ARTICLE

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The Brussels Ibis reform, third state defendants and the Dutch experience

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Abstract

Article 79 Brussels Ibis calls for the Commission to present a report on the application of the Brussels Ibis Regulation. The wording of this provision suggests that this report is to predominantly evaluate the need for an extension of the rules on jurisdiction to third state defendants. In doing so, the Commission must assess the practical operation of the Regulation as well as international developments that might influence the desirability of reform. While the notion of extending the Regulation's provisions to third state defendants was proposed – and ultimately abandoned – during the 2010 revision of the Brussels I Regulation, evolving global dynamics, such as increased digitalisation, the private enforcement of the GDPR and the introduction of the AI Act, may call for a fresh examination of the issue. This article explores the potential extension of the application of the Regulation's rules on jurisdiction to third state defendants through a Dutch lens. Starting from the premise that the Regulation principally works well, this article examines the possible inclusion of third state defendants and touches upon the Dutch experience with several important and timely topics, such as residual jurisdiction, the interplay between the Brussels Ibis Regulation and other instruments, such as the GDPR, and the growing significance of collective redress.

1. Introduction

The Brussels Ibis Regulation, also known as the Brussels Ia Regulation or the Brussels I Recast,[1] serves as a cornerstone of cross-border litigation within the EU. It establishes a unified framework on international jurisdiction in civil and commercial matters while facilitating the free circulation of judgments among the Member States.[2] In doing so, the Regulation seeks to enhance legal certainty and access to justice in cross-border civil litigation.

The revised Regulation has been in force for the past decade, replacing the Brussels I Regulation as of 10 January 2015.[3] Article 79 Brussels Ibis mandates a review of the Regulation's operation, requiring the Commission to present a report by 11 January 2022. This report was to

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1 Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* 2012, L 351/1.

2 Recital 4 Preamble Brussels Ibis Regulation.

3 Art. 81 Brussels Ibis Regulation on its temporal application and Art. 80 on the repeal of the Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. *OJ* 2001, L 12/1).

evaluate the potential need to extend the rules of jurisdiction to third state defendants in light of the operation of the Regulation and international developments. If necessary, it was to be accompanied by a proposal for revision. At present, a Commission report remains absent. Yet, a preparatory study detailing the application of the Regulation across the Member States was published in 2023.[4] In addition, the review of the Regulation has sparked serious academic interest, with studies being conducted by, e.g., the European Association of Private International Law (EAPIL),[5] the *Groupe européen de droit international privé* (GEDIP)[6] and a consortium of institutes – the Asser Institute, the *Internationaal Juridisch Instituut*, the University of Antwerp and the University of Hamburg – under the JUDGTRUST project.[7]

Although the Regulation is generally considered effective, several factors and recent international developments are likely to impact both the application and the need for potential reform. These include the evolution of the case law of the Court of Justice of the European Union (CJEU), the growing influence of digitalisation, and the adoption of EU sectoral instruments that establish private international law rules, such as the General Data Protection Regulation[8] (hereafter GDPR).[9]

Given the extensive scope of the Brussels Ibis Regulation, a comprehensive analysis falls beyond the scope of this article. Certain subject matters that merit monographic discussion on their own, such as the multitude of fora established under Article 7(2), have been intentionally omitted. Instead, the article examines the possible inclusion of third state defendants within

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4 European Commission: Directorate-General for Justice and Consumers, N. Rass-Masson, V. Rouas, M. Paron Trivellato & L. Vona, *Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation) – Final report*, Publications Office of the European Union, 2023.

5 See: https://eapil.org/2023/02/13/eapil-working-group-on-brussels-i-bis-regulation-reform-preliminary-report-and-survey/ (last accessed 26 February 20025); B. Hess et al., 'The Reform of the Brussels Ibis Regulation', MPILux Research Paper Series 2022 (6), available online at: https://www.mpi.lu/research/working-paper-series/2022/wp-2022-6/ (last accessed 26 February 2025); B. Hess et al., 'The Reform of the Brussels Ibis Regulation – Academic Position Paper', Vienna Research Paper 2024, available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4853421 (last accessed 26 February 2025). The EAPIL Young Research Network conducted a study on non-EU defendants under the Brussels Ibis Regulation: T. Lutzi, E. Piovesani & D. Zgrabljić Rotarp, *Jurisdiction over Non-EU Defendants: Should the Brussels Ia Regulation be Extended?*, Oxford: Hart Publishing 2023. Also see: https://eapil.org/2023/06/15/jurisdiction-over-non-eu-defendants-should-the-brussels-ia-regulation-be-extended/ (last accessed 26 February 2025).

6 GEDIP, 'Consolidated version of a proposal to amend Regulation 44/2001 in order to apply it to external situations (Bergen 2008, Padua 2009, Copenhagen 2010)', available online at: https://gedip-egpil.eu/wp-content/uploads/2010/10/gedip-Bergen.pdf (last accessed 26 February 2025).

7 D. Althof, L. Frohn & F. van Overbeeke, 'Regulation Brussels Ia: a standard for free circulation of judgments and mutual trust in the European Union (JUDGTRUST)'. Consolidated report, available online at: https://www.asser.nl/media/795650/consolidated-report.pdf (last accessed 26 February 2025).

8 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ* 2019, L 119/1-88.

9 Cf. Study to support the preparation of a report on the application of Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation) (*supra* note 4).

the scope of the Brussels Ibis Regulation and discusses several important and timely topics, such as residual jurisdiction, the interplay between the Brussels Ibis Regulation and other EU instruments, i.e., the GDPR and the AI Act,[10] and the growing significance of collective redress. The following paragraphs assess the need for a revision of the Regulation, drawing on the Dutch experience with these key issues. Yet, before discussing these matters, the following paragraph provides a brief overview of the general application of the Brussels Ibis Regulation in the Netherlands.

2. General application in the Netherlands

As other EU Regulations, the Brussels Ibis Regulation is directly applicable in the Netherlands.[11] Consequently, Dutch courts rely on the Regulation to determine their international jurisdiction in civil and commercial matters falling within the scope of the Regulation. Additionally, the recognition and enforcement of judgments from other Member States are governed by the framework set out in the Regulation.

Currently, the assessment of jurisdiction is primarily governed by national procedural law, which leaves it to national law to decide whether the court must establish its jurisdiction on its own motion.[12] However, exceptions apply in situations governed by the exclusive bases of jurisdiction under Article 24 Brussels Ibis (Art. 27 Brussels Ibis) or in cases involving a defendant's default of appearance (Art. 28 Brussels Ibis).[13] In these cases, the courts of all Member States are required to assess their jurisdiction *ex officio*. In the Netherlands, as stems from settled Dutch case law, all rules on international jurisdiction, including those of the Brussels Ibis Regulation, are to be applied *ex officio*.[14] This requirement exists regardless of whether the Regulation is invoked by the parties or whether the court's jurisdiction is part of the grounds

10 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), *OJ* 2024 L 2024/1689.

11 Art. 288 Treaty on the Functioning of the European Union (TFEU); cf. CJEU 19 December 2013, Case C-9/12, ECLI:EU:C:2013:860, *NIPR* 2014-48 (*Corman-Collins v. La Maison du Whisky)*. An important territorial consideration is that the Regulation does not extend to the Caribbean Netherlands (Bonaire, Saba and Sint Eustatius), nor does it apply to Curaçao, Sint Maarten, and Aruba. See Art. 355 TFEU; recital 9 Preamble Brussels Ibis Regulation; Art. 68 Brussels Ibis Regulation; Schaafsma, in: *T&C Rv*, Inleidende Opmerkingen Verordening Brussel I-bis, aant. 1h [Introductory comments Brussels I-bis Regulation, para. 1h] (2024).

12 Cf. B. Hess, 'Reforming the Brussels Ibis Regulation: Perspectives and Prospects', Max Planck Institute Luxembourg for Procedural Law Research Paper Series 2021 (4), p. 14.

