely for journalistic purposes or for the purposes of artistic or literary expression, which fall within the scope of the fundamental right to freedom of expression, in so far as they are clearly necessary to reconcile the right to privacy with the rules governing freedom of expression.

Taking account of the right to freedom of expression in every democratic society means, firstly, interpreting notions relating to that freedom, such as
journalism, broadly. Secondly, any derogations and limitations in relation to the protection of data must apply only insofar as is strictly necessary.

4.4.2.3 Rome II Regulation

Article 2 of the Treaty on European Union states that one of the aims of European Union is to maintain and develop the Union as an area of freedom, security and justice in which the free movement of persons is ensured and European citizens can assert their rights, enjoying the same guarantees as they have before the courts of their own country.

In order to constitute a true European area of justice, Articles 61 c) and 65 of the Treaty establishing the European Community incorporate measures in the field of judicial cooperation in civil matters, in so far as necessary for the proper functioning of the internal market. At its meeting in Tampere on 15 and 16 October 1999, the European Council concluded that the principle of mutual recognition should become the cornerstone of the required judicial cooperation. It asked the Council and the Commission to adopt, no later than December 2000, a programme of measures to implement this principle.

The joint Commission and Council programme of measures for the mutual recognition of judicial decisions in civil and commercial matters, adopted by the Council on 30 November 2000, states that the measures on harmonising the rules of conflict of laws are complementary, that they facilitate implementation of the principle of mutual recognition of judicial decisions in civil and commercial matters. Knowing that the courts of the Member States will apply the same conflict rules to determine which law governs a given situation boosts reciprocal trust in judgments handed down in other Member States and is an indispensable factor in achieving the longer-term goal of free circulation of judicial decisions without intermediary measures. The future Treaty of Lisbon strengthens this trend, moving this sector further into the Community context.

The present study forms part of the work of harmonising international private law in civil and commercial matters at EU level, which began in the 1960s. On 27 September 1968, and seeking to implement the provisions of Article 220, Section 4
(now Article 293-4) of the EEC Treaty, the six founding members of the European Economic Community entered a convention on the jurisdiction, recognition and execution of judicial decisions in civil and commercial matters (the ‘Brussels Convention’), based on the idea, already contained in the EC Treaty, that the creation of a common market implies the possibility of obtaining in any Member State, as easily as possible, the recognition and execution of a judicial decision made in another Member State. To help achieve this, the Brussels Convention began by setting out the rules on whose courts are competent to judge a cross-border dispute.

However, the mere existence of rules governing the competence of the courts does not make it possible to predict with any degree of confidence how the underlying dispute will be resolved. In effect, the Brussels Convention, and the regulation known as ‘Brussels I’ which has replaced it since 1 March 2001, contains a series of options that potentially allow for a choice of jurisdiction. The risk is that one party might select a particular country’s courts solely because the applicable law is more favourable than elsewhere. This phenomenon, known as ‘forum shopping’, is a consequence of the interaction between the international jurisdiction of the national courts and the question of applicable law. Given that the question of international jurisdiction takes precedence over determining the applicable legislation, the first decision may condition the second in so far as the conflict rules that the courts must apply are different.

That is why work began on codifying the rules on conflicts of laws in the Community in 1967. The Commission convened two meetings of experts in 1969, at which it was agreed to focus initially on questions having the greatest impact on the operation of the common market: the law applicable to tangible and intangible property, contractual and non-contractual obligations, and the form of legal documents.

On 23 June 1972, the experts presented a first preliminary draft convention on the law applicable to contractual and non-contractual obligations. Following the

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accession of the United Kingdom, Ireland and Denmark, the group was expanded in 1973, and that slowed progress.

In March 1978, it was decided to confine attention to contractual obligations so that negotiations could be completed within a reasonable time and to commence negotiations later for a second convention on non-contractual obligations.

On 19 June 1980 the Convention on the law applicable to contractual obligations (the ‘Rome Convention’) was opened for signature, entering into force on 1 April 1991.\(^{34}\) As there was no proper legal basis in the EC Treaty at the time of its signing, the convention takes the traditional form of an international treaty. However, as it was seen as the indispensable adjunct to the Brussels Convention, the complementarity being referred to expressly in the Preamble, it is treated in the same way as the instruments adopted on the basis of Article 293 (ex-220) and is an integral part of the Community *acquis*.

Article K.1(6) of the Union Treaty in the Maastricht version classified judicial cooperation in civil matters within the areas of common interest to the Member States of the European Union. In its Resolution of 14 October 1996 laying down the priorities for cooperation in the field of justice and home affairs for the period from 1 July 1996 to 30 June 1998,\(^{35}\) the Council stated that, in pursuing the objectives set by the European Council, it intended to concentrate on certain priority areas, which included the ‘launching of discussions on the necessity and possibility of drawing up ... a convention on the law applicable to non-contractual obligations’.

In February 1998 the Commission sent the Member States a questionnaire on a draft convention on the law applicable to non-contractual obligations. The Austrian Presidency held four working meetings, and it was ascertained that all the Member States supported the principle of having an instrument. At the same time the Commission financed a Grotius project\(^ {36}\) presented by the European Private International Law Group (Gedip) to examine the feasibility of a European

\(^{34}\)For the consolidated text of the Convention as amended by the various Conventions of Accession, and the declarations and protocols annexed to it, see the version published in OJ C 27, 26.1.1998, p. 34.


\(^{36}\)Project No GR/97/051.
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Convention on the law applicable to non-contractual obligations, which culminated in a draft text.37

The Council’s ad hoc ‘Rome II’ Working Party continued to meet throughout 1999 under the German and Finnish Presidencies, examining the draft texts presented by the Austrian Presidency and by Gedip.

The Amsterdam Treaty, which entered into force on 1 May 1999, moved cooperation in civil matters into the Community context, while on 3 December 1998 an Action Plan of the Council and the Commission was adopted on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice.38 The main points were that that such principles as certainty in the law and equal access to justice require ‘clear designation of the applicable law’ and that ‘the following measures should be taken within two years after the entry into force of the Treaty: … ... b) drawing up a legal instrument on the law applicable to non-contractual obligations (Rome II)’.

On 3 May 2002, the Commission launched consultations with interested parties on an initial preliminary draft proposal for a ‘Rome II’ Regulation prepared by the Directorate-General for Justice and Home Affairs. The consultations prompted a very broad response, and the Commission received some 80 written contributions from the Member States, academics, representatives of industry and consumers’ associations.39 The written consultation procedure was followed by a public hearing in Brussels on 7 January 2003, which led to the First Proposal for a Regulation on the Law Applicable to Non-Contractual Obligations40.

The first proposal was superseded by a second amended text which removed from the scope of the future Rome II Regulation the article referring to the violation of privacy and rights relating to personality. Thus the final text of the Rome II Regulation, recently passed and published in the Official Journal, leaves out Article 6 of the initial proposal.

Nonetheless, Article 30 calls on the Commission to submit to the Parliament, the Council and the European Economic and Social Committee, no later than 31 December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. It is precisely this last undertaking that has become the subject of the present study.

On the content of Rome II two specific aspects need to be highlighted. Firstly, the Community legislator has deemed that the general rule, as traditionally applied in the Member States, must follow the criterion of *lex loci delicti commissi*, and specifically the law of the place where the damage occurs (regardless of the country in which the operative event of the damage has occurred or in which the indirect consequences might occur). We are therefore left with the rule of ubiquity arising out of the general rule of *lex loci delicti commissi*, establishing this criterion in the place of the damage and not where the operative event of the damage may have taken place.

Secondly, Rome II clearly reflects a shift towards specialisation of the conflict rules in International Private Law. In contrast to the broad legal categories that were used to cover all types of non-contractual obligations, Rome II sets out special rules for non-contractual civil obligations arising out of damage caused by defective products, unfair competition and acts restricting free competition, environmental damage, infringements of intellectual property rights, industrial conflicts, etc. Experience has led the Community legislator to take into consideration the special nature of these cases, with particular rules of conflict suited to that special nature. As such, obligations arising out of violations of privacy and other rights relating to the personality via the press could be considered a particular case that requires a special choice-of-law rule to meet its own needs.
4.4.2.4 Exclusion of defamation from Rome II

i. Legislative proposals prior to the adoption of Rome II

Within the process of drafting the Rome II Regulation, the specific provision on non-contractual obligations arising out of damages to rights relating to the personality via the mass media has followed a truly tortuous path. Neither of the Commission and European Parliament proposals ultimately managed to achieve the required consensus.

The Commission's proposal, in the preliminary draft of the proposal for the Council Regulation of May 2002, provided for a special rule for non-contractual civil obligations arising out of violations of private life and rights relating to the personality. According this the applicable law should be that of the habitual residence of the person harmed. This criterion was intended to solve the practical problems created by a distributive application of various laws to a specific case, arising out of the CJEC's Fiona Shevill.

However, the Commission's solution met with criticism. For instance, it was said that it is not always easy to determine the habitual residence of celebrities, and that the combination of rules of competence and rules of conflict could lead to a situation in which the courts of the country of the publisher’s head office would have to apply the law of the habitual residence of the person harmed against the publisher, even if the publication or broadcast met the rules of the country of the publisher’s head office and no copies had been disseminated in the country of the victim’s habitual residence.41

Taking these submissions into consideration, the Commission submitted a new Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (‘Rome II’). Article 6 stated:

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.

2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

Based on this precept, it is necessary to refer back to the general rule of Article 3, whereby the law of the place of direct damage will apply unless the parties do not live in the same country or the conflict has closer ties with another country. The solution therefore involved applying the general rule of Article 3 in combination with the *lex loci delicti commissi*. Here, then, the decisive factor is the place where the damage occurred, regardless of the country in which the operative event of the damage occurred and of the countries in which the indirect consequences of the damage occur. According to the CJEC, in the *Fiona Shevill* case, the place of damage in the event of defamation in the press will be the ‘contracting state where the publication has been disseminated and where the victim claims to have suffered an attack upon her reputation’\(^{42}\). Dissemination is when the publication has been commercially distributed. This connecting factor meets the legitimate expectations of the person harmed and those of the author of the defamatory action. It is worth noting that a publication is only considered to have been disseminated if it has been subject to commercial distribution.

To allay the concerns expressed by the industry, the media and some of the Member States in their criticism of the initial proposal (notably the ‘risk’ that the courts of the country of the publisher’s head office would have to apply a foreign law, even if the publication or broadcast conformed to the rules of the country of the publisher’s head office) Article 6 had a special rule, whereby the law of the forum would apply wherever application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information. Nonetheless, this provision is unnecessary given the general rule of public order in the Rome II Regulation itself.

In the light of the Commission proposal for a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations (‘Rome II’), the European Parliament adopted a first-reading amendment to Article 6.\(^{43}\) The new Article 5 – ‘Violations of privacy and rights relating to the personality’ proposed by Parliament read:


\(^{43}\) A6-0211/2005.
1. As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country’s law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. This provision shall apply mutatis mutandis to publications via the Internet and other electronic networks.

2. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast shall be the law of the country in which the publisher or broadcaster has its habitual residence.

3. Paragraph 2 shall also apply to a violation of privacy or of rights relating to the personality resulting from the handling of personal data.'

The amendment was justified, according to Parliament, because it was in line with the ruling of the CJEC in the *Fiona Shevill* case. Furthermore, the idea that the closest ties are with the country of the principal place of publication or broadcast is something that favours the legal certainty of the publishers and provides a simple rule for all publications, including on the Internet.

There are therefore notable differences between the Commission’s proposal and that of the European Parliament. In general terms, whereas the Commission’s choice-of-law rule is based on application of the law of the country of direct damage (which tends to result in application of the law of the country of habitual residence of the harmed person), the choice-of-law rule backed by Parliament favours application of the law of the country in which editorial control is exercised. Although it is true that the reference to the law of the country ‘in which the most significant element or elements of the loss or damage occur or are likely to occur’, appears to refer to the law of the country of *locus damni*, the rule itself indicates that those should be considered to be the country ‘to which the publication or broadcasting service is principally directed’ which would coincide with the country of the publisher’s head office. Moreover, in cases involving a publication where there is no clear country ‘to which the publication or broadcasting service is principally directed’ the law of the country where the editorial control is exercised will apply. Parliament’s proposal, therefore, quite clearly favours the position of the media.
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The European Parliament amendment was not accepted by the Commission. In the opinion of the Commission the new text of Article 5 came down excessively in favour of the publisher. Furthermore, the Commission argued that the solution was not in line with that adopted by most Member States. The Commission believes that its initial proposal and Parliament's are irreconcilable. For this reason, it considers that the most acceptable solution would be to exclude the issue of press offences and the like from the scope of the Regulation and thus to remove Article 6 from its initial proposal. Nonetheless, this exclusion would only affect violations by the press and similar, with Article 5 of the amended proposal applying to other violations of private life.44

In this situation, on 25 September 2006 the Council adopted its common position45 with regard to the Rome II Regulation. In an attempt to reconcile the conflicting views, the text adopted in the Council's Common Position excludes the issue of violations via the press and similar from the scope of Rome II. It goes further, however. The Council, not limiting the exclusion to the matters suggested by the Commission, in Article 1.2 provided that this exclusion should affect ‘non-contractual obligations arising out of violations of privacy and Rights relating to personality, including defamation’. The exclusion thus includes not only violations by the media, but any violation of rights relating to personality.46

Nonetheless, this exclusion must be viewed in conjunction with the revision clause of Article 30, which requires the Commission to submit to the European Parliament, the Council and the European Economic and Social Committee a report on implementation of the Regulation. This report must be accompanied, where applicable, by proposals for adapting the Regulation. In particular the report must consider the non-contractual obligations arising out of violations of privacy and rights related to personality.


46 This is highlighted in the Communication from the Commission to the European Parliament concerning the common position of the Council on the adoption of the ‘Rome II’ Regulation, COM/2006/0566 final — 2003/0168 (COD), p. 3: 'Article 1, 2, g) reflects the Commission’s amended proposal (Article 1, 2, h) where the Commission suggested excluding violations of private life or rights relating to personality committed by the media. The Common Position, however, goes further. It does not restrict this exclusion to the non-contractual obligations assumed by the media, but extends it to all non-contractual obligations of this type. Ultimately, the primary reason for this approach was the inability to agree on the scope (definition) of media in this context.'
At the second reading under the codecision procedure, the European Parliament ignored the amendments proposed by the Commission and the Council with regard to violations of privacy and rights related to personality, and re-submitted the same text (now Article 7) as at first reading.47

In this situation, the Commission said that it could not accept the special choice-of-law rule relating to the violation of privacy and infringement of the rights of the person submitted by the European Parliament. It also reiterated that the rule had been rejected at the first reading. Thus, ‘given the political impasse in the Council, the Commission would now prefer to exclude this tricky question from the scope of the Regulation, as in its amended proposal, especially since there is very little international litigation in this area.’

ii. The end result: exclusion of the issue

The impossibility of reconciling the different interests — caused especially by the difficult balance between the right to private life and the right to freedom of speech — and of reconciling the texts proposed by the Commission and the amendments submitted by the European Parliament, led finally to the issue of non-contractual obligations arising out of violation of privacy or of rights related to personality being excluded from the scope of the Rome II Regulation. This exclusion is expressly stated in Article 1.2.g) of the Regulation.

The regulation also includes a review clause in Article 30.2 – the basis of this study - which states that

“Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (1).”

In this age of new forms of electronic communication, this exclusion has failed to satisfy case law. The exclusion may be considered surprising, especially bearing in mind that damages to the rights relating to personality via the press was and is one of the areas most in need of clear and uniform regulation, given that it is a field in which the international nature of the controversy is particularly relevant.  

