On soggy grounds. The GDPR and jurisdiction for infringement of privacy.
Geert van Calster.

Published, in French, in L'Observateur de Bruxelles, July 2018.
Please when quoting, quote referring to the published French version which is available here – check with author if you are unsure of exact location of quote in the article.

Invasion of privacy attracts attention from two sources: individuals (both natural persons and companies) and regulators (whose ultimate aim of course is the very protection of the privacy of the first group). Prior to the introduction of the General Data Protection Regulation 2016/679 – GDPR, these two sources at least in theory were neatly housed into two separate pieces of secondary law. On the one hand, the Data Protection Directive 95/46 detailed the public law or administrative law enforcement of the EU's data protection regime. On the other, individuals whose privacy was allegedly infringed, sued on the basis of the core EU Jurisdictional Regulation, now the Brussels I Recast Regulation 1215/2012.
Directive 95/46 illustrated this twofold approach in its recitals as well as in its substantial provisions. Article 1 specified its object:

> *Object of the Directive. 1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data. 2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.*

Its legal basis was Article 100A EEC, now Article 114 TFEU: the core legal basis for the Internal Market. The protection of the rights of natural persons in particular, specifically with a view to guaranteeing the working of the Internal Market, was the ultimate target of course of the Directive, however the only means which the Directive employed to reach these goals was the public law angle. To this end it organised the powers of the relevant authorities vis-a-vis processors of these personal data. The Directive did not impact , in whatsoever way, the jurisdictional regime specifying the courts with jurisdiction in civil cases concerning invasion of privacy. Individuals pursuing data processors for the alleged wrongful processing of their personal data, had to do so employing the Brussels I and now the Brussels I Recast Regulation.

On this point the GDPR is radically different. Recital 145 reads

> *For proceedings against a controller or processor, the plaintiff should have the choice to bring the action before the courts of the Member States where the controller or processor has an establishment or where the data subject resides, unless the controller is a public authority of a Member State acting in the exercise of its public powers.*

Recital 147:

> *Where specific rules on jurisdiction are contained in this Regulation, in particular as regards proceedings seeking a judicial remedy including compensation, against a controller or processor, general jurisdiction rules such as those of Regulation (EU) No 1215/2012 of the European Parliament and of the Council should not prejudice the application of such specific rules.* (footnote omitted)

Article 79

Right to an effective judicial remedy against a controller or processor

1. Without prejudice to any available administrative or non-judicial remedy, including the right to lodge a complaint with a supervisory authority pursuant to Article 77, each data subject shall have the

right to an effective judicial remedy where he or she considers that his or her rights under this Regulation have been infringed as a result of the processing of his or her personal data in non-compliance with this Regulation.
2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority of a Member State acting in the exercise of its public powers.

There is no detail in the original Commission proposal (COM(2012) 11) as to why the Commission saw fit to amend the regime on such a crucial point. It is clear however that the seemingly sec introduction of this provision takes the GDPR on very soggy grounds.

- A first obvious observation is that the jurisdictional rules of the GDPR consider themselves not to be lex specialis vis-a-vis the Brussels I Recast but rather lex formidabilis, so to speak. There is no suggestion that the jurisdictional rules of the Brussels I Recast are in any way diminished; the only hierarchical structure suggested is that the Brussels I Recast's rules must not displace the rule of Article 79 GDPR. Brussels I Recast and the GDPR therefore will co-exist.
- Secondly, the GDPR provisions in and of themselves raise a number of questions.
    - Firstly, the Regulation defines 'main establishment' in Article 4. But it does not define 'establishment' as such. Recital 22 does, and reads

      > *Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect.*

      'Effective and real exercise of activity through stable arrangements' has the advantage of suggesting a more than fleeting presence. However it lacks detail on a crucial consideration on establishment, which often creates discussion in the implementation of the similar provisions in the Brussels I Recast: in particular, whether these arrangement need to be directed externally or whether in the alternative, a purely internal stable arrangement suffices. The former would imply external commercial activity, whilst the latter could be met .e.g. purely by the employment of staff.
    - Further, the wording of the jurisdictional rule does not require that the rights which the data subject feels have been infringed, be infringed by the very 'establishment' that triggers the jurisdictional anchor. In the absence of any clarification to this effect, there is evidently no indication either of whether, when rights have been allegedly infringed by various establishments, jurisdiction applies in 'Mosaic' fashion. (Which would be the case in the application of the jurisdictional rule for torts under Article 7(2) Brussels I Recast).
    - 'Habitual residence' is not only left undefined in the Regulation. As a jurisdictional rule it is also unusual in civil and commercial cases. The Brussels I Recast Regulation employs the term 'domicile', which it defines for companies in Article 63. For natural persons, per Article 62, it leaves it up to Members States' residual private international law to define the concept. The EU Regulations on applicable law for contractual and non-contractual Regulations, respectively Rome I and Rome II, do use the concept of habitual residence and define it for companies and for natural persons although for the latter only in their professional capacity.

In Member States' residual private international law, 'habitual residence' is defined and applied in widely varying compositions. Where it is interpreted by the European Court of Justice outside of civil and commercial litigation, for instance in parental kidnapping cases, its analysis is extremely case-specific, ad hoc in other words, and difficult to predict entirely a priori. In other words, not exactly the kind of predictability which one would prefer in a more civil and commercial context, which includes the GDPR.

  - Finally, the exception for action in case '*the controller or processor is a public authority of a Member State acting in the exercise of its public powers*' invites the type of extensive discussions which are common in the Brussels I Recast Regulation. Not only can public bodies often act *iure gestionis*, leading to extensive discussions on the difference between act iure imperii and act iure gestionis; additionally, private parties are increasingly given public duties (such as certain activities of utilities companies).

- The aforementioned continued existence of the heads of jurisdiction in the Brussels I Recast Regulation will lead to a multitude of fora which are likely to endanger the GDPR's one-stop-shop principle. I am fully aware that this principle is primarily aimed at the public law enforcement of data protection. However private enforcement undeniably in practice impacts considerably on data protection compliance. Under the Brussels I Recast, jurisdiction for data protection enforcement is imaginable under a wide variety of jurisdictional rules: Article 4's general domicile rule; the special jurisdictional regime for contract (Article 7(1) as well as tort (Article 7(2); and, importantly, the protected regime for consumers.

In conclusion, the Commission's introduction of Article 79 GDPR without much debate or justification, will lead to a patchwork of fora for infringement of personality rights. Not only will it take a while to settle the many complex issues which arise in their precise application. Their very existence arguably will distract from harmonised compliance of the GDPR rules.