13 For Dutch case law on these matters see e.g.: *Hoge Raad* [Netherlands Supreme Court, HR] 22 December 2018, ECLI:NL:HR:2018:2361; HR 22 February 2019, ECLI:NL:HR:2019:292, *NIPR* 2019-64.

14 HR 17 April 2015, ECLI:NL:HR:2015:1077, *NIPR* 2015-297, para. 3.3.2; HR 12 April 2019, ECLI:NL:HR:2019:566, *NIPR* 2019-196, *NJ* 2019/260 with note L. Strikwerda, para. 3.4.3. Cf. recently: *Parket Hoge Raad* [Public Prosecutor's Office, PHR] 15 November 2024, ECLI:NL:PHR:2024:1220 (Opinion A-G Vlas); PHR 17 January 2025, ECLI:NL:PHR:2025:69 (Opinion A-G Ibili).

for appeal.[15] In other words: the rules on international jurisdiction are considered a matter of public policy, requiring both the court of first instance and the court of appeal to assess their jurisdiction *ex officio*.[16]

Cases involving the Brussels Ibis Regulation are extensively documented, as Article 4(1)(e) of the selection criteria for the database *rechtspraak.nl* mandates the publication of judgments involving the Lugano Convention,[17] the Brussels I Regulation and its successor(s).[18] With over 2000 reported cases addressing (just) the Brussels Ibis Regulation,[19] the Dutch courts have developed significant familiarity with the Brussels regime. Moreover, they regularly seek guidance from the CJEU by submitting preliminary questions, demonstrating their active role in the interpretation and development of the Regulation.[20]

3. Third-state defendants

During the upcoming review of the Brussels Ibis Regulation, the European Commission – as evidenced by Article 79 – seeks to revisit a timeworn and recurring debate: the inclusion of third state defendants within the Brussels regime. This subject has sparked considerable discussion ever since the regime's inception – with the introduction of the 1968 Brussels Convention on jurisdiction and the enforcement of judgment in civil and commercial matters–, reflecting concerns about access to justice and the harmonisation of jurisdictional rules across the EU.[21]

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15 HR 17 April 2015, ECLI:NL:HR:2015:1077, *NIPR* 2015-297, para. 3.3.2; L. Strikwerda & S.J. Schaafsma, *Inleiding tot het Nederlandse internationaal privaatrecht*, Deventer: Kluwer 2019, nos. 30 and 42; Schaafsma, in: *T&C Rv*, Inleidende Opmerkingen Verordening Brussel I-bis, aant. 5a (2024).

16 HR 17 April 2015, ECLI:NL:HR:2015:1077, *NIPR* 2015-297, para. 3.3.2: *'(…) dat de regels van internationaal bevoegdheidsrecht van openbare orde zijn. Dit betekent dat zowel de rechter in eerste aanleg als de rechter in hoger beroep ertoe is gehouden ambtshalve de rechtsmacht van de Nederlandse rechter aan een onderzoek te onderwerpen*' […that the rules on international jurisdiction are of public policy. This means that both the court of first instance and the court of appeal are required to examine the jurisdiction of the Dutch court ex officio].

17 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Lugano, 16 September 1988, *OJ* 1988, L319/9; Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Lugano, 30 October 2007, *OJ* 2007, L 339/3.

18 See for the criteria for publication *Besluit selectiecriteria uitsprakendatabank Rechtspraak.nl* (available online at: https://www.rechtspraak.nl/Uitspraken/paginas/selectiecriteria.aspx).

19 As documented on *rechtspraak.nl* (and additionally in the *NIPR*-database: www.nipr-online.eu).

20 See e.g. CJEU 16 June 2016, Case C-12/15, ECLI:EU:C:2016:449, *NIPR* 2016-298 (*Universal Music)*; CJEU 6 February 2019, Case C-535/17, ECLI:EU:C:2019:96, *NIPR* 2019-58 (*NK v. BNP Paribas Fortis*); CJEU 3 September 2020, Case C-186/19, ECLI:EU:C:2020:638, *NIPR* 2020-485 (*Supreme Site Services v. Shape*); CJEU 10 March 2022, Case C-498/20, ECLI:EU:C:2022:173, *NIPR* 2022-286; CJEU 13 February 2025, Case C-393/23, ECLI:EU:C:2025:85, *NIPR* 2025-367 (*Heineken v. MTB)*; *Stichting Right to Consumer Justice en Stichting App Stores Claims*, Case C-34/24 (pending); HR 21 December 2018, ECLI:NL:HR:2018:2361; HR 21 April 2023, ECLI:NL:HR:2023:660, *NIPR* 2023-490; Rb. [District Court] Amsterdam 16 August 2023, ECLI:NL:RBAMS:2023:5310, *NIPR* 2023-622.

21 See e.g. K.H. Nadelmann, 'Jurisdictionally improper fora in treaties on recognition and enforcement of judgments. The Common Market draft', *Columbia Law Review* 1967, pp. 995-1023; L. de Winter, 'Excessives Jurisdiction in Private International Law', *ICLQ* 1968, pp. 706-720; B.M. Karl, 'The Common Market Judgments Convention – Its Threat and Challenge to Americans', *International Lawyer* 1974, pp. 446-451; A.T. von Mehren, 'Recognition and enforcement of sister-state judgments: reflection on general

As part of the 2010 reform of the Brussels I Regulation,[22] the Commission proposed an extension of the jurisdiction rules of the Regulation to defendants domiciled in third states. This initiative was aimed at promoting the proper administration of justice[23] and ensuring equal access to justice, regardless of the domicile of the defendant.[24] In its 2010 proposal, the Commission sought to extend the special heads of jurisdiction under Article 5 – currently Article 7. For example, the proposal allowed a Member State to assume jurisdiction when a contractual obligation was to be performed within that Member State.[25] If adopted, the proposed Regulation would have subjected third state domiciliaries to the jurisdictional framework of the Brussels I Regulation, abandoning any reference to national law.[26] To compensate for the removal of national avenues of jurisdiction, the proposal introduced two additional jurisdictional grounds aimed at ensuring equal access to justice throughout the EU. First, the proposal sought to establish jurisdiction based on the presence of the defendant's movable assets within a Member State, enabling courts to assume jurisdiction in the event of enforcement prospects within the EU. Second, it proposed a *forum necessitatis* – allowing a Member State court to 'exercise jurisdiction if no other forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned'.[27]

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theory and current practice in the European Economic Community and the United States', *Columbia Law Review* 1981, pp. 1044-1060; F. Juenger, 'La Convention de Bruxelles du 27 septembre 1968 et la courtoisie internationale: Réflexions d'un americain', *Revue critique de droit international prive* 1983, pp. 37-51; B.M. Landay, 'Another Look at the EEC Judgments Convention: Should Outsiders Be Worried?, *Penn State International Law Review* 1987, pp. 25-44; T. Kruger, *Civil jurisdiction rules of the European Union and their impact on third States* (diss. Catholic University of Leuven), 2005; H. van Lith, *International Jurisdiction and Commercial Litigation Uniform Rules for Contract Disputes* (diss. Erasmus University Rotterdam), 2009, pp. 14-15; B. Hess, 'Die Reform der EuGVVO und die Zukunft des Europäischen Zivilprozessrechts', *IPRax* 2011, pp. 125-130; F. Ibili, 'Toepassing van de EEX-bevoegdheidsregels op verweerders uit derde landen: naar een universeel formeel toepassingsgebied', *WPNR* 2011, pp. 533-536; B.J. van het Kaar, 'EEX op de schop: het nieuwe Commissievoorstel tot wijziging van de EEX-verordening', *NTHR* 2011, pp. 149-156; U. Magnus & P. Mankowski, 'The Proposal for the reform of Brussels I, Brussels Ibis *ante portas*', *ZVglRWiss* 2011, pp. 252-301; J. Weber, 'Universal Jurisdiction and Third States in the Reform of the Brussels I Regulation', *RabelsZ* 2011, pp. 619-644; L.M. van Bochove, 'De herschikte EEX-Vo en derde landen: het formele toepassingsgebied van de Verordening nader bezien', *Tijdschrift voor Civiele Rechtspleging* 2017, pp. 1-10.