4.5 COMPARATIVE ANALYSIS OF THE CONFLICT-OF-LAW RULES IN THE NATIONAL LAW OF EU MEMBER STATES

4.5.1 An overview

Because Rome II excludes non-contractual obligations arising out of media violations of privacy and other rights related to personality, there continue to be as many rules for resolving conflicts as there are Member States of the European Union. The existence of 27 different conflict-of-law rules makes it difficult to predict whose law will be deemed applicable in cases of privacy infringements.

The Member States’ national rules for resolving conflicts of law differ. The European area is home to different legal traditions and this diversity is also reflected in the rules on resolving conflicts.

One notable feature is that most of the national legal systems of the Member States have no special rules regarding the law that applies in the area of non-contractual responsibility for damage caused by the media to rights relating to personality.

Only a few provide special rules: Hungary, Lithuania, Belgium, Bulgaria and Romania. The other states apply the general conflict-of-law rules relating to non-contractual obligations. Given the trend in international private law towards specialisation of rules on conflicts, it is all the more disappointing that the regulation of this issue is based, at present, on rules designed for categories as broad as non-contractual obligations.

On the other hand, in a minority of Member States the national legal systems incorporate a choice-of-law rule that is materially oriented towards protection of the injured party. This is the case in Slovenia, Estonia, Hungary, Italy, Lithuania, Germany and Bulgaria.

Some Member States’ legal systems draw a distinction between the law applicable to the existence and content of rights relating to personality, and the protection of these rights from possible violation. This is the case in Italy and Portugal.

In Italy, Article 24.1 of the 1995 International Private Law Act (Act 218 of 31 May 1995), establishes different criteria for determining the law applicable to the existence and content of such rights, on the one hand, and for the consequences of its violation, on the other:

‘1. L’esistenza ed il contenuto dei diritti della personalità sono regolati dalla legge nazionale del soggetto; tuttavia i diritti che derivano da un rapporto di famiglia sono regolati dalla legge applicabile a tale rapporto.
2. Le conseguenze della violazione dei diritti di cui al comma 1 sono regolate dalla legge applicabile alla responsabilità per fatti illeciti’.

In other words, the existence and content of the rights relating to personality are regulated by the subject’s national law. But the law applicable to the consequences of violating these rights is determined by the law on responsibility for illicit acts. So if there is an alleged violation of rights relating to personality, the liability of the author of the damage has to be established in accordance with the general rule applicable to liability for illicit acts. This leads to application of Article 62 of the Italian International Private Law Act, i.e. the choice-of-law rule applicable to situations of liability for illicit acts.

Article 27.1 of the Portuguese Civil Code contains a similar provision, stating that,

‘Aos direitos de personalidade, no que respeita à sua existência e tutela e às restrições impostas ao seu exercício, é também aplicável a lei pessoal’.

The law that determines the awarding, contents and limitations of rights relating to personality is therefore the national law of the subject enjoying such rights. However, it is the general rule of Article 45 of the Civil Code that determines which
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4.5.2 General rules

4.5.2.1 Rule of ‘Lex loci delicti commissi’

In national legal systems that do not contain special rules for cases of violations of privacy and other rights relating to personality, the general rule used in the great majority of Member States is that of *lex loci delicti commissi*. Under this rule the applicable law is that of the place where the illicit act was committed.

However, the connecting factor of the *lex loci delicti commissi*, despite its widespread acceptance, can be problematic, notably in the case of violations of privacy via the press. On many occasions it is not easy to determine exactly where the offence or violation was committed, since these may be classed as ‘offences at a distance’ and be spread among various countries.

An offence may be deemed to be ‘at a distance’ when the event occasioning the damage and the result or effective damage occur in different countries.

On the other hand, it is common for damage to rights relating to personality to take place simultaneously in various countries. This creates problems when deciding which country's law should govern the non-contractual responsibility of the author of the damage (commonly the publisher of the defamatory material), since, in principle, more than one law may apply simultaneously.

In the legislation of the Member States the criterion of *lex loci delicti commissi* is incorporated unevenly in the rules on conflict of laws. While some provide a simple rule restricted to establishing this principle, others incorporate the principle in a more complex form, to respond to some of the problems caused by its practical application.

Moreover, in many of the Member States, the general rule of *lex loci delicti commissi* is accompanied by exceptions reflecting either a recognition of the free
will of the parties in this area, or circumstances of proximity such as common
nationality or habitual residence of the parties involved, or the more flexible criterion
of the closest ties.

While in some countries the *lex loci delicti commissi* is regarded as a neutral
criterion, in others the different ways of understanding this rule leave the injured
party free to choose the law that is most favourable to his or her interests.

An example of the rule of *lex loci delicti commissi* set out in clear and simple
form as a connecting factor for cases of non-contractual responsibility can be found
in Latvian law. The choice-of-law rule is set out in Article 20 of the *Civil Law*, which
states that

‘Obligations arising from wrongful acts shall be adjudged in accordance with the law of the place
where the wrongful acts took place’.

Therefore, given that no specific or special choice-of-law rule exists for violation via
the press of privacy and rights relating to personality, the law of the place where the
wrongful act took place has to apply. In the specific field of media violations of
privacy and rights relating to personality, the usual problems may arise when
determining where the wrongful act occurred, if the place of production, publication
and distribution and the place (or places) where the damage has occurred are not
the same. The law does not, therefore, solve the problems posed when the event
giving rise to damage and the result of the illicit act are in different countries, and it
must therefore be jurisprudence that establishes the criteria to be used in each
specific case to determine where the damaging act took place.

Another example, similar to the law of Latvia, can be found in Greek legislation. In
Greece, the law applicable to the obligations arising from wrongful behaviour, under
Article 26 of the Civil Code, is the law of the place where the wrongful behaviour
was committed. This very general provision also leads to the same problems of
interpretation as offences at a distance and disseminated or multiple-location
offences, common in press violations of rights relating to personality. However,
Greek jurisprudence offers some guidelines for overcoming the problems that arise
when the damage is caused simultaneously in Greece and elsewhere; Ruling
1143/2003 of the Supreme Court of Greece establishes that Greek courts are
competent and Greek law is applicable. Jurisprudence in Greece has therefore
proved to be opposed to the distributive application of the laws of the states where the infringement of the rights relating to personality took place.

Where there is a divergence between the place of the operative event or the event giving rise to the damage and the place of the resulting damage, the wording of specific regulations indicates that some countries incorporating the rule of *lex loci delicti commissi* tend to rule in favour of the former, although in practice doubts can be seen to remain.

This is the case of the Spanish legal system, where Chapter IV Article 10.9 of the Civil Code governing the rules of international private law provides that non-contractual obligations shall be governed by the law of the place where the act from which they have arisen took place. In the Spanish system, neither jurisprudence nor case-law offers clear and decisive criteria to establish the meaning of Art. 10.9 of the Civil Code when there is a possibility of applying both the law of the place where the event giving rise to the damage occurred and the law of the place where the damage is manifested. Arguments have been made in favour of both criteria. Nor can the theory of ubiquity be dismissed in Spanish Law. Finally, case-law tends to favour the introduction, by way of jurisprudential development of Art. 10.9, of the parties’ freedom to choose the law applicable and the exception clauses.

Art. 48 of the Austrian Law of 15 June 1978 on private International Law (*IPRG*, published in the Austrian Official Journal, *BGBl*. No 304/1978), also states that, in the absence of a choice of law by the parties, disputes relating to non-contractual obligations are governed by the law of the country where the harmful conduct takes place. However, Austrian case-law has interpreted that the criterion of the *lex loci delicti commissi* can be that of the place where the injured party has suffered the affront and where the effects are felt most deeply; this place will in general be the habitual residence of the injured party. The Austrian conflict of laws rules determine the law that applies to issues such as deciding whether there is an obligation to indemnify, who must pay the indemnity for damages and the amount thereof.

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Along the same lines as the Spanish and Austrian conflict-of-laws rules, Art. 31, paragraphs 1 and 2, of the Private International Law of Poland provide that a non-contractual obligation is governed by the law of the country where the act that constitutes the source of the obligation took place. In Luxembourg, the liability of the author of the harm is governed by the law of the place where the harmful act occurred. Finally, in Sweden, the issue of the law applicable to non-contractual obligations is not governed by the Law of 12 November 1965 on Private International Law. However, in the order in case ref. NJA 1969 p. 163, case-law has maintained that, in relation to non-contractual issues, liability to indemnify for damages is determined according to the law of the country in which the harmful act occurred (lex loci delicti commissi). In that case, the fact that the person who caused the harm and the person who suffered it might have the same habitual residence was not taken into account. There is no case-law that deals with the issue of which law would apply when the country where the act that caused the harm took place and the country where the harm actually occurred are different.

Some national laws incorporate the rule of ubiquity. According to this rule, in cases of tortious acts committed at a distance, the lex loci delicti commissi relates to both the law of the place where the causal event occurs and also to the law of the place where the harm is manifested. Whereas the place where the causal act occurs tends to be equated with the place of habitual residence of the author of the harm (as has been made evident in the case-law of the ECJ in the Fiona Shevill case), the place where the harm is manifested tends to be equated with the place of habitual residence of the victim. However, the interpretative decision of the ECJ to regard the head office of the publisher as the place of the causal event is still to a certain extent unsatisfactory; the place of publication or the place where the defamatory material is distributed could also be argued to be the place of the causal event.

Art. 62.1 of the Private International Law of Italy provides that:

‘1. La responsabilità per fatto illecito è regolata dalla legge dello Stato in cui si è verificato l’evento. Tuttavia il danneggiato può chiedere l’applicazione della legge dello Stato in cui si è verificato il fatto che ha causato il danno’.

This article clearly incorporates the rule of ubiquity. Although the general rule is that liability derived from a tortious act is governed by the law of the country where the
harm is confirmed, the injured party may request application of the law of the country where the act that caused the harm has been confirmed. It is noted that the Italian rule favours the position of the injured party, giving him the opportunity to choose to apply, in these cases, the rule that is most favourable to his interests. In the case of violations of privacy and other personality rights, the issue will be to determine which is the place where the causal event occurs (the place of habitual residence of the publisher, the place of publication or the place where the defamatory material is distributed, or all of these) and which is the law of the place where the harm is manifested (the place of publication or distribution of the defamatory material or the place of habitual residence of the injured party, or all of these).

In the case of Germany, the rule of ubiquity also comes into play. Article 40 of the EGBGB provides that claims for damages arising from tortious conduct are governed, in principle, by the law of the country where the tortious act occurred (lex loci delicti commissi). However, the victim may require that the law of the country where the breach of the legal right occurred shall be applied. According to case-law, in German law, the applicable law may be that of the place where the publication appeared (which is generally the place of the publisher’s head office) and the various places of distribution (where it has been made available for sale)\(^{51}\).

As we can see, injured parties have the right to choose and may ask for the law to be applied of the country where the result occurred, instead of the law of the place where the tortious act was committed. This is usually the place of the victim’s habitual residence and each place of distribution. In reality, the applicable law of the place where distribution took place will only be relevant when the injury is suffered in each of the places where such distribution occurred (the mosaic system). In the event that it occurs in different countries, the victim has the right to sue in each country but the claim will be limited to the damages occurring in each country.

According to the laws of Slovakia and the Czech Republic, the conflict-of-laws rules applicable to cases of infringement of personality rights are found in Law No 97/1963, on International Private And Procedural Law. There are no specific rules that govern cases of infringements of personality rights and so the general rules

\(^{51}\) Ibid., pp. 77.
relating to non-contractual obligations will apply. According to Art. 15 of the Law (applicable in both countries):

‘Claims to compensation of damages shall be governed by the law of the place where the damages occurred or by the law of the place where it came to the event that justifies the right to compensation of damages unless the matter is non-fulfilment of an obligation following from agreements or other legal acts’.

Therefore, according to the rule of ubiquity, claims for compensation for damage caused to personality rights will be governed by the law of the place where the damage occurred or by the law of the place where the act that gave rise to the damage took place.

In Holland, the Law on conflict of laws in relation to tortious acts (Wet conflictenrecht onrechtmatige daad) provides that a tortious act will be governed by the law of the country where that act occurred (Article 3, paragraph 1, of the WCOD). However, there are several exceptions to this rule, for example, when the consequences of an act are suffered in a country other than the country where it occurred, this latter law may be applied52.

Alongside the aforesaid laws of the Member States that clearly incorporate the rule of ubiquity, there are other laws that suggest particular solutions.

52 District Court of Arnhem, February 14, 1997, NIPR 1997, 247. The Chairman of the Arnhem District Court must decide on a case in which certain Dutch claimants argue the liability of the German magazine ‘Stern’ for the damage caused to their reputation and good name by a publication. The claimants who reside in Curaçao are claiming against the journalist who wrote the article, who lived in Holland. The new magazine was published in Germany and in Holland. According to the Chairman, Dutch law applied because the distribution of the publication and the consequences of the damage mainly occur in Holland. In another case, Court of Appeal, January 11, 1996, NIPR 1997, 333, between the Dutch corporation Ahold and the Russian corporation Tonar, Dutch law was also applied by the Court of Appeal of Amsterdam. However, unlike the situation in the previous example, the article was only published in Holland, whereas the damage affected a foreigner (Tonar). Ahold and Tonar had signed a collaboration agreement. After one year, Ahold terminated the agreement with Tonar. A journalist from a Dutch newspaper asked Ahold what had happened and, with the information obtained, he had published an article about this. Tonar believed that the article misrepresented the reality of the situation. The Court decided that Dutch law applied to this case because the statements in the newspapers were made in Holland, by and on behalf of a Dutch organisation to the journalist and for a Dutch public. In this case, there was no argument that could prove that the harmful consequences had extended beyond Holland. See also Dutch Supreme Court November 19, 1993, NJ 1994, 622, and Dutch Supreme Court November 19, 1993, NJ 1994, 622, ground 4.2.
In French Law, the general rule relating to the law applicable to non-contractual obligations is found in Art. 3 of the Civil Code. According to this rule:

CC ‘Les lois de police et de sûreté obligent tous ceux qui habitent le territoire. Les immeubles, même ceux possédés par des étrangers, sont régis par la loi française. Les lois concernant l’état et la capacité des personnes régissent les Français, même résidant en pays étrangère’.

This is a confusing statement which entails regarding the rules relating to liability for an offence, in the sense of the Civil Code, as police laws and subject to the criterion of residence in the territory, which is also imprecise and allows of various interpretations53.

In cases of tort, case-law has generally chosen the law of the place where the offence was committed (lex loci delicti commissi), which has been the traditional solution of case-law and doctrine since the Middle Ages. The rule was established by the Lautour and Luccantoni decisions of the Cour de Cassation54.

There are numerous arguments in favour of this opinion. It is the only neutral criterion of connection in the absence of a decisive reason for choosing the law of the victim over and above that of the author or the other way around. The consequences of the offences or quasi-offences are associated with the country of the party against which the offence was committed. The law of the place of the offence and the law of the forum often coincide since the Court of the place where the harmful event was committed has jurisdiction (Art. 46 new Civil Code of Procedure and Art. 5.3 Lugano Convention and of the Brussels Regulations I).

Therefore, in the absence of International Treaties to the contrary, according to French case-law, non-contractual obligations are governed by the law of the place where the act from which they arose took place55. In the case of a compound or

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complex offence, case-law investigates and seeks out the country that has the closest links to the harmful act56.