22 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final, pp. 4-5 and 8.

23 COM(2010) 748 final, pp. 4-5 and 8.

24 Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final, p. 3; Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 174 final, pp. 4-5.

25 COM(2010) 748 final, p. 8.

26 COM(2010) 748 final, Preamble 19.

27 COM(2010) 748 final, p. 8.

Ultimately, the proposal failed to garner sufficient support from both the EU Parliament[28] and the Council. It was abandoned due to a need for further research and political debate, alongside concerns regarding recognition and enforcement, reciprocity, and international comity. The forthcoming review of the Brussels Ibis Regulation presents the opportunity for the Commission to revisit the issue more than a decade after the adoption of the revised Regulation. Once again, the question of whether to include third state defendants in the Brussels regime is set to take centre stage in discussions on the future of this pivotal Regulation. It remains to be seen whether such an extension is feasible and desirable in the current legal landscape.

3.1 Third state defendants under Brussels Ibis

Under the Brussels Ibis Regulation, litigation against third state defendants remains the exception. The Regulation primarily attributes jurisdiction to Member State courts based on the defendant's domicile within a Member State.[29] Whenever a defendant is domiciled outside the EU, national rules on jurisdiction must decide whether a court has jurisdiction.[30] Exceptions to this general rule are narrowly defined and exclusively listed in Article 6 Brussels Ibis. These concern matters of weaker party protection, i.e., consumer (Art. 18(1)) and employment matters (Art. 21(2)) as well as matters of exclusive jurisdiction, either due to the subject matter in dispute (Art. 24) or by reason of a choice of forum (Art. 25).[31]

3.2 Residual jurisdiction in the Netherlands

In European private international law, cases in which European instruments do not establish uniform rules on jurisdiction are commonly referred to as being subject to the 'residual jurisdiction' of the Member States.[32] The Dutch rules on residual jurisdiction thus apply, in matters that fall outside the scope of the Brussels Ibis Regulation, most notably when the defendant is not domiciled within a Member State.[33] In the absence of any applicable treaty or EU Regulation on jurisdiction, the jurisdiction of the Dutch courts is determined by Articles 1-14 of the Dutch Code of Civil Procedure (DCCP).[34] These provisions serve as the legal framework for adjudicating disputes involving third state defendants as well as other situations not covered

28 Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI)), para. 15; Report of the Committee on Legal Affairs and the Opinion of the Committee on Employment and Social Affairs on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (A7-0320/2012), p. 139.

29 As per Art. 4 Brussels Ibis.

30 As per Art. 6(1) Brussels Ibis.

31 For more on this see e.g. P. Vlas, in: U. Magnus & P. Mankowski, *European Commentaries on Private International Law. ECPI Commentary*, Cologne: Verlag Dr. Otto Schmidt 2023, pp. 103-107.

32 See e.g. A. Nuyts, 'Study on residual jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations)', 2007.

33 See Art. 4 Brussels Ibis outlining the general formal scope of the Regulation.

34 *Stb.* 2001, 580. See Art. 1 DCCP. Cf. P. Vlas, *GS Burgerlijke Rechtsvordering*, afd. 1 Rv, aant. 3 (2020).

by the Brussels Ibis Regulation. The most prominent rules on residual jurisdiction are briefly addressed below.

During the revision of Dutch civil procedural law, which introduced codified grounds of residual jurisdiction, the Dutch legislator carefully considered existing treaties and – later – EU regulations on jurisdiction.[35] As a result, a significant portion of the provisions governing international jurisdiction are derived from the Brussels regime.[36] In fact, where the provisions are so derived, their wording has, in principle, been adopted verbatim.[37]

As a general rule, akin to Article 4 Brussels Ibis, Article 2 DCCP grants jurisdiction whenever the defendant is domiciled in the Netherlands.[38] Articles 6 and 6a DCCP provide supplementary grounds of jurisdiction that are largely derived from and closely mimic the provisions of the Brussels Convention and/or the Brussels I Regulation.[39] Article 6 contains, *inter alia*, grounds for jurisdiction in matters concerning contractual obligations,[40] individual employment contracts,[41] consumer contracts, tort, and rights *in rem* in immovable property or the tenancy of immovable property.[42] In applying these provisions, the case law of the CJEU acts as a guideline. Despite the fact that the Dutch courts are not formally bound by the decisions

35 *Kamerstukken II* 1995-1996, 24 651, nr. 3 (Explanatory Memorandum); *Kamerstukken II* 2002-2003, 28 863, nr. 3 (Explanatory Memorandum).

36 Additionally, the legislator prioritised the international recognition and enforcement of Dutch judgments. To facilitate this, jurisdictional grounds that may be regarded as exorbitant – such as the *forum actoris* and *forum non conveniens* – were generally excluded, as their inclusion might impede the recognition and enforcement of Dutch judgments in foreign jurisdictions.

37 *Kamerstukken II* 1999-2000, 26 855, nr. 3 (Explanatory Memorandum), p. 33.

38 Art. 2 DCCP, for cases to be initiated by summons. In its Explanatory Memorandum, the Dutch legislator explains that while the maxim of *actor sequitur forum rei* also stems from Dutch law, its application aligns with the Brussels regime: *Kamerstukken II* 1999-2000, 26 855, nr. 3 (Explanatory Memorandum), pp. 27 et seq. It is important to note that the DCCP makes a distinction between cases initiated by summons and cases initiated by petition: Art. 3 DCCP provides a *forum actoris* in cases to be initiated by petition.

39 *Kamerstukken II* 1995-1996, 24 651 nr. 3, pp. 102-104 (Explanatory Memorandum); *Kamerstukken II* 2002-2003, 28 863, nr. 3, p. 5 (Explanatory Memorandum); *Wet van 8 september 2005 tot aanpassing van enkele onderdelen van het Wetboek van Burgerlijke Rechtsvordering en enige andere wetten in verband met het nieuwe procesrecht*, *Stb.* 2005, 455; X.E. Kramer, 'De regeling van de rechtsmacht onder het herziene Rechtsvordering', *NIPR* 2002, pp. 375-385; A.L.H. Ernes & A.W. Jongbloed, 'De bevoegdheid van de rechter. Over internationale, absolute, sectorale en relatieve bevoegdheid', in: A.L.H. Ernes & A.W. Jongbloed e.a., *Burgerlijk procesrecht praktisch belicht*, Deventer: Kluwer 2014, pp. 60-64.

40 Art. 6(a) DCCP mimics the provision of Art. 7(1)(a) of the Brussels Ibis Regulation, which clarifies the place of performance of contractual obligations and was included to align the provisions of the DCCP with the Brussels I Regulation.

41 The provision on employment contracts (Art. 6(b)) uses the same connecting factor as primarily applied under the corresponding provision in the Brussels Ibis Regulation (Art. 21(1)(a)(i) i.e. the place where the employee habitually carries out his work or the last place where he did so. Unlike the provisions on employment contracts in the Brussels Ibis Regulation, Art. 6 expressly extends to agency agreements and Dutch seagoing vessels.

42 Other jurisdictional grounds incorporated in Art. 6 refer to succession matters, corporate matters and issues of insolvency.

of the CJEU,[43] Dutch courts seldom exercise their judicial discretion to depart from the path set out by the CJEU. As a result, the Brussels interpretation of the rules on jurisdiction in, e.g., tort and contractual matters extends to third state defendants by virtue of the application of the corresponding domestic provisions. In part, this may be explained by reference to the so-called *Moldova* judgment.[44] In this case, the Supreme Court established that, as a general principle, the case law of the CJEU on the Brussels Ibis Regulation and its predecessors must be followed. A deviation from this principle is only considered justified if it is plausible that the Dutch legislator intended to diverge from the EU instruments or their interpretation when formulating national rules on jurisdiction. Where national provisions on jurisdiction mirror those of the Brussels regime, e.g., where it concerns the jurisdictional rule on tort, any intention to diverge is evidently absent. As a result, the discretion to depart from CJEU case law appears limited to situations where the Dutch provisions differ in scope, aim and/or wording from their EU counterparts. A notable example of such a provision is Article 7(1) DCCP on multiple defendants.[45] Although clearly derived from the former Article 6(1) Brussels Ibis – now Article 8(1) Brussels Ibis –, the Dutch rule on multiple defendants diverges from its EU equivalent both in aim and wording. As per Article 7(1), if the Dutch court has jurisdiction over one of the defendants, the court also has jurisdiction to hear claims instituted against the other defendants involved in the proceedings, provided that the claims are so closely connected that 'reasons of expediency' justify joint proceedings. In drafting this provision, the Dutch legislator drew inspiration from both the ECJ ruling in *Kalfelis/Schröder*[46] and rulings of the Dutch Supreme Court.[47] While the broader rule derives from European case law, the wording 'for reasons of expediency' has a national origin.[48] Unlike its counterpart in the Brussels regime, the Dutch provision does not explicitly aim to prevent the risk of irreconcilable judgments resulting from separate proceedings. Additionally, in contrast to Article 8(1) Brussels Ibis, the DCCP does not require the court to establish jurisdiction over the anchor defendant on the basis of domicile. Instead, jurisdiction over the anchor defendant may be founded on any available – independent – jurisdictional basis, [49] including those set out in Article 6 DCCP. Yet, despite the fact that Dutch courts have some discretion when it comes to the interpretation of Article 7(1) DCCP, the case law of the CJEU still acts as an important guideline. Interpreting the provision along such lines serves to enhance the coherence and predictability of the rule by ensuring that similar provisions are interpreted as consistently as possible.[50]

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43 See the Explanatory Memorandum in which the legislator clarifies – when discussing the provision on tort – that the 'Dutch court should be able to decide for itself whether it wants to follow the interpretation of the Court of Justice'; *Kamerstukken II* 1999-2000, 26 855, nr. 3 (Explanatory Memorandum).

44 HR 29 March 2019, ECLI:NL:HR:2019:443, *NIPR* 2019-195.

45 This rule applies only to cases thate are to be initiated by summons.

46 ECJ 27 September 1988, Case 189/87, ECLI:EU:C:1988:459, *NIPR* 1990-483 (*Kalfelis/Bank Schröder*).

47 HR 27 October 1978, *NJ* 1980, 102 with note WHH; HR 16 May 1986, *NJ* 1987, 456.

48 *Kamerstukken II* 1999-2000, 26 855, nr. 3 (Explanatory Memorandum), p. 37.

49 PHR 11 January 2019, ECLI:NL:PHR:2019:123 (Opinion A-G Vlas), para. 3.31; note L. Strikwerda, HR 29 March 2019, *NJ* 2019/260, para. 14.

50 PHR 11 January 2019, ECLI:NL:PHR:2019:123 (Opinion A-G Vlas), paras. 3.6-3.8; note L. Strikwerda, HR 29 March 2019, *NJ* 2019/260, para. 14.

Additional relevant provisions on residual jurisdiction include Article 8 DCCP on prorogation of jurisdiction, Article 9 DCCP which includes rules on tacit prorogation and a *forum necessitatis* and Article 10 DCCP which includes reference to a *forum arresti*[51] and ensures that jurisdiction is not based on general rules determining relative competence.[52] Articles 11-14 do not include rules on jurisdiction but include rules on pendency and provisional matters.

3.3 Reform options

Under a potential reform of the Brussels Ibis Regulation there may be multiple options for extending the scope of the Regulation to include third state defendants. These range from full integration, whereby the Regulation would apply comprehensively to third state defendants, to partial integration, involving selective application of specific provisions[53] – as presently exists where it concerns, e.g., consumers and employees.[54] Additionally, the reform could introduce targeted jurisdictional mechanisms – such as the creation of specific fora – to compensate for the potential elimination of exorbitant jurisdictional grounds or, e.g., to include a *forum necessitatis*, ensuring access to justice in cases where no other forum is available. Alternative approaches, such as preserving the status quo or addressing the issue outside the EU framework – for instance, within the Hague Conference on Private International Law – are not considered below, as both options would ultimately maintain the existing rules on jurisdiction in the Regulation.

3.3.1 Full integration

One possible reform approach would be to place third state defendants on equal footing with defendants domiciled in a Member State.[55] Doing so would end the duality in the application of jurisdictional rules, mainly dependent on the defendant's domicile.[56] A uniform application of the Brussels regime would ensure that the same legal framework governs jurisdiction over both EU and third state defendants, no longer requiring courts to make a distinction in the application of jurisdictional rules based on the defendant's domicile. A reform enabling the full integration of third state defendants into the Brussels Ibis Regulation would likely eliminate any reliance on national law, thereby excluding the application of residual jurisdictional rules.[57]

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51 In Art. 767 DCCP.

52 F. Ibili, *Gewogen rechtsmacht in het IPR* (Recht en Praktijk nr. 148), Kluwer 2007, para. 3.3.1.

53 The first two options align with some of the options explored by the European Commission in the run up to the Brussels I reform.

54 Art. 18(1) Brussels Ibis; Art. 21(2) Brussels Ibis.

55 This option has been supported by several scholars. See e.g. Weber 2011, p. 619 (*supra* note 21); A. Bonomi, 'European Private International Law and Third States', *IPRax* 2012, pp. 184 et seq.; B. Hess, *Europäisches Zivilprozessrecht*, Berlin: De Gruyter 2020, para. 5.24; F. Rielaender, 'Aligning the Brussels Regime with the Representative Actions Directive', *ICLQ* 2022, pp. 112-131.

56 Weber 2011, p. 626 (*supra* note 21); Nuyts 2007, p. 155 (*supra* note 32); Rielaender 2022, pp. 112-131 (*supra* note 55).

57 Cf. Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final in which the court proposes to abandon any reference to national law when expanding the application of the Regulation to third state defendants.

After all, ensuring equal access to justice across the EU, regardless of the parties' domicile, can only be fully achieved if the rules on jurisdiction set out in the Regulation cannot be undermined or supplemented by national rules, e.g., including exorbitant grounds of jurisdiction. Merely extending the alternative rules on jurisdiction of Article 7 Brussels Ibis while allowing national rules to remain in force – or referring to national law where the Regulation does not provide a forum against a third state defendant – would uphold the current fragmentation of rules on jurisdiction *vis-à-vis* third state defendants.[58] A primary reluctance to embracing a universal application of the jurisdictional rules in the Brussels Ibis Regulation could be the fact that the absence of any remaining recourse to national rules on jurisdiction would do away with the possibility of applying exorbitant grounds of jurisdiction.[59] For the Netherlands, this is not necessarily problematic as the Dutch legislator prioritised the international recognition of Dutch judgments during the reform of Dutch civil procedural law. To facilitate this, jurisdictional grounds that may be regarded as exorbitant – such as the *forum actoris* – were generally excluded, as their inclusion could potentially impede the recognition and enforcement of Dutch judgments in foreign jurisdictions.[60] A comparison between the jurisdictional grounds established by the Regulation and the residual rules on jurisdiction that exist in the Netherlands – as outlined in section 3.2 – reveals significant overlap. Dutch rules on jurisdiction largely mirror the provisions of the Regulation and are often interpreted in line with the Brussels regime. Consequently, extending the Regulation's jurisdictional rules to third state defendants would have minimal impact on how Dutch courts assess jurisdiction in cases involving such defendants.

3.3.2 Partial integration

At present, the Brussels Ibis Regulation narrowly applies to third state defendants.[61] A potential reform option could be to extend this partial integration to additional provisions within the Brussels regime, while still allowing some residual rules on jurisdiction. During the 2010 Brussels I reform this approach appears to have been one of the options preferred by the Netherlands. While the Dutch government principally considered the issue more appropriately addressed within the framework of the Hague Conference on Private International Law, it nevertheless supported extending the rules of Article 5 – now Article 7 Brussels Ibis – to

58 Weber 2011, p. 626 (*supra* note 21).

59 J. Ungerer, 'Extending the Brussels Ia Regulation to Third State Defendants – Cui Bono? A Third State Perspective from the UK', in: T. Lutzi, E. Piovesani & D. Zgrabljić Rotarp, *Jurisdiction over Non-EU Defendants: Should the Brussels Ia Regulation be Extended?*, Oxford: Hart Publishing 2023, pp. 309-310, who argues that the Member States should refrain from harmonising jurisdiction rules with regard to third state defendants, as the loss of exorbitant rules on jurisdiction might be detrimental to EU claimants. Instead, he argues that Member States should maintain the status quo or decide to amend their own rules on residual jurisdiction to better align jurisdiction over third state defendants with the Brussels regime, if desirable.