Specifically in cases involving violation of personality rights, the issue becomes complicated. Classifying this category of offence as connected to non-contractual obligations presents certain problems. Firstly, this type of offence does not always belong in the same category but varies according to the rights being protected (right to privacy, right to private or family life, right to image, to decency), according to the materials and technologies concerned (press, radio, Internet), and from the point of view of the means of protection of victims (whether civil or criminal means of protection). This diversity necessarily affects how the place of the offence is determined under the conflict of laws rule; a degree of flexibility is essential here and other connecting factors must be taken into account, such as the causal act, and the domicile or residence of the victim. At the same time, the classification of the offence in terms of jurisdictional law cannot be completely disregarded. In this sense, other factors which may not be associated with rules on conflicts must also be considered57.

In cases of attacks against the person, claimants generally set themselves ‘spontaneously’ within the area of influence of civil liability under Art. 9.2 of the Civil Code. The Cour de Cassation has declared that the consequences of violating a person’s private life or of infringing a person’s right over his image will be governed by the law of the place where the infringement occurred, thus relying on the classification of the offence.

This choice is complicated when the acts occur in different places and the place of commission can no longer be a deciding factor. Then the harm should take priority over the act giving rise to it and, to resolve the conflict, one should choose the claimant’s domicile or place of principal activity (Gaudemet Tallon order 1976). The claimant can also be allowed to opt for the place where the author of the violation is assured56.


established. But the most realistic solution, according to French case-law, seems to be to consider that, in cases of a violation via the press causing different damage in each country because of different distribution levels, the laws of the countries where the violation has occurred should be applied in a way that reflects the distribution. This option would mean taking account of the local distribution criterion and assessing the damage in each country differently\(^{58}\).

In short, case-law concerning violations of private life, or infringement of the right to image, favours the law of the place where the acts were committed. French case-law has regularly used the criterion of the place of distribution in matters concerning press-related harm to personality rights, when discussing the criterion of the place where the acts were committed\(^{59}\).

In Slovenia, there is no special conflict-of-laws rule on non-contractual obligations derived from press infringement of privacy or personality rights. So the law applicable will follow the general rules for cases of non-contractual obligations. This is Art. 30 of the Private International Law and Procedural Act. The first paragraph of this rule provides that:

> For non-contractual obligations for damages, the law of the place where the action was committed shall be used. If it is more favourable for the injured party, the law of the place where the consequence occurred shall be used instead, but only if the perpetrator could or should have foreseen the location where the consequence occurred.

This is a conflict of laws rule based on the criterion of the *lex loci delicti commissi* which incorporates the rule of ubiquity but in a somewhat particular manner, by establishing it conditionally. That is, in order for the law of the place where the harm occurred to apply, instead of the law of the place where the act was committed, it must (a) be more favourable for the victim and (b) the perpetrator

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should have been able to foresee that the consequences of his act would be felt in that place.

In Estonia, the conflict-of-laws rule applicable to violations of privacy and other personality rights also establishes the rule of ubiquity conditionally, and on a particular basis. To determine the law that applies in these cases, the provisions of the Estonian International Private Law Act of 2002 must be studied. The rules to be taken into consideration are Articles 50 to 54. There is no specific rule for infringements of these rights by the press, so these will come under the general rules for non-contractual obligations. Art. 50 of the Estonian International Private Law Act sets out the general rule. According to this rule:

‘(1) Claims arising from unlawful causing of damage shall be governed by the law of the state where the causal act or event occurred.
(2) If the effects are not felt in the state where the causal act or event occurred, the law of the state where the effects of the act or event became evident shall be applied at the request of the injured party’.

In cases of non-contractual obligations derived from tortious acts therefore, the Estonian Courts will apply the law of the country where the harmful act occurred. However, if the effects, that is, the harm, are not felt in the country where the causal act took place, the law of the country where the effects are evident will be applied. This latter law will only apply if the injured party so requests, that is, the victim of the tortious act. The intention is thus to protect the victim by giving him the option of choosing, in these specific cases, to apply the law that is most favourable to his interests, in turn allowing him to avoid application of a law that has not provided for this situation.

Finally, in Portugal, conflict-of-laws rules relating to non-contractual obligations also incorporate the rule of ubiquity when applying the criterion of the lex loci delicti commissi which follows this rule. However, as in the above examples, this rule has a particular basis and is conditional. According to the first and second paragraphs of Art. 45 of the Portuguese Civil Code,

‘1. A responsabilidade extracontractual fundada, quer em acto ilícito, quer no risco ou em qualquer conduta ilícita, é regulada pela lei do Estado onde decorreu a principal actividade causadora do prejuízo; em caso de responsabilidade por omissão, é aplicável a lei do lugar onde o responsável deveria ter agido.
2. Se a lei do Estado onde se produziu o efeito lesivo considerar responsável o agente, mas não o considerar como tal a lei do país onde decorreu a sua actividade, é aplicável a primeira lei,'
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desde que o agente devesse prever a produção de um dano, naquele país, como consequência do seu acto ou omissão’.

Therefore, as a first rule, non-contractual obligations relating to violations of privacy and other personality rights are governed by the law of the country where the activity that caused the harm takes place. However, if this law does not regard the author of the harm as liable, but the law of the country where the harmful effect is suffered does consider him to be responsible, then this latter law will apply, provided that the author could or should have foreseen that, as a consequence of the act or omission, the harm would occur in this country. As a result, in order for the rule of ubiquity to come into play, a double condition must be met: first, the law of the country where the causal activity takes place should not consider the author to be responsible for the harm caused. Second, for the law of the place where the harm occurred to apply, the author should have been able to foresee that his act could cause harm there.

4.5.2.2 ‘Double actionability’ rule.

The common law countries (United Kingdom, Ireland, Malta and Cyprus) have traditionally had a particular conflict-of-laws rule to determine the applicable law in relation to non-contractual obligations. Known as the ‘double actionability rule’, its origin is in three English orders of the nineteenth century60 and it has been maintained as a general rule, although with certain variations introduced by case-law61, until very recently.

At present, the almost complete supremacy of the double actionability rule is owed principally to the adoption in the United Kingdom of the Private International Law (Miscellaneous Provisions) Act 1995, Part III, in Choice of Law in Tort and Delict.

However, in spite of the importance of the Private International Law (Miscellaneous Provisions) Act 1995, the double actionability rule continues to be the conflict-of-laws rule to be used in determining the law applicable to disputes

60 The Halley (1868), LR 2 PC 193, Phillips v. Eyre, 1870, LR 6 QB 1 and Machado v. Fontes, 1897, 2 QB 1.
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relating to non-contractual obligations derived from defamation. It is possible to maintain that the double actionability rule, which was the general rule in other times, has undergone a kind of conversion into a special rule for defamation disputes.

In the laws of the United Kingdom, therefore, there is no conflict–of-laws rule with a legal basis that defines which country’s law is applicable in cases of defamation. In fact, Section 13 of the Private International Law (Miscellaneous Provisions) Act 1995, Part III, on Choice of Law in Tort and Delict, excludes defamation claims. This provision provides that:

‘1. Nothing in this Part applies to affect the determination of issues arising in any defamation claim.
2. For the purposes of this section ‘defamation’ claims means –
a. Any claim under the law of any part of the United Kingdom for libel or slander or for slander of title, slander of goods or other malicious falsehood and any claim under the law of Scotland for verbal injury; and
b. Any claim under the law of any country corresponding to or otherwise in the nature of a claim mentioned in paragraph (a) above.’

However, in infringements caused by the media, cases of defamation or calumny, verbal insults or similar cases, it is not clear whether these cover all possible cases of infringement or violations of personality rights.

The exclusion of Section 13 has led case-law to give specific answers.

English case-law has traditionally used the double actionability rule, according to which the dispute, in cases of non-contractual obligations, had to be actionable in accordance with both the lex loci delicti and the lex fori. Over time, this criterion has been replaced by the rule of the lex loci delicti; clearly (although cases of defamation are expressly excluded) from the adoption of Part III of the Private International Law (Miscellaneous Provisions) Act 1995.

Nowadays, this cumulative criterion (lex loci delicti and the lex fori) or the common law double actionability rule is maintained in disputes concerning liability in cases of defamation, since they are excluded by Section 13\(^2\). Thus, cumulative application of the law of the place of distribution and the lex fori is required.

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The double actionability rule of the common law, as manifested by Section 10 of the *Private International Law (Miscellaneous Provisions) Act 1995* which provided for its abolition:

‘a) require actionability under both the law of the forum and the law of another country for the purpose of determining whether a tort or delict is actionable; or b) allow (as an exception from the rules falling within paragraph (a) above) for the law of a single country to be applied for the purpose of determining the issues, or any of the issues, arising in the case in question’.

The double actionability rule is applied in claims brought before the English courts for harmful actions carried out by the defendant abroad. When the defendant’s actions that caused the harm took place in the United Kingdom, there are no problems in United Kingdom law concerning the applicable law, even in cases that have substantial connections with another country.

In order to satisfy the double actionability rule, the claimant must prove that the defendant would have been responsible under national law if the facts had taken place in England and that, by his conduct, he has incurred civil liability according to the law of the place where he committed the tortious act. However, this rule may be interpreted flexibly in cases where its application can lead to an injustice. In such cases, the law that has the most significant connections to the act is applied and thus the liability of the defendant is established63.

The principal motive for the exclusion of personality rights from the *Private International Law (Miscellaneous Provisions) Act 1995* was the fear that freedom of expression (in particular, that of the press) would be prejudiced by application of the new conflict-of-laws rules64. The aim is therefore to safeguard freedom of expression, as provided by English law, in the event of possible application of foreign laws that are more restrictive as regards this freedom.

The impact of the double actionability rule, as developed by the law, principally case-law, of the United Kingdom, is very important. In this connection, we should remember that the source of Malta’s conflict-of-laws rules is basically those of the United Kingdom. At present, there is no Maltese law that clearly Establishes its own conflict-of-laws rules. As a consequence, legal decisions are the only national

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source of these rules, which interpret and apply the conflict-of-laws rules of the United Kingdom; this is the double actionability rule according to the case-law interpretation made in the cases Phillips v. Eyre (1870), Boys v. Chaplin (1971) and Red Sea Insurance v. Bouygues SA (1994).

The same considerations serve for Cyprus. The Cypriot jurisdiction is a common law jurisdiction and the common law principles of English law will be applied in the courts of Cyprus when there is no specific rule or case-law in Cypriot law for the specific case65. This point has been acknowledged by the courts of Cyprus in the case Cochino v. Irfan66.

With regard to non-contractual obligations, according to the private international law of Cyprus, the central issue is the following: when a claim is presented to the courts of Cyprus based on events that occurred in another country, should the Cypriot courts declare themselves competent? And, if so, which law should they apply?

When the tort occurs in Cyprus, the courts will apply the substantive law of Cyprus. This is the same solution provided by English law. This option has been confirmed by the Supreme Court of Cyprus in the case Georghiades and son v. Kaminaras67 (application of the lex loci delicti commissi).

In cases of defamation that occurred abroad, the courts of Cyprus will apply English private international law. In this way, the double actionability rule will apply. In order for the Cypriot courts to be able to hear the claim, it must be actionable both in accordance with the law of the country where the tort occurred (lex loci delicti) and in accordance with the law of Cyprus (lex fori).

The court in the Coupland v. Arabian Gulf Oil Co. case considered that, once the double actionability requirement had been met, the law in accordance with which the court must decide should be the lex fori, to the extent that this corresponds to the provisions of the lex loci delicti. This decision has been cited and approved by the Supreme Court of Cyprus in the Safarino v. Stavrinou case68.

Civil liability under the *lex fori* and the *lex loci delicti* must exist between the same parties involved in the proceedings. In the event that, under the *lex loci delicti*, the action can only be brought by a person other than the claimant, this action may not be filed in Cyprus. In the same way, if the defendant according to the foreign law cannot be sued in accordance with the *lex fori*, this action may not be brought.

The general rule of double actionability does, however, have an exception. According to this special rule, in specific cases, the court may apply another law when this presents closer links to the case and the parties. This exception increases the flexibility of the rule and cases of injustice that might arise as a consequence of the application of the general rule are avoided, although it also has the effect of increasing legal uncertainty.

The solution adopted by Irish law with regard to the conflict of laws rule relating to non-contractual obligations has been developed along with the evolution of other common law laws.

However, the double actionability rule of the Anglo-Saxon laws was radically rejected in the mid-eighties. The decision of the Supreme Court of Ireland, in the *Grehan v. Medical Incorporated and Pine Valley Associates* (1986) case, criticised and rejected the double actionability rule established in the *Phillips v. Eyre* case. The *Supreme Court of Ireland* stated that:

> ‘the rule in Phillips v. Eyre… has nothing to recommend it because it is capable of producing quite arbitrary decisions and it is a mixture of parochialism and a vehicle for being, in some cases, unduly generous to the plaintiff and, in others, unduly harsh. In my view, so far as choice of law in torts is concerned, the Irish courts should be sufficiently flexible to be capable of responding to the

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69 Cf. Ibid., p. 883.
70 Cf. Ibid., p. 883.
71 Vid. P.M. North, ‘Reform…’, loc. cit., pp. 231 y ss.; O’Higgins, P. and P. Mc. Grath: ‘Third Party Liability in the Field of Nuclear Law and Irish Perspective’, at http://www.nea.fr/html/law/nlb/nlb-70/007_021.pdf, p. 18. Subsequently, in the *An Bord Trachtala v. Waterford Foods Ltd* case, High Court, 25 November 1992, the court opted for the traditional double actionability rule. However, the comments made by the Supreme Court in the *Shortt v. Ireland, the Attorney General and British Nuclear Fuels Limited* (1997) case, concerning issues of international legal jurisdiction and applicable law, are of great interest. In this decision, the court stated that: ‘Prima facie it is difficult to see how any provision of English law could make legal in Ireland injury or damage which would otherwise be tortious under Irish law. Certainly it is hard to see how any provision of UK law could deprive the Irish courts of jurisdiction which they would otherwise have. Prima facie the relevant law would appear to be the *lex loci delicti* rather than the law of the United Kingdom’. 

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individual issues presented in each case and to the social and economic dimensions of applying any particular choice of law rule in the proceedings in question’.

The Court has adopted a flexible position in respect of the conflict-of-laws rule to be used in cases of non-contractual obligations. It seems to defend the use of different conflict of laws rules depending on the case; conflict-of-laws rules seem to be selected having regard to the socio-economic consequences that the adoption of one or another rule would involve. However, the alternative that it suggests to the double actionability rule is not entirely satisfactory, in particular, because it does not establish what these rules could be. There is no reference to the initial conflict-of-laws rule nor to the alternative solutions, nor is there any reference to which are the significant connections or links that should be taken into consideration.

It is therefore possible to state that, having rejected the double actionability rule, the conflict-of-laws rule or rules of Irish law are a source of marked legal uncertainty.

4.5.3 Special conflict-of-laws rules for non-contractual civil obligations arising from media infringement of privacy and other personality rights

The trend towards specialisation of the conflict-of-laws rules in this area of private international law has influenced some of the national laws of the Member States. So far we have examined those laws where there is no specific conflict-of-laws rule for cases of non-contractual obligations arising from media infringement of privacy and other personality rights.

In laws that provide specific conflict-of-laws rules, the aim is to take account of the special nature of cases of non-contractual obligations relating to media violations of personality rights, without thereby cancelling the criterion of the \textit{lex loci delicti commissi}. These special rules usually follow the theory of ubiquity, by incorporating a series of connections based on the criteria of the place where the causal event occurs and the place of the result or harm. The choice between the various possible applicable laws is usually given to the injured party, although freedom of choice may in some circumstances depend on foreseeability by the author. By providing for various connections, the aim is to respond to tortious acts
committed at a distance. Furthermore, choice by the injured party means that the liability of the author is governed by a single law, thus avoiding distributive application of the laws of the countries where the harm has been manifested.