60 *Kamerstukken II* 1999-2000, 26 855, nr. 3 (Explanatory Memorandum), p. 33. More so in: *Kamerstukken II* 2012-2013, 33 676, nr. 3, p. 3 the legislator specifically mentions that, within the Netherlands there exist no exorbitant fora which require reporting under Art. 5(2)/Art. 76 Brussels Ibis.

61 See Art. 6 Brussels Ibis.

third state defendants. However, it emphasised that these rules should supplement rather than replace existing national rules on jurisdiction.[62]

The residual rules on jurisdiction that exist in the Netherlands are largely modelled on the alternative grounds of jurisdiction that exist in Article 7 Brussels Ibis. Under the Regulation, these grounds are based on a close connection between the court and the action, ensuring both proximity to the dispute and foreseeability for the defendant.[63] In today's globalised economy, parties – especially businesses – are increasingly engaging in cross-border activities, not only beyond their home country, but often beyond their continent. A closer look at Dutch case law reveals that jurisdiction over third state defendants is frequently assumed on the basis of the jurisdictional provision for tort or contract (or alternatively, of the rule on multiple defendants).[64] Given this reality, it is difficult to see why – under the Brussels Ibis Regulation – a close connection between the dispute and the action should not suffice to establish jurisdiction over third state defendants. Within academic literature, several proposals have been made to extend – at least some of – the heads of jurisdiction of Article 7 Brussels Ibis to third state defendants.[65]

The 2010 legislative proposal on the reform of the Brussels I Regulation equally extended the special heads of jurisdiction to third state defendants.[66] However, despite its apparent objective, this proposal fell short of achieving full integration of third state defendants, as it maintained an exception for cases involving multiple defendants, restricting its application to defendants domiciled in a Member State. This provision was to remain restricted to those domiciled in a Member State. Looking at today's Dutch case law, jurisdiction over third state defendants is

62 *Nederlandse conceptreactie op het Groenboek Brussel I*, available online at: https://www.staten-generaal.nl/eu/behandeling/20090914/nederlandse_conceptreactie_op/document3/f=/vi8jelui20ys.pdf? (last accessed 26 February 2025).

63 Recital 16 Brussels Ibis.

64 HR 29 March 2019, ECLI:NL:HR:2019:443, *NIPR* 2019-195; HR 12 July 2020, ECLI:NL:HR:2020:1038, *NIPR* 2020-357; Hof [Court of Appeal] Amsterdam 14 August 2018, ECLI:NL:GHAMS:2018:2951, *NIPR* 2018-432; Hof Amsterdam 16 October 2018, ECLI:NL:GHAMS:2018:3707, *NIPR* 2019-67, *JBPr* 2019/6; Hof Den Haag 18 December 2015, ECLI:NL:GHDHA:2015:3587; Hof Den Haag 18 December 2015, ECLI:NL:GHDHA:2015:3588, *NIPR* 2016-80; Rb. Amsterdam 25 March 2020, ECLI:NL:RBAMS:2020:1881, *NIPR* 2020-370; Rb. Arnhem 12 August 2009, ECLI:NL:RBARN:2009:BJ6240, *NIPR* 2009-305; Rb. Den Haag 30 December 2009, ECLI:NL:RBSGR:2009:BK8616, *NIPR* 2010-219; Rb. Den Haag 1 May 2019, ECLI:NL:RBDHA:2019:4233, *NIPR* 2019-321; Rb. Den Haag 15 December 2021, ECLI:NL:RBDHA:2021:14372, *NIPR* 2022-303; Rb. Den Haag 23 March 2022, ECLI:NL:RBDHA:2022:2448; Rb. Limburg 20 January 2021, ECLI:NL:RBLIM:2021:542; Rb. Rotterdam 5 April 2006, ECLI:NL:RBROT:2006:AV9819, *NIPR* 2006-152; Rb. Rotterdam 23 October 2013, ECLI:NL:RBROT:2013:8203, *NIPR* 2014-89; Rb. Rotterdam 21 September 2022, ECLI:NL:RBROT:2022:7549, *NIPR* 2023-418; Rb. Rotterdam 19 October 2022, ECLI:NL:RBROT:2022:8625; Rb. Rotterdam 14 December 2022, ECLI:NL:RBROT:2022:11082; Rb. Rotterdam 17 May 2023, ECLI:NL:RBROT:2023:4092, *NIPR* 2023-525.

65 Hess 2021 (*supra* note 12); Hess et al. 2024, pp. 6-7 (*supra* note 5).

66 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final.

largely based on the rule that exists for multiple defendants.[67] Extending Article 7(1) Brussels Ibis to include third state defendants would likely have little impact in the Netherlands but could significantly contribute to harmonising jurisdictional approaches across Member States. This would enhance legal certainty for businesses operating within the EU and potentially resolve some of the problems in enforcing EU law against third state defendants, where they are among a group of defendants, in proceedings concerning violations of the GDPR or the AI Act (see section 4).

3.3.3 Special jurisdictional mechanisms

A final reform option would be to introduce targeted jurisdictional mechanisms that are specifically tailored to resolving the issues surrounding jurisdiction over third state defendants. Such provisions could result in the creation of specific fora – to compensate for the potential elimination of exorbitant residual rules on jurisdiction – or the inclusion of a *forum necessitatis*, ensuring access to justice in cases where no other forum is available. The following analysis examines two potential approaches: the inclusion of a *forum arresti* and a *forum necessitatis*, as these were the jurisdictional grounds considered important by the Dutch government during the 2010 Brussels I reform.[68]

3.3.3.1 *Forum arresti*

During the 2010 Brussels I reform, the Dutch government pressed the matter of including a *forum arresti*,[69] presumably aiming to ensure that Member State citizens are offered sufficient avenues to jurisdiction. Under Dutch residual law, a *forum arresti*[70] – providing jurisdiction on the basis of the location of attached (or arrested) assets – is granted jurisdiction only in situa-

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67 HR 29 March 2019, ECLI:NL:HR:2019:443, *NIPR* 2019-195; HR 12 July 2020, ECLI:NL:HR:2020:1038, *NIPR* 2020-357; Hof Amsterdam 14 August 2018, ECLI:NL:GHAMS:2018:2951, *NIPR* 2018-432; Hof Den Haag 18 December 2015, ECLI:NL:GHDHA:2015:3587; Hof Den Haag 18 December 2015, ECLI:NL:GHDHA:2015:3588, *NIPR* 2016-80; Rb. Amsterdam 25 March 2020, ECLI:NL:RBAMS:2020:1881, *NIPR* 2020-370; Rb. Amsterdam 30 June 2021, ECLI:NL:RBAMS:2021:3307, *NIPR* 2021-598 (*Facebook*); Rb. Amsterdam 15 July 2021 ECLI:NL:RBAMS:2021:3670, *NIPR* 2021-599 (*Microsoft*); Rb. Amsterdam 9 November 2022, ECLI:NL:RBAMS:2022:6488, *NIPR* 2022-556 (*TikTok*); Rb. Arnhem 12 August 2009, ECLI:NL:RBARN:2009:BJ6240, *NIPR* 2009-305; Rb. Den Haag 30 December 2009, ECLI:NL:RBSGR:2009:BK8616, *NIPR* 2010-219; Rb. Den Haag 15 December 2021, ECLI:NL:RBDHA:2021:14372, *NIPR* 2022-303; Rb. Limburg 20 January 2021, ECLI:NL:RBLIM:2021:542; Rb. Rotterdam 5 April 2006, ECLI:NL:RBROT:2006:AV9819, *NIPR* 2006-152; Rb. Rotterdam 23 October 2013, ECLI:NL:RBROT:2013:8203, *NIPR* 2014-89; Rb. Rotterdam 14 December 2022, ECLI:NL:RBROT:2022:11082.