An initial point needs to be made about the double actionability rule. It must now be regarded as a special de facto rule, despite the fact that it originated as a general rule for any type of non-contractual obligation. In fact, in the United Kingdom, at present, this rule only operates in cases of violations of privacy or other personality rights. However, the rule survives, not because it is regarded as constituting an appropriate rule for this type of dispute (although the application of the lex fori is justified because of the importance of freedom of communication and information in English law) but because of the impossibility of achieving any agreement on a special rule that might provide a better response to the interests involved.

In Hungary, when we refer to violations that affect personality rights, we must turn to Article 10 of Law-Decree No 13 of 1979 on International Private Law. Article 10.1 states that a person’s capacity and also the status and rights of the person are governed by personal law. Then, the second paragraph of Article 10 provides that:

‘The law applicable in the place and at the time of the violation of rights shall apply to claims arising from the violation of the rights attached to one’s person; if, however, the Hungarian law is more favourable for the person suffering the injury in respect of the resultant compensation or indemnification, the claims shall be adjudged according to that law.’

If we consider that the privacy rights with which this study is concerned come within the area of application of this Article — as would seem logical — Article 32 (the general rule on the law applicable to non-contractual obligations) would be displaced by the necessary application of Article 10.2.

Thus, although the general rule would continue to be the lex loci delicti, that is, the law of the place where the personality rights were violated, the play between the alternatives established in Article 32 disappears\(^\text{72}\). The law applicable in the place

\[^{72}\text{Art. 32 of the Law-Decree sets out the general conflict of laws rule relevant to non-contractual liability. This Article provides as follows: ‘(1) The law applicable at the place and time of the activity or omission causing damage shall apply to the liability for damage caused outside contracts, unless this Law-Decree provides otherwise. (2) If it is more favourable for the injured party, the law of that state shall apply, in the territory of which the damage came about. (3) If the}\]
Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. JLS/2007/C4/028. Final Report

and at the time of the violation of the person's rights would only cease to be applied if it is confirmed that Hungarian law (the lex fori) is more favourable to the injured party as regards the compensation or indemnity to be received.

This last exception clearly shows the intention of the Hungarian legislator to favour the position of the injured party\textsuperscript{73}. The rule under Article 10.2 is presented as a special rule, a substantially directed conflict-of-laws rule that puts the protection of the rights of the person over and above the right to freedom of information, by providing for the application of the lex fori — which acts as the minimum standard — when this is more favourable to the injured person.

The private international law rules of Lithuania published in the Civil Code of The Republic of Lithuania incorporate a specific conflict-of-laws rule for determining the law applicable to claims resulting from the violation of personal non-property rights. Article 1.45 of the Civil Code (law applicable to claims resulting from infringement of personal non-property rights) provides as follows:

\begin{quote}
1. Claims for reparation of damage resulting from infringement of personal non-property rights committed by the mass media shall be governed, depending on the choice of the aggrieved person, by the law of the state where the aggrieved person is domiciled, or has his place of business, or where the infringement occurred, or by the law of the state where the person who caused the damage is domiciled or has his place of business.

2. Response to the media (denial) shall be governed by the law of the state in which the publication appeared, or the radio or television program was broadcast.
\end{quote}

What is certain is that this rule is not dissociated from the criterion of the lex loci delicti either, because it incorporates several connecting factors that can be regarded as different manifestations of this rule: the country where the injured person has their residence; the country where the injured person has their place of business; the country where the violation occurs; the country where the person who caused the harm has their residence and the country where the person who caused the harm has their place of business.

\textsuperscript{73} T. Kadner Graziano, Gemeineuropäisches Internationales Privatrecht, Tübingen, 2002.
Therefore, the criterion of the *lex loci delicti commissi* in this rule follows the rule of ubiquity. It will be the injured party who selects the law from amongst any of the options established by Article 1.45. The intention is thus to provide a response to the difficulties caused by tortious acts committed at a distance, provided any of the places provided for in the rule are foreseeable to the parties. Furthermore, it seems that implementing this rule overcomes another of the problems characteristic of media violations of personality: the problem of dissemination of the violation over several countries or, in other words, the multi-location nature of the tortious act (either as the place of origin of the harmful event or as the place where the harm is manifested) in various countries. In principle, when the injured party chooses one of the stated laws, this law will govern liability for all the harm caused to the injured party, thus avoiding distributive application by a single judge of as many laws as there are places where the harm has been manifested.

The Belgian Private International Law Code introduces a special conflict-of-laws rule for cases of defamation or violations of private life or of personality rights (Article 99.2.1).

Article 99.2.1. contains a specific reference to violations of private life and provides that the obligation derived from a harmful act in a case of defamation or violation of private life or of personality rights will in any event be governed by the law of the country in whose territory the harmful act or the harm itself occurred or threatens to occur, unless it is established that the liable person cannot foresee that the harm is going to occur in that country.

As we can see, this is a rule that offers the injured party the possibility of choosing between the law of the place where the harmful act occurred and the place where the harm occurred, whether now or in the future. This is an application of the concept of ubiquity in relation to the criterion of the *lex loci delicti commissi*, which tends to favour the injured person and which can help to avoid the problems caused by dissemination of the damage throughout several countries, by applying a single law to the liability of the author in respect of all instances of the harm.
The place where the act causing the damage is located will be the place where the written medium has been published or the place where the programme relating the events has been broadcast. For its part, the place where the harm occurs normally tends to coincide with the claimant’s place of habitual residence.

However, the claimant’s choice is not presented as unlimited but as conditional. The natural or legal person liable may argue that they could not have foreseen that the harm would occur in a particular place and can thus avoid application of the law of that country. In that case, it will only be possible to take into account the place where the causal event took place. Foresight as to where the damage will occur depends on the type of broadcast (whether the local press is involved or it is a programme broadcast over national channels or world satellite). The language used will also be an element to take into consideration. The same guidelines are applied for the Internet.

The Bulgarian Private International Law Code, *Prom. SG. 42/17 May 2005*, also incorporates a special conflict-of-laws rule for obligations that arise from violations of personal rights committed by the media. According to Article 108 of the Bulgarian DIPr. Code, obligations arising from violations of personal rights by the media and especially by print, radio, television or other means of information will be regulated at the injured party’s choice by the law of the country of their habitual residence; or the law of the country where the harm has occurred; or the law of the country of the habitual residence or place of activity of the person claimed liable. This article, along the lines of the above-mentioned conflict-of-laws rule of Lithuania, uses the criterion of the *lex loci delicti commissi* in accordance with the theory of ubiquity. For its part, the choice of a single law applicable by the claimant makes it possible to overcome the problems raised by multi-location harm and distributive application of the laws of the countries where these instances of harm are located.

Application of the rule of ubiquity is conditional in this case since it is only possible to opt for the law of the injured party’s habitual residence, or that of the country where the harm has been manifested, if the person claimed liable could have foreseen that the harm could occur in those countries.
With regard to the right of objection, Article 108.3 of the Bulgarian DIPr. Code provides that, in the case of violations of personal rights by the media, this right of objection will be determined according to the law of the country where publication took place or the programme was broadcast. Finally, provision 4 of this same article states that the foreseeability under paragraph 1 will also apply in relation to obligations that arise from the violation of rights relating to personal data protection.

According to Bulgarian law, together with the specific provision examined above, the general provision under Article 2.2 of the DIPr. Code must be taken into account. According to this, if the applicable law cannot be determined in accordance with the reasons provided in Part Three (which includes Article 108), the choice will be the law of the country with the closest links on the basis of other criteria. So it is only when the connections under Article 108 are not effective (on a very few occasions) that one would need to determine the law with the closest links according to other criteria.

In the case of Romania, Law No 105 of 22 September 1992 on the Settlement of Private International Law Relations regulates the issue of the law applicable to non-contractual obligations deriving from media infringement of personality rights. The Law takes account of the special nature of pain and suffering, and envisages specific conflict-of-laws rules for these cases74. Thus, Article 112 of the Law provides that:

‘(1) The claims for redress based on a prejudice caused to the personality by the mass media, especially by press, radio, TV or by other public means of information shall be governed, at the choice of the injured person, by:

a) the law of the state of his domicile or residence;

b) the law of the state where the damaging outcome emerged;

c) the law of the state where the author of damage has his domicile or residence or registered office.

(2) In cases provided under letters a) and b) it shall also be required that the author of the damage should have reasonably expected that the effects of the prejudice caused to the personality be produced in one of the two states’.

This article largely coincides with the Bulgarian conflict-of-law rule. According to this, the injured party may opt for any of the following three laws: the law of the country of their domicile or residence, the law of the country where the harmful results were apparent, or the law of the country where the author of the damage has

their domicile, residence or registered office. This three-way choice clearly favours the victim.

However, as stated in paragraph 2 of the same article, in order for the injured party to be able to choose the laws designated by letters a) and b) (the law of the injured party’s country of domicile or residence, or the law of the country where the harmful results were apparent), the following is also required: the author of the harm must have reasonably expected that the harm would be caused in one of those two countries. The aim of this limitation is somehow to ensure a connection based on foreseeability between the author and the harm in a place that justifies the application of its laws.

Finally, Article 113 of the Law provides a specific conflict-of-laws rule for cases of claim that do not involve compensation but a right of response or rectification. In such cases, this right will be governed by the law of the country where the publication or broadcast took place.

### 4.5.4 Exceptions to the general rule of the ‘lex loci delicti commissi’

The rule of the *lex loci delicti commissi*, in its various expressions, is the rule most commonly found in the national laws of the Member States in the area of non-contractual obligations deriving from media violations of privacy or other personality rights. However, some of these national laws incorporate exceptions to this general rule. As we shall see below, under certain circumstances some laws leave the parties free to choose the applicable law, or they give priority to the common residence or nationality of the parties as a connecting factor, or they provide an escape clause based on the existence of closer links with another country, or they allow application of the law of the injured party’s habitual residence, or, finally, they also recognise a certain role for the *lex fori* in some cases.

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75 Vid. ibid.
4.5.4.1 Freedom of choice

Freedom of choice by the parties in media violations of personality rights does not play a large part in practice. The reason for its lack of use may be that this type of litigation brings together two parties who are not very inclined to negotiate\textsuperscript{77}. However, some of the laws of the Member States expressly allow for the possibility that the parties in dispute may choose the law applicable to their dispute.

This is the case with Estonia. The Estonian International Private Law Act of 2002 allows (limited) freedom of choice by the parties in the area of non-contractual obligations. For example Article 54 of the Law states that the parties can always agree to application of the law of Estonia after the act giving rise to the non-contractual obligations has taken place.

Therefore freedom of choice by the parties, although recognised in the Law, is limited. Firstly, their choice is limited to Estonian law. Secondly, the choice will only be valid if it is made after the act that gave rise to the liability. And, thirdly, the law also provides that the choice of law may not affect the rights of third parties.

On the same lines, in Germany Article 40 of the EGBGB states that claims for damages arising from tortious conduct are, in principle, governed by the legislation of the country where the tortious act occurred (\textit{lex loci delicti commissi}); but in all cases, the parties may, under Article 42 of the EGBGB, choose the applicable law after the act that gave rise to the liability.

Austrian Law gives parties the possibility of choosing the law that will govern liability arising from infringement of personality rights. Furthermore, the parties’ choice is presented as the first criterion for determining the applicable law; it is only in the absence of this choice that the criterion of the place of occurrence of the harmful conduct will be applied.

In Holland, contrary to the provisions of the conflict-of-laws rule in the area of tortious acts (Article 3 of the \textit{Wet Conflictenrecht Onrechtmatige Daad} (WCOD)),

\textsuperscript{77} T. Kadner Graziano, \textit{La responsabilité délictuelle}, ... op. cit., p. 77.
the parties may choose the applicable law in accordance with Article 6 of the CWCOD.

4.5.4.2 Common nationality or habitual residence

Another of the exceptions that is found in more than one law of the Member States relates to common habitual residence of the parties. In this case, this special criterion derives from an argument of proximity of the litigation to the parties’ common habitual country of residence. It is assumed that, in these cases, the application of the law of the common habitual residence is best able to resolve the issue because it is the law with the closest links to the relationship, being the place where both parties live and carry out their activities. It is also the law to which they entrust both the protection of their personal rights and the regulation of their information activity. In some of the laws, the connection of habitual residence appears together with the connection of common nationality.

Applying the law of common nationality or residence of the person who is responsible and the injured party solves two sets of problems: those caused by tortious acts at a distance and those caused by tortious acts disseminated in more than one country, since it indicates a single law applicable to all the harm.

In Italian law, the second paragraph of Article 62 of Law No 218 on Private International Law, of 31 May 1995, provides that, when the tortious act involves only nationals of the same country, who have their residence in that same country, the law of that country will be applied. This special connection prevails over the general rule of Article 62.1 (which states that liability for a tortious act is governed by the law of the country where the harm occurred), although the injured party may still request application of the law of the country where the harmful act occurred.

This special rule of Italian law requires that there should be, simultaneously, common nationality of the persons involved and habitual residence of these persons in the same country. It is only when these two conditions are met that the law of that country will apply. This rule aims to deal specifically with cases where these requirements are met and the parties clearly have a greater connection to a
particular law. It is therefore based on the criterion of closeness which, in principle, favours both parties, since it will be the law most familiar to all the parties involved.

Along the lines of the Italian law, in Poland the combination of common nationality and common domicile in that same country is also required. So if the parties are nationals of the same country and also have their domicile there, the law of that country will apply and this will prevail over the general rule of the law of the country where the act that constitutes the source of the obligation took place.

In Germany and in Holland this special rule has certain slight differences of meaning. There, the only requirement is that the person liable and the injured party should have the same habitual residence, regardless of nationality.

So according to German law, if the person liable and the injured party have the same country of residence at the time when the causal event occurred, the law of the place where they reside will apply and this will prevail over the rule of the *lex loci delicti commissi*, although not over the parties’ freedom of choice. In the case of associations, companies or legal persons, it will be the place of their principal establishment or, in the case of a branch, the place where it is situated.

A particular formula is used by the Portuguese conflict-of-laws rule. In this case, under Article 45.3 of the Civil Code:

*Se, porém, o agente e o lesado tiverem a mesma nacionalidade ou, na falta dela, a mesma residência habitual, e se encontrarem ocasionalmente em país estrangeiro, a lei aplicável será a da nacionalidade ou a da residência comum, sem prejuízo das disposições do Estado local que devam ser aplicadas indistintamente a todas as pessoas.*

Accordingly — and this has priority over the general rule of the *lex loci delicti commissi* — if the author of the harm and the injured party are of the same nationality, the law of that country will apply. It is only in the absence of a common nationality that the factor of common habitual residence is relevant. So if the parties do not have the same nationality, the law of their country of common residence will apply, provided that this point is confirmed.
4.5.4.3 Closest links

The general rule of the *lex loci delicti commissi* is sometimes accompanied by an escape clause based on the criterion of the closest links.

For example, Article 30.2 of the *Private International Law and Procedural Act* of Slovenia provides that, if the law determined under the first paragraph of the article (*lex loci delicti commissi*) does not have a close connection to the relationship and yet there is clearly a connection to another law, this latter law must be used. This rule introduces an important touch of flexibility into the rule. It will be the Court which hears the case which must assess these points and decide, if appropriate, to apply a law other than any of those stated in the first paragraph of Article 30. In principle, this law may be that of any other country, provided that a close connection to the relationship is confirmed. However, the escape clause does not operate in all cases. In order for it to apply, it will be necessary for the law determined by the first paragraph not to have a clear connection to the relationship. If this law has a clear connection, this must be the law applied, even if there is another law that has the same, or even a greater, degree of connection to the relationship.