68 *Nederlandse conceptreactie op het Groenboek Brussel I*, available online at: https://www.staten-generaal.nl/eu/behandeling/20090914/nederlandse_conceptreactie_op/document3/f=/vi8jelui20ys.pdf? (last accessed 26 February 2025).

69 *Nederlandse conceptreactie op het Groenboek Brussel I*, available online at: https://www.staten-generaal.nl/eu/behandeling/20090914/nederlandse_conceptreactie_op/document3/f=/vi8jelui20ys.pdf? (last accessed 26 February 2025).

70 Art. 10/Art. 767 DCCP.

tions where it would otherwise be impossible to attain a title of execution in the Netherlands. This provision is considered to be of considerable practical importance.[71] Under this provision, the mere attachment of assets in the Netherlands does not grant jurisdiction to the Dutch courts: jurisdiction exists only if there is no other way to ensure effective enforcement in the Netherlands.[72] More precisely, jurisdiction on this basis cannot be assumed if the Dutch courts already have jurisdiction on another basis or if the attaching creditor can obtain an enforceable judgment from another (Member) state.[73]

A comparable – yet more stringent –[74] provision, based on the presence of the defendant's assets within a Member State, was introduced in the Commission's 2010 proposal.[75] Accordingly, a claim could be brought before the courts of a Member State where the defendant holds assets, regardless of whether the claim is directly connected to such assets, provided that no other Member State court has jurisdiction. To prevent third defendants from being subjected to the courts of a Member State too easily, the Commission proposed two limitations to this general rule: (1) the value of the property must not be disproportionate to the value of the claim, and (2) the dispute must have a sufficient connection to the Member State seized. This solution has been criticised for being overly vague[76] and for subjecting third states to Member State jurisdiction where there is only a tenuous link between the court and the dispute.[77] Indeed, the mere presence of property – attached or not – within a Member State does not establish an overly close connection to that jurisdiction. As a result, such jurisdictional grounds are often considered exorbitant as they compel the defendant to litigate in a forum that lacks a meaningful connection to the dispute.[78] The approach effectively removes the defendant from his natural

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71 *Staatscommissie voor het Internationaal Privaatrecht en Adviescommissie voor Burgerlijk Procesrecht*, 'Advies ontwerp-Verordening Brussel I (document COM(2010) 748 d.d. 14 december 2010)', 2011, available online at: https://www.eerstekamer.nl/eu/publicatie/20110909/advies_ontwerp_verordening_brussel/document (last accessed 26 February 2025), para. 4.3.2.

72 G. den Dekker, 'Forum arresti en de immuniteit van eigendommen van een buitenlandse centrale bank', *NJB* 2019, p. 2435; HR 12 April 2019, ECLI:NL:HR:2019:566, *NIPR* 2019-196, para. 3.4.5.

73 HR 12 April 2019, ECLI:NL:HR:2019:566, *NIPR* 2019-196, para. 3.4.5.

74 *Staatscommissie voor het Internationaal Privaatrecht en Adviescommissie voor Burgerlijk Procesrecht*, 'Advies ontwerp-Verordening Brussel I (document COM(2010) 748 d.d. 14 december 2010)', 2011, available online at: https://www.eerstekamer.nl/eu/publicatie/20110909/advies_ontwerp_verordening_brussel/document (last accessed 26 February 2025), para. 4.3.2 who considered that the *forum arresti* in Art. 767 DCCP should be maintained over the provision proposed by the Commission.

75 Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748.

76 *Staatscommissie voor het Internationaal Privaatrecht en Adviescommissie voor Burgerlijk Procesrecht*, 'Advies ontwerp-Verordening Brussel I (document COM(2010) 748 d.d. 14 december 2010)', 2011, available online at: https://www.eerstekamer.nl/eu/publicatie/20110909/advies_ontwerp_verordening_brussel/document (last accessed 26 February 2025), para. 4.4.1.

77 P. Stone, 'The Commission Proposal for a Revised Version of the Brussels I Regulation', *Ankara Law Review* 2011, p. 119; Weber 2011, pp. 638-639 (*supra* note 21).

78 L.T.L.G. Pellis, *Forum Arresti. Aspecten van rechtscheppend (vreemdelingen-)beslag in Europa* (diss. University of Groningen) 1993, pp. 43-44; Nuyts 2007 (*supra* note 32); Van Lith 2009, pp. 45-46 (*supra* note 21); B.L.F.M. Schim, 'Enkele kritische gedachten over het forum arresti', *WPNR* 2019/7230; Ungerer 2023 (*supra* note 59). The Commission considers the proposal only 'mildly exorbitant': Commission staff working

forum – that of his domicile – without a clear link to the alternative forum.[79] For this reason, and to avoid abuse, any asset-based jurisdiction should – if adopted at all – be assumed with restraint.[80] Arguments against inclusion of an asset-based forum lie in the fact that it deviates from the principle that the defendant should be able to reasonably foresee where he might be sued, running counter to the aim of the Brussels Ibis Regulation to ensure a predictable system of jurisdiction.[81] In addition, any judgment rendered on the basis of the asset-based jurisdiction would be directly enforceable in other Member States, extending the effects beyond the mere enforcement against the asset located in the Member State in which jurisdiction is assumed.[82]

3.3.3.2 *Forum necessitatis*

In providing a universal framework on jurisdiction across the Member States, the inclusion of a *forum necessitatis* is essential to ensuring access to justice and preventing negative conflicts of jurisdiction.[83] This necessity was also stressed by the Dutch government, which advocated for the introduction of a *forum necessitatis*, in its response to the Green Paper on the Brussels I reform.[84] Similarly, the 2010 proposal for reform of the Brussels I Regulation included such a provision enabling a Member State court to exercise jurisdiction where there is no alternative forum guaranteeing the right to a fair trial and where the dispute maintains a sufficient connection with the Member State concerned.[85] This proposal bears similarities to the *forum necessitatis* that exists under Dutch residual jurisdiction. The inclusion of such a provision would thus align with the existing Dutch framework on residual jurisdiction, which could become obsolete if a universal framework on jurisdiction were established at the EU level.[86] At present, Dutch law recognises two types of *forum necessitatis*, both codified in Article 9 DCCP: (1) an absolute type, which applies when litigation abroad is wholly impossible,[87] and (2) a less stringent – yet

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paper, Impact Assessment Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), SEC(2010) 1547 final, p. 27.

79 Pellis 1993, p. 2 (*supra* note 78).

80 Cf. Hof Arnhem-Leeuwarden 17 February 2015, ECLI:NL:GHARL:2015:1148, *NIPR* 2015-188, para. 5.19.

81 Ibili 2011, p. 535 (*supra* note 21); Hess et al. 2022, p. 17 (*supra* note 5), who argue that an asset-based jurisdiction should not be part of the Brussels Ibis Regulation. Cf. F. Ibili, 'EEX en forum non conveniens', *WPNR* 2006/6650, pp. 23-24; recital 15 Brussels Ibis Regulation.

82 Schim 2019 (*supra* note 78).

83 Weber 2011, p. 641 (*supra* note 21); Ungerer 2023, p. 315 (*supra* note 59). Critical of a *forum necessitatis* in EU rules on jurisdiction: G. Van Calster. 'Change for change's sake? A succinct primer on the European Parliament's proposal to amend Brussels Ia with a view to boosting corporate due diligence', Nova Centre on Business, Human Rights and the Environment Blog, 4th March 2021.

84 *Nederlandse conceptreactie op het Groenboek Brussel I*, available online at: https://www.staten-generaal.nl/eu/behandeling/20090914/nederlandse_conceptreactie_op/document3/f=/vi8jelui20ys.pdf? (last accessed 26 February 2025).