What are the circumstances to be taken into consideration when determining this connection? In principle, the rule does not say anything about this and so the Court may take into account any fact that it considers appropriate to show the existence of a close connection. Over time, it must be case-law that identifies the nature of these links and the relevance of each one of them. In the meantime, together with increased flexibility, this provision introduces an element of insecurity which may act against the value of the rule in terms of foreseeability.

Article 53 of the Estonian International Private Law Act of 2002 establishes an exception to the connecting factors of Article 50 founded on the criteria of the *lex loci delicti commissi*, on the basis of the closest links. According to this rule, if the non-contractual obligation has a closer link to the law of a country other than those indicated by the above conflict-of-laws rules, the law of that other country will be applied. Furthermore, Article 52, paragraph 2, states when a closer link must be understood to exist. This shows that the closest connection may emerge in particular: 1) from a legal relationship or a connection of fact between the parties, or
2) from the fact that, at the time when the harmful event occurs, the parties have their residence in the same country.

There are some differences between this escape clause and the escape clause provided for in Slovenian law. On the one hand, in this case, the escape clause may become relevant provided that it is shown that there is a law that has closer links to the relationship. In this case it will not be necessary to prove the absence of a clear connection between the relationship and the law determined on the basis of the general rule of the *lex loci delicti commissi*. Furthermore, in this case, the rule itself shows some of the circumstances or elements to be taken into consideration to determine the existence of a closer connection, thus increasing the foreseeability and legal certainty of the rule, although at the cost of a certain flexibility inherent to escape clauses.

In Germany, Article 41 of the EGBGB allows the applicable law determined in accordance with the rule of the *lex loci delicti commissi* to be replaced by another law that, in special circumstances, presents much closer links to the facts.

Austrian law also allows application of the law of the country where the harmful conduct occurs to be replaced by another law, if there is a closer connection of the parties to the law of that other country. The application of the law of this country will prevail, provided that it is the same for all.

### 4.5.4.4 Habitual residence of the injured party

Application of the law of habitual residence of the affected person is not established precisely as an exception to the general rule of the *lex loci delicti commissi*. The fact is that the criterion of the *la lex loci delicti* can lead to the place where the injured party suffered the injury and where the effects are experienced most intensely; this place generally corresponds to their habitual residence. In fact, Austrian case-law has opted for this criterion\(^7\). Therefore, the place of habitual residence of the affected person may be presented as a variant of the place of the result.

\(^7\) *Ibid.*, pp. 80-81.
However, there are few laws of the Member States that expressly provide for the possibility of using the law of the country where the injured party has their residence. This is the case in Lithuania, Bulgaria and Romania. In all these, the choice of the law of the injured party’s habitual residence is presented together with other laws and the injured party must choose from amongst them.

For example, in Romania, Article 112 of Law No 105 of 22 September 1992 on the Settlement of the Private International Law Relations provides that claims based on harm caused to personality by the media (in particular, by the press, radio, TV or by any other public means of information) are governed, at the choice of the injured party, by the law of the country of their domicile or residence, the law of the country where the harmful results occurred or the law of the country where the author of the harm has their domicile, residence or registered office.

However, the second paragraph of the same article states that, in order for the affected person to be able to choose the law of the country of their domicile or residence or the law of the country where the harmful results occurred, there is also a requirement that the author of the harm must reasonably foresee that the effects of the harm would be caused in one of those countries79.

In part because of this requirement just mentioned, there is a debate in Romania as to whether application of the law of the victim’s habitual residence has any independent significance. The dominant opinion is that habitual residence is a variant of the place of the result, so that it would only be applicable if an injury had been suffered there as well, and this would only be the case if the printed product had been distributed in that place80. It is only thus that we understand the limitation of the second paragraph which, for application of the law of the country of the victim’s residence, requires that the author should reasonably be able to foresee that the harm would be caused in this country81.

79 Vid. R. Bogdan Bobei, Legea nr. 105/1992 cu privire..., op. cit..
80 Cf. T. Kadner Graziano, Gemeinrepublikisches..., op. cit..
81 Ibid.
4.5.5 Conflict-of-laws rules substantially aimed at protection of the injured person

One of the issues raised in this area is whether the conflict-of-laws rule that governs non-contractual obligations for harm caused by the media to privacy and other personality rights should be formulated as a conflict-of-laws rule substantially aimed at protection of the injured party. As a general principle, the rule of the *lex loci delicti commissi* is not a rule to protect a person who has suffered harm to their personality rights. It is presented as a neutral rule, due to reasons of proximity to the relationship and foreseeability for both parties.

However, definition of the rule of the *lex loci delicti commissi*, in the case of harm committed at a distance and multi-location harm, is problematic, since it can have various manifestations. It can refer to application of the law of the place where the causal act occurred (if applicable, the residence of the publisher, according to the interpretation of the ECJ) or to the laws of the countries where the results or the harm caused by the causal conduct were manifested (if applicable, the habitual residence of the injured party).

Although this rule is not based on an intention to protect, some laws of the Member States do (to a lesser extent), when faced with the various manifestations of the *lex loci delicti commissi*, allow the injured party to choose the law that is most favourable to their interests. These provisions to some extent favour the position of the injured party vis-à-vis the author of the harm.

The law of Slovenia is one of the laws that to some extent favour the position of the injured party. Here, under Article 30 of the Private International Law and Procedural Act, the law of the country where the causal conduct was committed or the law of the country where the consequences of that conduct occurred may apply. The application of either law depends on which is the most favourable to the injured party. This point clearly reveals the legislator’s intention to afford special protection to the injured party as compared with the interests of the perpetrator of the conduct (in our specific case, personality rights as compared with the rights of freedom of information and communication).
However, this favouring of the injured party has certain nuances. Thus, when the law of the place of the result is most favourable to the injured party, this law will only apply when the author could have foreseen that the consequences might take effect in this country. This requirement ensures that the applicable law, although the most favourable to the injured party, does not operate contrary to the expectations of the author when the latter could not have foreseen that the harm would take effect in those countries.

A similar (but not identical) provision arises from the Belgian conflict-of-laws rule in relation to the obligation derived from a harmful act in the case of defamation or a violation of private life or of personality rights (Article 99.2.1 of the Private International Law Code). According to this rule, these obligations will be governed by the law of the country in whose territory the harmful act or the harm itself occurred or threatens to occur, to be chosen by the claimant, unless the person liable establishes that they could not foresee that the harm would occur in that country. Therefore, by allowing the injured party the possibility of choice (though limited) of the applicable law, the latter’s position is favoured, since it allows them to choose the position that is most beneficial to their interests.

German law also offers this possibility for the injured party to choose between the law of the country where the causal event takes place and the law of the countries where the harm manifests itself.

In Hungary, too, the applicable conflict-of-laws rule favours, although in a different way, the position of the injured party. Here, under the general rule, the law applicable to non-contractual obligations is the law of the place and of the time of the violation. If it is confirmed that the Hungarian law (lex fori) is more favourable to the injured party as regards the compensation to be received, this latter law will be applicable. Hungarian law therefore acts as a minimum standard of protection of the injured party, rejecting application of the foreign law when it is less protective of the injured party as regards compensation for the harm.

The conflict-of-laws rule of Lithuania, Article 1.45 of the Civil Code of the Republic of Lithuania, is a rule that clearly favours the position of the person whose non-property rights have been harmed, that is, their personality rights.
The method of favouring the position of the injured party is formulated by means of a range of possible applicable laws and injured parties themselves must decide from amongst these. In this way, they will choose the option that is most advantageous to their interests from the various options afforded by the rule. The options amongst which the injured party may choose are the following: the law of the country where the injured person has their residence, the law of the country where the injured person has their place of business, the law of the country where the violation occurred, the law of the country where the person who caused the harm has their residence or the law of the country where the person who caused the harm has their place of business.

Romanian law provides a similar solution. In this case, under Article 112 of Law No 105 of 22 September 1992 on the Settlement of Private International Law Relations, the injured party may opt for application of any of the following laws: the law of the country of their domicile or residence, the law of the country where the harmful results were apparent or the law of the country where the author of the harm has their domicile, residence or registered office. By establishing this choice, the position of the victim is clearly favoured.

However, as stated in paragraph 2 of the same article, in order for the injured party to be able to choose the law of the country of their domicile or residence or the law of the country where the harmful results were apparent, the following is also required: the author of the harm must have reasonably expected that the harm would be caused in one of those countries. Thus, this limitation is intended in some way to ensure that the law that is finally applicable, although it will be the law that best protects the interest of the injured party, would also be foreseeable to the author at the time of commission of the act.

Finally, a very similar provision to that of Romania is provided by Bulgarian law, both in respect of the laws amongst which the injured party may choose and in respect of the limitation on this freedom of choice.

82 Vid. R. Bogdan Bobei, Legea nr. 105/1992 cu privire..., op. cit..
4.5.6 Limits on the application of foreign law

Member States concur in incorporating a public order exception in their national laws. So if a foreign law is applicable, but is contrary to the public order of the country of the jurisdictional authority charged with applying it, the requirements of international public order will nullify the application of that law. By way of example, in the Spanish law, Article 12.3 provides that:

‘The foreign law will never apply if it is contrary to public order’.

The international public order exception therefore has the function of safeguarding the basic interests of any national laws that may be harmed by the application of a foreign law.

In the specific area of harm to personality rights by the media, a balance of interests of two fundamental rights is required — the protection of private life and the protection of freedom of expression. Here the general public order clause incorporated in the national laws of the Member States could operate in cases where the application of a foreign law might involve a manifest violation of constitutional guarantees protecting private life or safeguarding the right to freedom of expression.

However, amongst the Member States of the EU, it is difficult to imagine the general public order clause operating as an exception to the application of the laws of one Member State in another Member State. This is not only because of the common constitutional tradition of many of the Member States, but also because of the existence of common legal instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union. Even so, this possibility should not be completely dismissed because, despite the fact that these international instruments have contributed to a certain rapprochement of the rules on the freedom of the press in the Member States, there are still differences with regard to the specific adaptation of this liberty.
Some of the laws of the Member States provide specific limitations on the application of foreign law (beyond the general public order provision) within the framework of non-contractual civil obligations; these may be extended to the obligations arising from media violation of personality rights.

Thus, Article 52 of the Estonian International Private Law Act of 2002, for example, provides that:

‘If a claim arising from unlawful causing of damage is governed by foreign law, compensation ordered in Estonia shall not be significantly greater than the compensation prescribed for similar damage by Estonian law’.

Therefore, application of a foreign law may not lead the Estonian courts to order compensation that is significantly greater than the compensation provided for similar damage by Estonian law. In these cases, the lex fori acts as a law of reference for any foreign laws that may apply under the conflict-of-laws rule of Article 50 when determining non-contractual civil obligations.

Along the same lines, in Germany, Article 40.3 of the EGBGB limits the scope of a compensation claim arising from tortious conduct, but with a special reservation for public order. Claims under foreign law may not be relied upon if they significantly exceed the compensation appropriate to the injured party, whether they serve objectives other than compensation for the victim or they contradict legal provisions on liability under a Convention to which Germany is a party.

Furthermore, as we have shown above, according to Hungarian law — Article 10 of Law-Decree No 13 of 1979 on International Private Law — the lex fori also plays a part with regard to the foreign law that will apply according to the general criterion of the law of the place and of the time of the violation of the right. Thus, if Hungarian law is more favourable to the person who suffers the harm as regards the compensation to be received, claims must be judged in accordance with the lex fori.
Finally, as regards the restrictive role played by national law vis-à-vis the foreign law applicable according to the criterion of the *lex loci delicti commissi*, we must also remember the double actionability rule, which is still in force in some of the common law countries. Here, a person may only be sued for events that occurred in a foreign country if the author of the harm may be regarded as liable both under the law of the place where the tortious act occurred and in accordance with the *lex fori*.

### 4.5.7 Summary table

On the next page we present a table designed to give a simplified overview of the topic. For details, readers should consult the section above on the situation in each Member State.
### Table: Summarised conflict-of-law rules in the 27 EU Member States

<table>
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<tr>
<th>Member State</th>
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<th>Special conflict of laws rules</th>
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<th>Double actionability rule</th>
<th>Autonomy of will</th>
<th>Common nationality or habitual residence</th>
<th>Closest links</th>
<th>Residence of the injured party</th>
<th>Conflict of laws rules substantially aimed</th>
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4.6 ANALYSIS OF THE RESULTS OBTAINED FROM THE SURVEYS CARRIED OUT FOR THE STUDY

For this study we conducted surveys among legal practitioners in the 27 Member States. The findings reflect the situation currently applying to civil non-contractual obligations for violations of privacy and other personality rights.

Two types of survey were carried out; the first was quantitative, aiming to obtain approximate data on the number of cases relating to the subject of the study. The second was qualitative, on the problems created by existing legislation and the legal practitioners’ opinions as to whether this aspect of private international law should be harmonised within the European Community.

Below we present and analyse the results obtained, starting with the quantitative questionnaire, then going on to the qualitative questionnaire. Annex II gives the full, unamended and uncommented answers.

4.6.1 The quantitative questionnaire

In reply to the question ‘How many civil court cases of violations of privacy or rights relating to personality, in a cross-border context, involving mass media, have you been involved in during the last five years?’, 76% of respondents stated ‘none’. Of those who had been involved in a case of this type, the majority had experienced only 1 to 4 cases. These data indicate that this type of dispute is rare.

![Graph showing the distribution of cases](image-url)
In the instances of violations of privacy and other personality rights experienced by respondents, the number of cases where the disputes were resolved by the courts or out-of-court was similar.

Finally, concerning the impact of the Internet and new technologies on the number of cases of this type, the majority of those surveyed — 66% — believe that they have led to an increase. But only 32% believed that the increase had been large, while 33% were of the opinion that it was only small.

4.6.2 The qualitative questionnaire

The qualitative questionnaire was sent out to a variety of professional groups. Most of those surveyed, 44%, were practising lawyers. The opinion of others such as judges, members of national government and other professionals such as university professors was also sought. Alongside these groups, the specialist nature of the subject required us to gather information from other parties directly affected by it; the survey was therefore also sent out, and received replies from, press associations (who played a major and very active role in the whole process of finalising the production of the EC Rome II Regulation and in the ultimate exclusion of the subject from its scope) and data protection agencies. The breadth of types of people surveyed provided a complete overview of the situation, reflecting the various opinions on the subject under consideration.

Starting from the fact that violations of privacy and other personality rights had been excluded from the scope of Rome II, the first general question concerned their opinion on this option, which had been narrowly adopted as Community legislation. The question put to respondents referred to whether they believed it ‘necessary to unify the conflict-of-law rules at a European level, to harmonise protection levels in cases of
alleged violations of privacy or rights relating to personality, in a cross-border context, performed by mass media’, and required a commented yes or no answer. The results were as follows:

From the results obtained it became clear that a large majority of respondents were of the opinion that it would be better to adopt a single set of conflict-of-law rules instead of retaining the current situation with the 27 conflict-of-law rules of the Member States.

If we take into account that those who opposed the adoption of a single set of conflict-of-law rules include the press associations — which represent 9% of total respondents — we may conclude that the overwhelming majority do not find the current situation satisfactory.

The press associations opposed the inclusion in the Rome II Regulation of non-contractual civil obligations arising from violations of privacy and other personality rights, so their opposition to unification of conflict-of-law rules in the survey is to be expected. Bearing this out, one of the comments received in the survey gave reasons for rejecting the unification of conflict-of-law rules, stating that

‘European Publishers Council remains deeply sceptical as to the desirability of EU intervention in this area, touching as it does so closely the area of editorial responsibility and freedom, something which under the Treaties is outside the legal competence of the EU. During the negotiation of the Rome II Regulation we recalled that the only legal basis upon which the EU is competent to intervene is on internal market economic grounds. EU intervention in the area of choice of law in defamation and privacy cases self-evidently has no economic single market objective’.

Nevertheless, in the other professions surveyed, opinion was overwhelmingly in favour of unification. Therefore, it is possible to draw the general conclusion that the
exclusion from Rome II is not in tune with the wishes of the large majority of professionals, but only with those of the press associations group.

In cases of violations of privacy and other personality rights caused by the media there tends to be conflict between two fundamental rights: the right to privacy and the right to freedom of communication and information. Recognising this to be the case, respondents were asked the following question: In cases of alleged violations of privacy or rights relating to personality, in a cross-border context, performed by mass media, two basic rights conflict: the right to privacy and the right to freedom of the press. Which of these should prevail in an EU common juridical system? The responses received were as follows:

The majority opinion is that both rights should have the same importance in the construction of a common legal area in the European Union. Therefore, any potential Community rule on the subject should not favour personal privacy rights over media freedom of communication. Both rights are of equal importance and any potential rule should ensure that they are in balance.

This view, as has been seen, is also reflected in the free comments made by the respondents, that the conflict-of-law rules for non-contractual obligations in violations of privacy and other personality rights should not be presented as conflict-of-law rules directed at protecting the party injured by media actions. The comments by the respondents indicate that only a few support the favor laesi principle in this context, thereby agreeing with the majority doctrine. The party whose privacy rights have been infringed should not consider itself as the weaker of the parties, and neither should privacy rights prevail over the right to freedom of information.
As a result, any set of conflict-of-law rules should be neutral in nature, which may affect the choice of connecting factors. The factors chosen should not favour the position of either party; they should determine the most appropriate connection in accordance with the principles of closeness and predictability.

Nevertheless, our survey findings also suggest that if a weaker party exists, it would be the party whose privacy was infringed, and in no case would it be the media that had distributed the defamatory article. This is demonstrated by the opinion of 31% of respondents that the right to privacy was more important when creating the EU legal area, compared with 13% who considered the right of freedom of information to be more important. Indeed more than one comment made by respondents reflected the opinion that conflict-of-laws rules should be for the protection of the injured party, giving them the right to opt for the law that is most beneficial to their interests.

Recognising that in principle any conflict-of-law rules should be formulated taking into account that the right to privacy and the right to freedom of information should have the same emphasis, respondents were presented with a series of possible connection criteria, asking them to decide which would be the most appropriate in any future set of conflict-of-law rules. The question asked was as follows: 'In cases of alleged violations of privacy or rights relating to personality, in a cross-border context, performed by mass media (especially the press), in your opinion, what should the general connection criteria be to determine the applicable law?' The results obtained were as follows:
From the responses obtained it is not possible to conclude that any one connection criterion would be clearly preferable to any other. Although ‘The place of residence of the plaintiff’ was the most widely favoured, with 26% of responses, there were another three connection criteria receiving around 20%: the place of distribution directly producing the injury ‘The place where the damaging content is disseminated, understanding this to be the place where the direct damage is caused’, ‘The place of residence of the publisher or the place of distribution (direct injury) at the plaintiff’s option’ and the ‘The place of residence of the publisher responsible for publishing the damaging content’.

We have previously concluded that the connection criteria should result in formulating neutral conflict-of-laws rules whose purpose should not be purely to protect the injured party’s privacy rights. Nevertheless, in spite of the fact that the final choice of a connection criterion may be based on predictability and closeness, in this context it is of course traditionally considered that connections based on the publisher’s place of residence favour the party responsible for publishing the defamatory material, while connections based on the habitual residence of the victim, or the place where the direct injury takes place, favour the injured party.

If we divide the connection criteria suggested in the survey between those based on the application of the law of the country where the publisher is established and those that refer to the locus damni criteria, we can see that most of them allow the injured party to apply the law of the locus damni country. Except for the criteria of the ‘place of residence of the medium distributing the article giving rise to the injury’ and of ‘lex fori’, all the remaining connection criteria allow the injured party to apply the law of the locus damni. Therefore, although we stated above that the responses obtained did not indicate a preference for any one specific connection criterion, it is now possible to maintain that the solution certainly appears to involve applying a criterion based on the locus damni, since 77% of respondents favoured a criterion that allows the injured party to apply the law of the country where the injury is manifested.
The ‘place of residence of the injured party’ criterion was the one that received the most support (at 26%) \(^83\). Certainly, as has been demonstrated in previous sections of this study, the injured party’s habitual residence is not one of the connection criteria generally used in the national legislations of Member States. Only the conflict-of-law rules of the legal systems of Bulgaria, Romania and Lithuania provide for an option for the law of habitual residence of the injured party. The law of habitual residence of the injured party usually appears as an additional option amongst a number of laws, and applying it depends on the wishes of the injured party. It should be noted that these three conflict-of-law rules are specific to the subject of violations of personality rights. The data show that although quantitatively few legal systems contain this connection criterion, those that do are qualitatively significant.

In the remaining Member States, because most of the national legal systems apply general conflict-of-law rules pertaining to non-contractual obligations, based on the *lex loci delicti commissi* rule, there is no express provision for connection based on the habitual residence of the injured party. But when there are media infringements of personality rights, the place in which the injury arises (one of the aspects of *lex loci delicti commissi*) often means that the law applied is that of the victim’s country of domicile or residence.

Of course, there is a significant body of thinking that the law of the injured party’s habitual place of residence is the most appropriate one for determining non-contractual obligations arising out of violations of privacy and other personality rights. To this effect, one of the comments received explains the suitability of this point of connection, pointing out that at the conflict-of-laws level, it is the one that best expresses the balance between the fundamental rights of privacy and of freedom of expression. According to this point of view,

> ‘as a general rule, the place of habitual residence is the centre of social, personal and economic relationships that are liable to be affected by a violation of privacy or other personality rights; it is a predictable connection both for the injured party (who will rely on the protection provided by their country of habitual residence) as well as for the party responsible for the injury, which will usually know the personal circumstances of the injured party, including their place of habitual residence. It also makes it possible to apply a single law in those instances frequent in practice in which the injury is caused in a number of countries. The application of this law means

\(^83\) Those in favour of the habitual residence criteria were M. Amores Conradi and E. Torralba Mendiola: ‘Difamación y ‘Roma II’ [Defamation and Rome II], loc. cit., pp. 255-256.
that the party responsible for cross-border injury has to adhere only to the limits on freedom of expression provided for by the legal system of the place of habitual residence of the injured party'.

Nevertheless, despite being the option favoured by most respondents, it does not meet with general acceptance and is of course unquestionably rejected by representatives of the media.

Indeed, media industry representatives are generally in favour of the connection criterion being the ‘place of residence of the publisher of the medium responsible for distributing the item giving rise to the injury’. This is the one that provides the greatest security to the media, since to avoid non-contractual obligations arising from their information activities, they only have to act in accordance with the law of the place of residence of the publisher. It is also the criterion that creates the least information cost for the media, since they do not need to analyse and assess the content of other domestic legal systems, such as that of the place of habitual residence of the injured party or that of any other country in which their information activity may give rise to injury. Nevertheless, this option does not have sufficient support as a potential general rule (18.7% of respondents) even although it is the one that receives the most support from the media industry (9% of respondents). Amongst the grounds given by some respondents in favour of this connection criterion, we would highlight the comment that the person distributing the article giving rise to the injury should be able to determine with certainty which law is applicable; on this point some say that it is not reasonable to expect the publisher to know the differences between the legal systems of the various Member States. In reality, behind this comment lies the debate about who should have to pay the costs that the internationalisation of information activity entails. The author of this comment feels that this price should not be paid by the publisher; which suggests that it is up to the injured party to bear the costs of this internationalisation. Of course, that does not seem logical. Since it is the publisher that decides to extend their activity to countries beyond that of their residence, it should be the publisher (and not the injured party, who has nothing to do with this decision) that should bear the cost of dealing with the problems posed by internationalisation.

As was stated in one of the comments received, the disadvantage of this connection is that often the legal system of the publisher’s residence is unlikely to
have any actual or substantive connection with the dispute, particularly when the defamation has been published on the Internet. In addition, the comments emphasised that the publisher should not be able to hide behind the more permissive law of their place of establishment; according to this comment, if the injured party suffers injury in the place of distribution it makes sense that they should be able to claim there. One thing that is certain is that if the publisher’s habitual residence is adopted as the sole connection in this matter, and if it is combined with freedom of establishment within the EU, it could give rise to a sort of ‘domicile shopping’, choosing the country that is most favourable to media interests, on the basis of its national law on liability for violations of privacy and other personality rights.

The options put forward in the survey aimed at different legal practitioners were nowhere near the total number of possible options. As a result, the comments received from respondents suggested further options, some of them of interest.

For example there was a comment that ‘the most reasonable link would be the place in which the facts that were the subject of the information arose’. Furthermore this link would frequently coincide with the residence of the injured party, although not always. In the opinion of another respondent the law applicable should be ‘the law of the place of residence of the victim if distribution took place there, as the place of principal injury’. A third person suggested as an alternative ‘the residence of the injured party, unless there was more significant contact with the place in which the most significant element(s) of loss or damage occurred’.

In Member States with the general rule of lex loci delicti commissi many of the conflict-of-law rules make provision for an exception when the country of habitual residence is the same for both the party causing the injury and the injured party. Given that fact, it might be appropriate to ask if this exception should also be included in any potential unified conflict-of-law rules. Along these lines it was suggested that the law of the shared country of habitual residence of both the victim and the party responsible for the publication should prevail over the general criterion. Opinions on this were divided.
The first fact to take into account in interpreting the responses is that the 48.8% of positive responses include those that were in favour of connection based either on the habitual residence of the injured party or only on the residence of the publisher responsible for the injury. (Nevertheless, this last statement too must be qualified since, in these cases, the exception based on both parties having the same habitual residence could still be valid if one of the parties involved has more than one habitual residence in different Member States. In this case, one of the respondents commented that ‘the habitual residence of the victim should be of application only in the absence of both the responsible party and the victim having the same habitual residence’. Therefore, taking into account that these make up 45% of respondents, in reality only 3% of respondents were in favour of this general exception, against 51.2% that opposed it.

Some comments mentioned the advantages: that this provision safeguards predictability for the party responsible and the interests of the victim, and that it gave greater certainty for both parties; it also usually coincides with the place with the closest links to the incident.

On the other hand, those defending conflict-of-law rules favouring the victim also said that both parties having the same residence simplifies matters but does not provide the necessary protection.

In any case, the general opposition does not include any great criticism in respect of using common place of residence as the link. The suitability of this criterion is thought to vary depending on the facts of each case: it is considered best to refer to the more general exception of the closest links. That is, that of the habitual residence of both parties, as a general rule, if there is a special connection of the incident with the law of the country in question. Nevertheless, there is no reason for this to happen in all cases. For instance, it might be more appropriate to
consider this circumstance on a case-by-case basis and include it within a general exception of the closest links, and not as an independent exception.

In connection with the above, the following question was put: To make the conflict-of-law rules more flexible, and if it responds better to both parties’ expectations, along with the above possibilities, should the court that is knowledgeable on the issue be given the option to apply any other law, if that law is more connected to the issue?

The 60% of favourable responses against 40% disagreeing (in which we must logically include the media industry managers) shows clearly the appropriateness of including an exception of this type. Nevertheless, the appropriateness of including an escape clause based on the criterion of the closest links is not a view shared by all, or not shared unreservedly.

Several of the comments indicated that this escape clause would be acceptable only if it favoured the injured party. Some argued that an escape clause of this type made sense in the case of neutral connections, but not in a field such as this where privacy must be ensured in a particular manner. Such a clause would lead to inconsistent solutions and would open up escape routes for countries with restrictive protection that adhere to the double actionability rule. As a result, according to these opinions, the escape clause will be appropriate so long as it offers an additional choice of law to the injured party, but not if it leaves the court with the job of evaluating and applying the exception.

Supporters of an escape clause offered several justifications for their position. Comments suggested that this clause could help to take into account factors such as the volume of sales and audience; that it could be a way of achieving justice in individual cases, always provided there were sufficient grounds for applying this other law; others said that the escape clause should permit the most closely connected law to be applied and should also be used when it is not possible to
determine the exact country of residence of the injured party; in this connection, comments were made that a person’s habitual residence could be chosen for tax reasons or that, when dealing with an internationally well-known person, it could be difficult to determine the real centre of their social relationships.

Amongst comments received, both for and against this option, the following concerns were observed: the greater flexibility that this exception clause would provide would inevitably bring with it greater ‘legal uncertainty and chaos’, and could also ‘introduce a certain degree of arbitrariness’. In this respect, a few respondents indicated that the exception clause might provide the court with objective criteria for determining when links were closest, thereby avoiding the courts having to apply lex fori.

Practice has shown that in media violations of privacy and other personality rights, it is common for the harm to be caused in a number of countries, since it can be caused in all countries where the publication was distributed. This is even clearer if the publications include those in electronic format on the Internet. The spread of injury over various countries complicates the task of determining the law applicable to these violations of privacy and other personality rights. For this reason the survey included a question which took these facts into account.

We asked: in such cases, which law should the judge apply to resolve the case? The responses were as follows:

<table>
<thead>
<tr>
<th>Option</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>The law of the publisher’s country of residence, if it is the origin of the fact causing the damage.</td>
<td>23.9%</td>
</tr>
<tr>
<td>The law of every country in which the damage is caused or the news published, in a distributed way.</td>
<td>19.6%</td>
</tr>
<tr>
<td>The law of the publisher’s country of residence, if it is the origin of the fact causing the damage.</td>
<td>17.8%</td>
</tr>
<tr>
<td>The law of the country where the most significant facts occur concerning the damage or loss.</td>
<td>16.0%</td>
</tr>
<tr>
<td>The law most connected to the case and foreseen by the parties.</td>
<td>10.4%</td>
</tr>
<tr>
<td>Others</td>
<td>12.3%</td>
</tr>
</tbody>
</table>
The first finding was that 20% of the respondents supported the separate application of the law of every country in which the publication was distributed or injury resulted, but that this was not the preferred solution. Indeed, as a general rule, it was considered more appropriate to apply a single law for all injury that may have arisen, independently of the place in which it manifested itself.

It appears somewhat surprising — although as we shall see below the relevance of the finding has to be put in context — that the majority of respondents (24%) have taken a position in favour of applying the law of the country of residence of the publisher responsible for distributing the article causing the damage.

Moreover, this option is preferable independently of whether the publisher’s country of residence is or is not considered as the origin of the fact causing the damage (this last option received the support of 19% of respondents). It was preferred even over the law of the country in which the most significant elements of damage or loss occurred, which may also involve applying a single legal system to all injury caused, thereby avoiding proliferation of applicable law by the competent judicial body.

This result needs to be put in context: it was not at all consistent with the majority preferred option of a general rule in favour of the law of the habitual residence of the injured party — although of course this option was not included in the question. As a result, applying the law of the victim’s habitual residence also provides a single law when damage is incurred in more than one country. Several comments were made along these lines, stating that the law applicable should be that of the habitual residence of the victim.

Several of the comments suggested that in this case it should be up to the injured party to choose between the different legal systems of the countries in which the injury occurred. To a certain extent this equates with the criterion of favor laesi in opting for the applicable law. But more than one respondent mentioned the problems arising from publication on the Internet. Currently, this is an issue that
very much needs to be taken into account when deciding on the right answer to the question posed.