85 Art. 26 Commission proposal.

86 Ibili 2011, p. 535 (*supra* note 21).

87 Art. 9(b) DCCP.

restrictively applied[88] – type, which applies when it is considered unacceptable to require litigation abroad, provided that there is a sufficient connection to the Dutch legal sphere.[89] Both of these types appear to be accommodated in the Commission's proposal as it applies both to the situation where proceedings cannot reasonably be brought or conducted in a third state and the situation where proceedings before a third state would be impossible. As such, the provision appears to apply to negative conflicts of jurisdiction – where a case cannot be brought before any foreign forum[90] and situations where there is a well-founded fear that the claimant may not receive a fair trial or where it may not reasonably be required of the claimant that he initiates proceedings in the relevant country. In Dutch case law, such a situation was, e.g., considered to exist where, as a result of the (aftermath of the) American invasion, the Dutch claimant could not reasonably be required to apply to the courts in Iraq.[91]

The inclusion of a *forum necessitatis* in the Brussels Ibis Regulation is widely supported.[92] It is considered that such an inclusion would enhance coherence across the EU in addressing cases involving third state defendants where no forum is available under the existing rules on jurisdiction. The inclusion of such a provision would counter the fragmentation of national approaches among the Member States.[93] More so, the inclusion of a general *forum necessitatis* would counter the need for the inclusion of a specialised *forum necessitatis* in sector-specific legislation.[94]

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88 *Kamerstukken II* 1999/00, 26 855, nr. 3, p. 42 (Explanatory Memorandum).

89 Art. 9(c) DCCP; this type of *forum necessitatis* only applies in cases that are initiated by a writ of summons.

90 Cf. *Kamerstukken II* 1999/00, 26 855, nr. 3, p. 41 (Explanatory Memorandum).

91 Rb. Rotterdam 4 June 2003, *NIPR* 2004-158.

92 Weber 2011, p. 641 (*supra* note 21); M. Stürner & M. Juris, 'Residual Jurisdiction: Back to the Future?', *Zeitschrift für das Privatrecht der Europäischen Union* 2019, p. 228; Hess 2021 (*supra* note 12); Hess et al. 2022 (*supra* note 5); Ungerer 2023, p. 315 (*supra* note 59); Hess et al. 2024 (*supra* note 5). Critical of a *forum necessitatis* in EU rules on jurisdiction: Van Calster 2021 (*supra* note 83). Cf. Van Bochove 2017, p. 5 (*supra* note 21); *Staatscommissie voor het Internationaal Privaatrecht en Adviescommissie voor Burgerlijk Procesrecht*, 'Advies ontwerp-Verordening Brussel I (document COM(2010) 748 d.d. 14 december 2010)', 2011, available online at: https://www.eerstekamer.nl/eu/publicatie/20110909/advies_ontwerp_verordening_brussel/document (last accessed 26 February 2025), para. 4.4.2 who argue that the text of such a provision should be designed in line with the *forum necessitatis* provisions in the Maintenance Regulation (No 4/2009) and the Matrimonial Property Regulation (No 2016/1103).

93 Hess et al. 2022 (*supra* note 5).

94 A *forum necessitatis* provision for business-related human rights claims, as was proposed by the European Parliament's Committee on Legal Affairs and subsequently abandoned by the European Parliament. The newly introduced Directive (EU) 2024/1760 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 merely includes a provision ensuring its application as overriding mandatory rules (Art. 29(7)), but excludes any provisions on international jurisdiction. See: Committee on Legal Affairs, 'Report with recommendations to the Commission on corporate due diligence and corporate accountability' (2020/2129(INL). Cf. P. Mankowski, in: U. Magnus & P. Mankowski, *European Commentaries on Private International Law. ECPI Commentary*, Cologne: Verlag Dr. Otto Schmidt 2023, p. 258; European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL).

4. Relationship with other instruments

The upcoming reform of the Brussels Ibis Regulation presents a valuable opportunity to (re) assess and clarify its delineation from other EU instruments, specifically sector-specific frameworks such as the *GDPR* and the *AI Act*.[95]

4.1 GDPR

The GDPR serves as the primary legislative framework on privacy and data protection within the EU. Since it entered into force on 25 May 2018, the GDPR aims to protect individuals' right to privacy by providing a comprehensive set of rules regulating the processing and transfer of personal data. The Regulation requires the controller and the processor of personal data to compensate 'any damage which a person may suffer as a result of processing that infringes this Regulation'.[96] To facilitate private enforcement, the Regulation introduces a jurisdictional rule in Article 79(2). This rule allows a data subject to initiate a claim against a controller or a data processor before (1) the courts of a Member State where the controller or processor has an establishment, or (2) the courts of the data subject's habitual residence. This provision represents a notable anomaly within the EU private international law framework. First, its jurisdictional factors deviate from standard EU terminology on international jurisdiction. Second, the GDPR does not clearly define its relationship with the Brussels Ibis Regulation, providing only an ambiguously phrased clarification in its recitals.[97]

4.1.1 Jurisdiction rules in Article 79(2)

The jurisdiction rules contained in Article 79(2) refer first to the place of establishment of the controller and data processor and, second, present a *forum actoris* in favour of the data subject. By contrast, the Brussels Ibis Regulation offers multiple jurisdictional bases for privacy violations, including the general rule of the defendant's domicile (Art. 4) and the special rule on tort (Art. 7(2)), which allows claims to be brought before the courts of the *Handlungsort* (place of the act giving rise to the damage), the *Erfolgsort* (place where the damage occurs), or the victim's centre of interests. Within Dutch case law, GDPR violations are rightly classified as

95 Cf. Hess 2021, p. 4 (*supra* note 12), who suggests that clarifying the relationship between the Brussels Ibis Regulation and other instruments should be a priority when reforming the Brussels Ibis Regulation.

96 Recital 146 GDPR; Art. 79(1) GDPR.

97 Recital 147 GDPR; for criticism on the provisions of the GDPR see *inter alia*: G. van Calster, 'Sur des bases fragiles. Le RGPD et les règles de compétence concernant les infractions au droit au respect de la vie privée', *L'Observateur de Bruxelles* 2017, p. 30; F. Marongiu Buonaiuti, 'La disciplina della giurisdizione nel regolamento (UE) n. 2016/679 concernente il trattamento dei dati personali e il suo coordinamento con la disciplina contenuta nel regolamento "Bruxelles I-bis"', *Cuadernos de Derecho Transnacional* 2017, pp. 448-464; I. Revolidis, 'Judicial Jurisdiction over Internet Privacy Violations and the GDPR: a Case of "Privacy Tourism"?', *Masaryk University Journal of Law and Technology* 2017, pp. 21-36.

torts within the meaning of Article 7(2) Brussels Ibis, allowing the infringement of privacy or personal data to be treated analogously to the infringement of personality rights.[98]

Article 79(2) appears to depart from the well-established principle of *actor sequitur forum rei*, which traditionally serves as the principal rule in establishing international jurisdiction. Rather than granting jurisdiction based on the defendant's domicile, the GDPR primarily allows the data subject to sue at the place of establishment of the controller or the processor. To clarify this, recital 22 provides a broad and somewhat vague definition of establishment that is rooted in data protection law.[99] It states that the term 'establishment' 'implies the effective and real exercise of activity through stable arrangements'. The legal form of such an establishment – including whether it possesses legal personality – is deemed irrelevant.[100] In data protection law, the concept of 'establishment' is given a flexible definition, deliberately diverging from the formal approach that traditionally links a business's establishment to its place of registration[101] – one of the key criteria for establishing domicile under the Brussels Ibis Regulation.[102] This departure is to be attributed to the specific nature of businesses operating via the internet.[103] In the landmark judgments *Google Spain*[104] and *Weltimmo*,[105] the CJEU defined 'establishment' and 'activities within the context' thereof expansively[106] under data protection law, holding that it is not necessary for the alleged infringement of the data subject's rights to be directly attributable to the establishment; the existence of 'a real and effective activity – even a minimal one – in the context of which that processing is carried out'[107] is sufficient. For an establishment to exist within the EU, the mere presence of a single representative may suffice. If this broad definition were to be applied to jurisdictional matters, it could lead to the jurisdiction of a Member State court where there is only a tenuous link between the dispute and the court asserting jurisdiction, thus promoting forum shopping and undermining some of the fundamental objectives of the rules on international jurisdiction.[108] Fundamental underpinnings of such rules lie in the

98 This justifies the application of the centre of interest-criterion established in *eDate Advertising*, CJEU 25 October 2011, Joined cases C-509/09 and C-161/10, ECLI:EU:C:2011:685, *NIPR* 2011-475 (*eDate and Martinez*).