Taking into account the application in various EU Member States of the double actionability rule and, therefore, the importance of lex fori in certain judicial systems, there were two related questions to assess the role that the law of the place where the case is pending would play in this type of dispute. Firstly the following question was asked: If, according to the chosen criteria, in the law finally chosen to be applicable, the protection of the freedom of the press is less than the protection that the law of the country of the knowledgeable court would give, do you think the latter law should be selected? The responses were as follows:

Connected with the previous question, but showing the other side of the coin, we asked: If, according to the chosen criteria, in the law finally chosen to be applicable, the protection of the privacy rights is less than the protection that the law of the country of the knowledgeable court would give; do you think the latter law should be selected?

As may be observed, the responses received to both questions were very similar. The main conclusion to be drawn from these two questions is that lex fori should only come into play when the substantive law indicated by the conflict-of-laws rules is contrary to the international public law of the forum. From the responses received
it appears that the double actionability rule, still in force in some states, does not receive sufficient backing to be retained in the Community area.

As demonstrated in the free comments received, the fundamental nature of the conflicting rights does not justify systematic application of *lex fori* every time that the applicable law gives less protection of press freedom or less protection of personality rights than that provided for in the law of the court that hears the case. The exclusion of applicable law is only justified when this produces a result manifestly contrary to the criteria used by constitutional case law and that of the European Court of Human Rights when assessing and establishing the relationships and reciprocal limits of the fundamentals of both laws.

The traditional scenario for questions relating to violations of privacy and other personality rights (print media and short-range broadcasting) has changed markedly with the appearance and establishment of new media and technologies that make it possible to violate privacy rights worldwide. The Internet, in particular, has radically changed the traditional communication formulas, obliging us to re-assess the solutions that have been used up to now. Accordingly, in view of its specialist nature, the survey asked whether specific conflict-of-laws rules should be set down for defamatory articles and information distributed over the Internet.

The majority of respondents considered it appropriate to set out conflict-of-law rules specific to injury caused over the Internet. Nevertheless, some well reasoned opinions consider a specific set of conflict-of-law rules to be unnecessary for these cases. Indeed, as was highlighted, if the point of connection to the country of the victim's habitual residence is considered to be appropriate, conflict-of-law rules do not present any problems in instances of defamation transmitted over the Internet. Other problems may arise; such as identifying the person responsible for defamatory publication or information, taking account of and defining specific
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We conclude that, depending on which criterion is used under general law, injury incurred through the Internet may or may not require specific conflict-of-law rules. It would be worthwhile to have the benefit of a single set of conflict-of-law rules for use in all cases, such as that of the residence of the injured party.

A particular aspect arising in media violations of privacy and other personality rights is the right to answer, object and rectify. The specifics of this aspect were the motivation for the following question: Should the law of the country where the media organisation or the publisher has their usual residence be the law applicable concerning the right to answer, object and rectify?

Respondents' opinions were divided on this point, although most answered yes. The comments received contained some arguments that the law of the broadcaster's or publisher's habitual country of residence would be more advisable for practical reasons, or represented the most reasonable solution. Indeed it was stated that a claim for rectification could be considered as a special case differentiated from the rest, and that the law applicable for that purpose should permit a speedy response.

Nevertheless, many objections were also raised to the solution. It was said that in practical terms it was unduly complex and expensive to require the victim to apply to other states. Concerns were also raised because such a solution would again give the publisher the upper hand. In the opinion of another respondent, the law applicable should be that of the place of distribution and not that of the place of residence of the publisher or the broadcaster. Another group of respondents agreed in stating that the law applicable should be that governing non-contractual
obligations, preferring a single law applicable to all issues arising from violations of personality rights. However some people qualified this by saying that the judge in charge of adopting this measure should take account of the law of the country in which the measure would actually be implemented.

EC Regulation 44/2001 (Brussels I) establishes in Article 5 (3), a specific competence in cases of tort and negligence of the ‘court of the place in which... the injury occurred’. From case law it may be concluded that when the place of the action giving rise to liability and that where this act causes damage are not the same (frequently the case in violations of privacy by the press), the defendant may be called, at the plaintiff’s option, before the court of the place of the act that gave rise to the damage, or to the place where the direct damage occurred.

The ECJ’s method for interpreting the *lex loci delicti* rule in accordance with the ubiquity rule led us to include the question whether it would be desirable that this criterion should match that of applicable law. The responses received were as follows:

A large majority of respondents thought it desirable that the criteria for international judicial competence should match those of applicable law. In support of the two agreeing it was argued that this would be beneficial for the injured party, which clearly reflects the position of those who defend the *favor laesi* principle in this matter. Moreover, it was pointed out that wherever possible there should be consistency between international judicial competence and the issue of applicable law.

Halfway between those for and those against, it was claimed that even if agreement between the criteria in the two matters were desirable it is not indispensable, and that it is not necessary that forum and law should coincide.
Nevertheless, many of the comments received gave reasons for opposing this approach. From the perspective of the media industry the Brussels I Regulation Article 5 (3) and the case law established by the Fiona Shevill case threaten the freedom of the press, exposing publishers to multiple actions under any system of law worldwide. In the opinion of other respondents the transposition of this decision into the scope of applicable law is unacceptable. They stated that it is one thing to offer an alternative forum to that of the defendant’s domicile in the course of the proper administration of justice, and quite another to make applicable law depend on a choice made with the resulting multiple application of different local legal systems. As a result the interests that govern the field of international competence and applicable law are diverse and do not necessarily need to be in agreement. There are even those who consider that what needs to be changed is the competence criterion, which is muddled and inadequate.

In certain specific matters relating to the subject of non-contractual obligations, the European Union has made use of techniques and legislative instruments different from those of the conflict-of-law rules unified by means of Community Regulation. This is the case with Directive 95/46/EC, relating to the protection of individuals in terms of personal data processing and the free circulation of this data. Directive 95/46/EC was formulated with the aim of smoothing out obstacles to free circulation of data without diminishing the protection of personal data and the right to privacy. This required each Member State to guarantee its effective application within its legal system. Under Article 4 of Directive 95/46/EC, states must apply the laws that they have approved by transposition when a data controller establishes itself on their territory. This being so, the Directive, in addition to providing for substantive harmonisation of national law on subjects covered by its scope, clearly makes use of the country of origin criterion in the Article 4 rule for extension or self-limitation.

Taking into account, therefore, that the regulatory activity of the European Union can make use of legal instruments such as the Directive, where substantive harmonisation can lead to justification of the publisher’s country of establishment criterion as a key element for the application of Community law, the survey included the following question: Do you think that using this instrument would be
enough to harmonise the level of protection in cases of alleged violations of privacy or rights relating to personality performed by mass media in a cross-border context?

Opinions here are very much divided. Some of the respondents acknowledge that they do not know a great deal about this subject and therefore decline to give a positive response.

Some respondents said that the alternative of a Directive dealing with substantive harmonisation of minima and self-limitation rules, based on the criterion of the publisher's country of establishment, was a good alternative. Here it was argued that 'in the current state of European construction in this matter it is possibly the answer'. Another of the comments mentioned what in our opinion is one of the main advantages which this solution could provide; it was emphasised that:

'harmonisation of the level of protection in cases of cross-border violations of personality rights by means of a Community directive would allow the application of the law of the country of origin (residence of the person responsible for the publication or broadcast) and would thereby facilitate free circulation without impairment of privacy rights, always of course, provided that the person responsible is established in an EU Member State'.

So the potential to apply the law of the publisher's country of establishment is one of the main advantages that this initiative could provide, as it can be used to mollify the information industry's attitude to European regulatory initiatives on the subject. Other respondents indicated that the Directive was a good technical instrument, and a perfect tool to achieve harmonisation. Nevertheless, those in favour of this option also expressed concern about the problems that it could pose, especially difficulties deriving from the nature of the Directive. Thus, they said that since it is a good technical instrument it would be desirable for the Member States to delay less in transposing directives into national law; this means that the
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appropriateness of the proposed solution might depend on the effectiveness of transposition into national law.

Nevertheless, it is certain that over 50% declared themselves against an alternative similar to Directive EC/95/46 on the protection of privacy rights and other personality related rights against injury produced by the media. We may therefore conclude that, in principle, the option of unifying conflict-of-law rules is felt to be preferable to harmonisation by means of a directive with extension or self-limitation rules. What is certain is that, depending on the range or scope of application of a Directive, its success can vary significantly. It is also worth pointing out that, in principle, unification of the conflict-of-law rules and harmonisation by means of a directive are not mutually exclusive, but rather complementary. The function of conflict-of-law rules will continue to be fundamental to everything not governed by any potential EC directive.

At the end of the questionnaire several sets of conflict-of-law rules were set out to sound out the respondents’ views of them. The selection of the conflict-of-law rules took into account the various formulas used during the Rome II negotiation. The respondents had to give the answer ‘very appropriate’, ‘appropriate’, ‘acceptable’ or ‘not appropriate’.

The first set of conflict-of-law rules presented for the respondents to consider was that based on the general criterion of *lex loci delicti commissi*. To some extent it resembled the option adopted in the draft Rome II Regulation, which referred back, in this specific matter, to the Regulation’s general rule, unless that entailed applying a law conflicting with the fundamental principles of the forum as regards freedom of expression and information. As a result, the conflict-of-law rules suggested were as follows:

1. The law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality is the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with a particular country may be deemed to exist having regard to factors such as the country to which a publication or broadcast is principally
directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size or a combination of these factors’

Total responses received were as follows:

- Very appropriate: 11.4%
- Appropriate: 22.6%
- Acceptable: 17.1%
- Not appropriate: 48.6%

Only 11.4% of respondents considered these conflict-of-law rules to be very appropriate. On the contrary, 48% of respondents considered them to be not appropriate.

It should be pointed out that 100% of press associations considered these rules-of-conflict to be not appropriate. This response is completely logical bearing in mind the position taken by these associations throughout the negotiation of the Regulation, opposing any conflict-of-laws rules based on the criterion of locus damni, as is the case here, since this would be the law of the country in which the injury occurred.

However, the response to this question from other professionals brings out very interesting results. If we focus on all feedback received except for that from these associations, we can see that only 18.1% considered them not appropriate and, moreover, almost 82% consider these rules to be acceptable, appropriate or very appropriate, against 18% who consider them to be not appropriate, as one can see in the following graph.

- Very appropriate: 16.2%
- Appropriate: 36.4%
- Acceptable: 27.3%
- Not appropriate: 18.1%
Amongst the criticisms voiced on the proposed rules, some supporters are concerned that the rules should not give a specific answer in instances where injury occurs in many different localities, a circumstance which is of course usual in injuries to personality rights caused by the media, since that could lead the court responsible for judging on all injuries to apply the fragmentation theory, that is, to apply as many laws as there are places in which the injury had an effect.

The second set of conflict-of-laws rules follows the pattern put forward by the secretary of the Committee on Legal Affairs of the European Parliament, D. Wallis, who suggested adopting an intermediate solution between that put forward by the Commission and the position of press agencies, so as to be acceptable to all parties.

1. As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable.

2. Where it is clear from all the circumstances of the case that the tort/delict has manifestly closer connection with a country different from the one of paragraph 1, the law of this other country shall apply. A manifestly closer connection with a particular country may be deemed to exist having regard to factors such as the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given country as a proportion of total sales or audience size or a combination of these factors.

The first rule of this article includes a novel expression to refer to the place in which the injury occurs: the place in which the most significant element(s) of the loss or damage occur. This set of rules frequently refers to the law of the country where the injured party has their habitual residence, since this will be the place where the injured party will suffer the greatest injury to their privacy or personality rights. Moreover, it has the advantage of avoiding the multi-jurisdictional application of the laws of the place in which the injury occurred (the fragmentation theory), applying a single law to all injuries, that of the place in which the most significant elements of loss or damage occur.

Nevertheless, there would be an exception to this general rule: that of the closest links. To assess when a defamatory publication has closer links with other countries, various factors will need to be taken into consideration. Principal among these will be the country to which a publication or broadcast is principally directed or the language of the publication or broadcast or sales or audience size in a given
country as a proportion of total sales or audience size or a combination of these factors. Behind this exception may be discerned a wish to meet the expectations of publishers, in such a way that they are able to predict which law will be applicable. In line with this, the above factors demonstrate that the application of such laws can be completely predictable for the publisher. But given its flexibility, this rule threatens to be converted into the general rule, and that of the most significant elements of damage into the special rule.

In the responses received to the survey we observe that this option attracts less support than the first.

Accordingly, only 5.4% of respondents consider this set of rules to be very appropriate and 16.2% appropriate. Over half of the respondents consider this to be a not appropriate rule. The position of press associations also stands out, with over 90% of their respondents believing that it is an unsatisfactory rule.
Amongst the criticisms levelled against this option, it is worth noting those that refer to its excessive flexibility or open nature, which would act against legal certainty. Some say that it does not make it possible to ascertain in advance the law applicable for both parties, which leaves a high degree of uncertainty and creates difficulties in defining which elements of the damage are significant.

The third set of conflict-of-laws rules, put forward as a modification of the above, was intended to overcome the reservations that it met with from the media industry. In large part it corresponded to the text of the article presented by the European Parliament which ultimately was not accepted by the Council.

1. As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable.

2. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country’s law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. This provision shall apply mutatis mutandis to publications via the Internet and other electronic networks.

This solution maintains the general provision that the applicable law is that of the country in which the most significant element(s) of damage occur, but the second paragraph of the rules lays down the criteria for determining the country in which the most significant elements of damage occur. Thus it is understood that the most significant elements of damage occur in the country to which the publication or broadcast is principally directed. Or if this point is not apparent, it will be the country in which editorial control is exercised. This last interpretation is no doubt a nod to the media industry, anticipating the application of the country in which editorial control is exercised.

The respondents’ opinions are summarised in the following graph:
We may observe that this formula too failed to win the approval of the respondents. Only 30% of them considered it to be satisfactory. This intention to placate the media lobby is to a certain extent reflected in the opinions of the press associations consulted:

Although over 61% of respondents consider these conflict-of-law rules to be unsatisfactory, it should be noted that, in contrast to the reaction to prior conflict-of-law rules, in this case 23% of press associations surveyed viewed them positively. Nevertheless, it is a set of rules that is still far from achieving consensus in this matter.

The comments received object, amongst other aspects, that this is a set of rules with a long and complicated second paragraph, that generates uncertainty and that is unnecessarily slanted in favour of the publisher-broadcaster.

Finally, a final set of conflict-of-laws rules based on the application of *lex fori* was put forward.

‘The law applicable to non-contractual obligations arising out of violations of privacy or rights relating to personality is the law of the country of the court that has knowledge of the conflict (*lex fori*).’

This was the least popular of all. We should emphasise that almost 90% of all respondents considered it unsatisfactory, and 100% of all press associations surveyed.
This was considered to be too simple. But most of all it was pointed out that such conflict-of-law rules in combination with the Brussels I Regulation rules in force would not be desirable because it would give rise to *forum shopping*. Therefore, while it might not modify current international judicial competence rules, application of *lex fori* would not be satisfactory.
4.7 **FINAL CONSIDERATIONS AND PROPOSALS FOR THE FUTURE**

From our study of the current regulatory regime in the European Union on civil non-contractual obligations in privacy and other personality-related rights — which is divided among as many systems of law as there are Member States — and from the findings of the surveys carried out in this study, it is possible to draw certain general conclusions and suggest potential ways forward for Community legislation to overcome the current situation of stalemate and legislative vacuum in this sector.

The future options proposed as the most feasible in the current legislative situation are the outcome of a progression of events which have to be taken into consideration to sketch out these future options.

In the first place, before starting to formulate the actual alternatives that exist, we consider it appropriate to start from an initial assessment. At this moment, it is hardly practical to put forward as a priority, single action the preparation of a European law on civil non-contractual obligations that includes damage caused to privacy and other personality related rights.

Creation of a uniform Community law, a European obligations law, by way of unification of substantive legal systems, has been and is an objective that has been proposed, analysed and assessed both in doctrine and in European legal establishments. Although it could have major advantages in helping to mitigate the difficulties arising from there being as many laws as there are Member States, this is currently not a viable objective, at least not in the short or medium term.

The first option that may be put forward given the scenario that we are faced with is to keep the system as it stands at present. That is, to give up any attempt at harmonisation and/or unification of the rules both substantive and relating to conflict of laws that govern civil non-contractual obligations for damage to privacy or other personality rights in the 27 Member States, so that each country’s legal system continues to adopt its own rules of substantive law and private international law.
This solution does not seem satisfactory. The enormous differences that exist in this field in the legal systems of individual Member States have a negative impact on the construction of a Community market and on a ‘European legal area in civil matters’ (Art. 61 c) Treaty of the European Community (EU Treaty) which guarantees its proper working. The proper working of the internal market will depend on the ultimate consolidation of the principle of mutual recognition. This, in its turn, depends on the ability of the Member States’ legal systems to guarantee a minimum standard of protection of fundamental rights in the Community territory including, with the rapid growth of new technologies and the media, rights related to personality.

But although this ‘status quo’ solution may not seem appropriate, it is also true that the negative impact of maintaining the current situation is relative. On the one hand, quantitatively speaking, as this study shows, there are very few such cases in the case law of EU Member States. And on the other hand, under current rules including the European Court of Justice case law on the Fiona Shevill case, Member States can often end up applying their own law, the one that corresponds to lex loci delicti commissi.

To reduce the complexity generated in this area by the disparities in legislation, European institutions must step up the harmonisation process that has been initiated. Legislative harmonisation in matters of non-contractual obligations for injuries against personality rights is a reaction to the uncertainty caused by the differences between the Member States’ judicial systems and to the added costs accruing for participants in the internal market. The costs may be procedural and/or for information about and adaption to the different legal systems.

Therefore, starting from the premise that we must continue with the harmonisation commenced in the field of civil non-contractual obligations and move into the field of violations against personality rights, what we now have to ask ourselves is what methods should be used. Setting aside a complete unification of substantive rules, the question is whether harmonisation of conflict-of-laws is a workable method; and not just workable, but satisfactory. Finding the answer to this question has specifically been the main aim of this study.
Indeed, harmonisation of the conflict-of-law rules of the 27 Member States to resolve cross-border disputes would bring greater legal certainty in the European judicial area, since it would define the law applicable to the obligation independently of whichever court may be competent. If the parties did not have to know the 27 conflict-of-law rules of the 27 Member States, but could have access to a single regime of Community private international law, then the direct consequence would be to reduce litigation costs and provide greater predictability as to the solution for all parties. In this way, harmonisation of conflict-of-law rules would contribute to guaranteeing equal treatment of parties engaged in cross-border litigation in the European market.

The initial Rome II Regulation draft in 2003 clearly backed harmonisation of conflict-of-law rules in this field. Its Article 6 included the subject of non-contractual obligations for violation of privacy and other personality rights and, in particular, liability arising from defamation by the mass media. Nevertheless this article was subsequently excluded from the amended 2006 draft.

Probably one of the reasons for this exclusion was the existence of major disparities in the substantive and conflict-of-law rules in force in the Member States. But the Commission certainly removed violations by the press and similar bodies from its scope because of the difficulty of reconciling the positions taken by the persons directly involved and the irreconcilable differences in the texts put forward by the Council and the Parliament. Pressure from the press championing the publisher’s head office as the connecting factor paralysed the process and brought it to a halt.

At this point we should consider if it would be possible to develop neutral rules on conflict of laws that might succeed in balancing the interests of the alleged author of the damage and the injured party, and thereby serve to achieve the desired consensus.

In fact, the need not to completely abandon the road to unification of conflict-of-law rules in this field, despite the failure reflected in Rome II, is very apparent, as has been demonstrated by the survey carried out on selected legal practitioners.
The desirability of unifying conflict-of-law rules is still very apparent in the opinion of 85% of the persons consulted in this survey, who were in favour of this. The unification of conflict-of-law rules at Community level would provide greater legal certainty, instead of the current situation with 27 national conflict-of-laws rules operating together on the same subject.

Therefore, the unification of conflict-of-laws legislation at Community level could be used as an alternative route to substantive harmonisation/unification. Nevertheless, for a potential unified conflict-of-law to be developed satisfactorily its workings must ensure that a sufficient level of protection exists for the parties in a cross-border dispute and that the judicial-political conditions of the market in which they operate effectively place them in a position that ensures that they will receive equal treatment. Only if it can be guaranteed that neither party can avoid these minimum protection standards will a unification of conflict-of-law rules be possible, as they will not then have to be designed simply with this protection in mind.

If we accept the diversity of laws in the 27 Member States on obligations arising from infringements of personality rights and we therefore reject the idea of reaching complete substantive uniformity, we must face the problems linked with this diversity. However, the diversity of substantive legal systems should not be seen as something negative. Diversity allows each state to adopt the regulatory solutions that are most suited to its special circumstances and permits the operator to choose the law best suited to the case.

Nevertheless, for this premise to be sustainable and for diversity not to create problems, it is necessary to ensure a balance and equality between the parties, their full knowledge of the rules of operation of the market and a high predictability of costs and benefits of the action or case that they are going to bring. Uniformity within diversity. In this case unification of conflict-of-law rules will be a valid tool for harmonisation.

It could be based on the law of country in which the publisher is established. The problems of applying the law of the country in which the publisher is established arise when the situation of the participants is not as we assume and where one of the two parties is in a weaker position than the other, or when from the
circumstances of the case it emerges that one of the parties does not have the same guarantees, as happens in non-contractual obligations. In such a case the party in the favourable position can succeed in choosing the applicable law purely in their own interests, to take advantage of the weakness or inequality of the other party. Then private international law designed to follow the criterion of the publisher’s country of establishment will have failed.

Accordingly in the case of non-contractual obligations, if operators can choose the law applicable to potential non-contractual damage caused by their actions, they will choose the law that is most favourable, even before the damage has occurred. Which means that injured parties are faced with conditions that were set down before they even became a party to them. In these cases, when unifying conflict-of-law rules so as to achieve a minimum balance and ensure the proper working of the market, the law of the country of locus damni should be opted for. As shown by the surveys carried out in this study, the connecting factors preferred by most of the respondents were those which allowed the injured party to have access to a law based on the principle of country of damage.

The logic of the law of the country of damage presupposes a difference between the parties and re-establishes a balance by choosing the law that most favours the weaker party, and thereby ensures that the other party must comply at least with the minimum requirements of the law most closely linked to the injured party. The unequal position in which the parties find themselves requires that the cost of the international nature of the case falls on the party that is in the most favourable position.

This is exactly the option that was chosen by the Rome II Regulation in establishing the conflict-of-laws rules to indicate the law applicable. In general, in Article 4 it establishes as the applicable law the law of the place in which the direct injury occurs or might occur. And in the context of infringements against personality rights or defamation caused by the media, the first draft of the Regulation also favoured this option by including them in its Article 6. Article 6 of the First Draft of the Regulation refers us back to the general rule of Article 3 (current Article 4 RII). Transposed to the subject that we are dealing with, the law applicable will be that of the place in which the damage occurs, which in cases of infringements of
personality rights or defamation is the place where the injured person suffers the injury to their privacy or private life; or where the effects of this infringement have their most severe effect. This will usually be the same as the victim’s place of residence. This does not exclude the possibility of modulating this option with an exception clause applicable to those cases in which a law exists that has closer links with the case in question.

The salient advantages of the *locus damni* include the fact that it usually coincides with the victim’s residence, constituting a close link for the victim, and being predictable for the person alleged to be responsible. When this connection is established, the injured party can be protected by the legal system of their place of residence, which will usually be the legal system with the closest links to them. In turn, it is usual for any victim of defamation by the press to be known to the author of the damage, who can easily ascertain where their residence is and therefore which law will be applicable in the event of a dispute, ensuring predictability.

The criticisms of this connecting factor by the press associations have been overwhelming. On one hand, they cite the difficulty of knowing the victim’s residence; this is not very probable, and is an argument that could be refuted by invoking an exception clause incorporated into the Regulation. They also claim that it might happen that although the product complies with the laws in force in the publisher’s country of establishment and no copy has been distributed in the victim’s country of residence, it may end up with the law of the victim’s country of residence being applied. This argument should not detain us because if no injury occurs in the victim’s country of residence, it does not matter whether this or that system of laws should apply.

If on the other hand we opt for the law of the place of domicile or establishment of the producer of the publication, as has been recommended, one of the parties is significantly favoured. Also there is no sense in working on so specific a line as an exception from general rules and deriving the opposite from it. Indeed, the Rome II Regulation tries to balance a market full of ‘negative externalities’ that pose difficulties for its proper working. That is why it has to give greater prominence to the law of the habitual residence of the party injured by a defamatory action.
If we follow the criterion of the publisher’s country of establishment, as the press and media want, the costs of the international aspect of the case will be suffered by the victim of an action carried out by third parties. It would be an action in which the victim has no negotiating capacity and which they can know nothing about. The victim would be unable to predict it since the person initiating the action would be fully in command of the action. The inequity of the arrangement is unquestionable. The victim cannot predict the result because he does not know from where or from whom the injury will come. And what is more, faced with this advantageous situation, authors can choose the country of establishment that best suits them and in which the regulations applicable to their activity will be the most favourable possible to them, without the victim having any say or decision-making power.

Given the difficulty of reaching a consensus on the route to be followed for the unification of conflict-of-laws rules on the subject (as became blatantly obvious in the negotiation and development phase of the Rome II Regulation) and of breaking the current stalemate on this subject, another possibility is to try to end the problems inherent in the current diversity by means of harmonisation based on a few common minimum principles.

Community legislation could prevent inequalities or defects in the market by establishing minimum principles where such deficiencies are present. If all legal systems guaranteed a satisfactory level of protection to the victim of violations against personality rights, it would not be so attractive for perpetrators to opportunistically seek the legal system most favourable to them, or most lenient on their actions, because all would have the same obligation to adhere to minimum principles laid down at Community level.

Unification of conflict rules should not be presented as an alternative option to substantive harmonisation of the legal systems of Member States, but as an additional option. Without doubt the most satisfactory format for assuring a minimum level of concordance between legal systems to prevent the proliferation of problems connected with the diversity of legislation is to seek the appropriate combination between mechanisms for harmonisation of conflict-of-law rules and a certain amount of minimum substantive harmonisation that is found indispensable.
Frequently, the success of measures intended to harmonise conflict-of-law rules at European level will depend on bringing substantive legislation and the general principles of national legal systems closer together. Thus it may be advisable in non-contractual matters to coordinate the unification route with initiatives on partial harmonisation.

We learned from the work begun with the Rome II Regulations, and the difficulty of arriving at a consensus on conflict-of-law rules governing torts/delicts against personality rights, that the Member States must bring their substantive law closer together and develop some common principles before one can hope to harmonise conflict-of-law rules in such a way as to unify private international law.

Only harmonisation of the principles or substance of national law could justify using the criterion of the publisher’s country of establishment, in place of the country of *locus damni* that is natural to conflict-of-law rules in non-contractual matters.

This statement could be considered self-evident if one assumes that minimum substantive harmonisation already exists. This minimum harmonisation should derive partly from the fundamental nature of protected rights (right of freedom of information, right to respect), by virtue of which the resolution of cases based on the facts would hypothetically be consistent with the legal system of the forum, whichever law is applicable. Indeed, the European Court of Human Rights boasts extensive case law on how to achieve the difficult balance between personality rights and the freedom of the media, but does a Community protection standard on the subject actually exist?

We have already seen that private international law helps us to deal with the multiplicity of substantive laws, indicating one of them as being responsible for resolving a specific dispute. But if the current differences between legal systems mean that opting for one rather than another will give completely different results, we run the risk of establishing a system in which interested parties will use the conflict-of-law rules to seek residence in the place whose law is most favourable to them, giving rise to the phenomenon of forum shopping, which will increase legal uncertainty and the inequalities between market participants.
Nevertheless, in fields that are partially or minimally harmonised with a standard shared by all Member States, there are far fewer possibilities for any one operator to act in an opportunistic manner. For that reason they will come to accept the criterion of the country in which the publisher is established, even in the field of non-contractual obligations in respect of media violations of personality rights and defamation, where the logical starting point is to the contrary, as demanded by the press lobby.

So, to reach a balance between the different interests present we should not focus on the difficulty of achieving consensus in opting for conflict-of-law rules to satisfy the interests of all protagonists, or in preparing what may be considered a neutral set of conflict-of-law rules. Instead, we should just ask whether a common standard currently does or does not exist to support the criterion of the publisher’s country of establishment as advocated by the press lobbies that opposed the first Draft of the Rome II Regulation. The answer is no.

If we consider the different levels of protection of personality rights arising from national substantive legal systems and from the material and case law differences in the tug-of-war between the right to privacy and freedom of information in the 27 Member States, and the fact that this is what distorts the workings of the market, the obvious alternative is to prepare a Directive which would establish some common substantive minima on the subject.

It would include an extension or self-limitation rule, as in Article 4 of Directive 95/46/EC on the protection of personal data, which included the criterion of the publisher’s country of establishment. Harmonisation of substantive minima would be the determining element to justify adopting the criterion of the publisher’s country of establishment. In this way, preparation of a Directive — always taking into account the problems inherent in this type of legal instrument — to incorporate common substantive minimum regulation and an extension or self-limitation rule founded on the criterion of the publisher’s country of establishment could be a viable alternative in the current stalemate situation. It could create a meeting point for a consensus on the different positions on the subject, i.e. the positions held by the Commission, Parliament and the information industry lobbies.
The work required to prepare a Directive on a subject as sensitive as this is unquestionable. We have suggested the possibility of adopting the criterion of the publisher’s country of establishment in the extension or self-limitation law of this potential Directive. However, this option would require prior harmonisation of substantive laws on this subject. The harmonisation of substantive minima should be based on the parameters of justice embodied in the Charter of Fundamental Rights of the European Union — which in the not too distant future could come to form part of Community law — and the European Convention on Human Rights and Fundamental Liberties prepared in the Council of Europe and the case law of the European Court of Human Rights.

Given the current stalemate and the difficulty of adopting a single conflict-of-laws rule at European level on non-contractual obligations in violations of privacy and other personality rights, the European institutions should aim to achieve agreement on the minimum substantive threshold reconciling media rights and personality rights, in such a way that it will be possible to adopt an instrument whose application can be based on the criterion of the publisher’s country of establishment.

As an incentive for a Directive on the subject, there are similar examples in other Directives already adopted on matters pertaining to non-contractual obligations. These include Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (added to by Directive 96/9/EC on the legal protection of databases and Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector), Directive 85/374/EEC, of 25 July 1985, on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage and a number of Directives on consumer protection.

However, some Member States would probably not accept an EU harmonising intervention, in view of the limited competences of the EU in this area.
From all this it may be concluded that adopting a Directive on the subject we are dealing with could be a first step towards harmonising or unifying national law at Community level. This is not intended to exclude other initiatives, such as the adoption of a single set of conflict-of-law rules on the subject, but rather to complement them. In fact, a Directive that provides for a minimum threshold could help to reconcile positions in the future, facilitating the second-stage adoption of conflict-of-law rules acceptable to all parties, this time based on the criterion of *locus damni.*
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