99 The term 'establishment' and its accompanying definition was already part of 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 *OJ* 1995, L 281, in recital 19 of the Preamble.

100 Recital 22 GDPR.

101 Opinion of A-G Cruz Villalón, *Weltimmo v. Nemzeti Adatvédelmi és Információszabadság Hatóság*, Case C-230/14, ECLI:EU:C:2015:426, paras. 28, 32-34.

102 See Art. 63 Brussels Ibis.

103 Opinion of A-G Jääskinen, *Google Spain*, Case C-131/12, ECLI:EU:C:2013:424, para. 65.

104 CJEU 13 May 2014, Case C-131/12, ECLI:EU:C:2014:317 (*Google Spain*).

105 CJEU 1 October 2015, Case C-230/14, ECLI:EU:C:2015:639 (*Weltimmo*).

106 Critical of this broad definition: I. Kartheuser & F. Schmitt, 'Der Niederlassungsbegriff und seine praktischen Auswirkungen. Anwendbarkeit des Datenschutzrechtes eines Mitgliedstaats auf ausländische EU-Gesellschaften', *Zeitschrift für Datenschutz* 2016, pp. 155-159; Revolidis 2017, pp. 26-27 (*supra* note 97).

107 CJEU 13 May 2014, Case C-131/12, ECLI:EU:C:2014:317 (*Google Spain*), para. 52.

108 Similarly: L. Lundstedt, 'International Jurisdiction over Crossborder Private Enforcement Actions under the GDPR', Stockholm University Research Paper No. 57 (2018), available online at: https://scandinavianlaw.se/pdf/65-14.pdf (last accessed 26 February 2024), p. 246; Revolidis 2017, p. 27 (*supra* note 97).

predictability of the adjudicating court and its proximity to the dispute, thereby promoting procedural efficiency and facilitating a sound administration of justice.[109] Under EU jurisdiction rules, there is a clear emphasis on limiting jurisdiction to cases where a close connection exists between the court and the action.[110] This is explicitly mentioned in the recitals of the Brussels Ibis Regulation, which highlight the importance of ensuring a strong jurisdictional link, particularly in cases involving privacy violations.[111] As such, the key question is whether the CJEU will (and should) interpret the concept of 'establishment' in Article 79(2) GDPR in accordance with the broad definition applied in data protection law, or whether its interpretation should align with the general principles of jurisdiction under EU law. In answering this question, it is important to recognise that Article 79(2) serves as a jurisdictional provision, rather than a rule on data protection. Aligning the interpretation of this provision with, e.g., Article 63 Brussels Ibis – thus linking a business's establishment to its statutory seat, central administration or principal place of business – would ensure both predictability of the adjudicating court and a close link between the action and the dispute. Yet, this solution does not account for situations in which a controller or processor is domiciled outside the EU while offering its services – often via the internet – to individuals within the EU. However, this exclusion is not as problematic as it appears: this scenario is covered by the alternative rule on jurisdiction in Article 79(2), which grants jurisdiction to the courts of the Member State in which the data subject habitually resides. At first glance, this jurisdictional rule too does not easily fit within the general European framework on international jurisdiction. After all, rules on jurisdiction traditionally utilise the phrasing 'domicile'[112] rather than 'habitual residence'.[113] In addition, the introduction of a *forum actoris* – allowing the claimant to bring proceedings before the courts of his residence – is difficult to reconcile with the Brussels regime. Under the Brussels Ibis Regulation, an explicit *forum actoris* is reserved only for insured parties[114] and consumers,[115] due to their weaker socio-economic position compared to their contractual counterparts. Individuals whose privacy has been infringed do not fit within this classification.[116] As such, they do not benefit from this special protection under Brussels Ibis. Instead, they must rely on either the general rule or the alternative jurisdictional rule for torts. Yet, the protection of the data subject aligns with the

109 Asser/Vonken 10-I 2023/304; recital 15 Brussels Ibis.

110 Asser/Vonken 10-I 2023/303-304; P. Vlas, 'Zoektocht naar de "natuurlijke rechter" in de EEX-Verordening', in: R. Kotting, J.A. Pontier & L. Strikwerda (eds.), *Voorkeur voor de lex fori, bundel opstellen ter gelegenheid van het afscheid van prof. mr. Th.M. de Boer*, Deventer: Kluwer 2004, p. 181; L.M. van Bochove & X.E. Kramer, 'Opgelegde bescherming in het Europees internationaal privaatrecht. Van waardeneutraal verwijzingssysteem tot communautair beschermingsmechanisme', in: F.G.M. Smeele & M.A. Verbrugh (eds.), *Opgelegde bescherming in het bedrijfsrecht. Ratio, methodiek en dynamiek van dwingendrechtelijke bescherming van kwetsbare belangen in het bedrijfsrecht*, The Hague: BJu 2010, pp. 5-32; Strikwerda & Schaafsma 2019, no. 34 (*supra* note 15).

111 Recital 16 Brussels Ibis.

112 See e.g. Brussels Convention 1968, Brussels I Regulation, Brussels Ibis Regulation.

113 The term 'habitual residence' is e.g. used in the Rome I (No 593/2008) and Rome II Regulation (No 864/2007).

114 Art. 11(1)(b) Brussels Ibis.

115 Art. 18 Brussels Ibis; even employees, as evident weaker parties, are not granted the option of bringing a claim before the courts of their domicile.

116 Revolidis 2017, p. 29 (*supra* note 97).

aim of the GDPR. The provision of Article 79(2) makes all the more sense when taking into account that it was presumably derived from the CJEU judgment in *eDate Advertising*.[117] In this judgment, the Court ruled that the alleged victim of the infringement of personality rights via the internet may also bring an action in respect of all the damages caused before the courts of the place where he has his centre of interest.[118] This centre of interest is usually located at the victim's habitual residence.[119] In this context, the rule conferring jurisdiction on the courts of the data processor's habitual residence appears consistent with the principles of the Brussels regime.

4.1.2 Relationship with Brussels Ibis

The GDPR does not explicitly supersede the Brussels Ibis Regulation in matters of jurisdiction in privacy related disputes. In accordance with the principle *lex specialis derogat legi generali* one would generally assume that specialised rules on jurisdiction, such as those in the GDPR, take precedence over general rules. Recital 147 of the GDPR speaks against such an assumption by stating that the provisions of the GDPR should not prejudice the application of the rules established by the Brussels Ibis Regulation.[120] Due to its ambiguous phrasing the recital offers little in terms of clarification. Do the provisions of the GDPR apply in conjunction with those of the Brussels Ibis Regulation? Similarly, Article 67 Brussels Ibis, which governs the relationship of the Brussels Ibis Regulation *vis-à-vis* other instruments of private international law, provides an equally vague provision, stating that it does not prejudice the application of jurisdiction provisions on specific matters that are part of other EU instruments. Given the ambiguous language of both the recital 147 GDPR and Article 67 Brussels Ibis, it is generally assumed that the jurisdictional provision of the GDPR serves as a supplementary framework, rather than a replacement of the Brussels regime.[121]

In the Netherlands, cases involving the violation of privacy – most prominently against tech giants such as Google, Microsoft, TikTok and Facebook – are steadily on the rise, especially in cases involving collective redress.[122] There have been several cases in which the jurisdiction rules of the GDPR have been invoked.[123] This has resulted in an express discussion of the rela-

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117 Mankowski 2023, p. 990 (*supra* note 94).

118 CJEU 25 October 2011, Joined cases C-509/09 and C-161/10, ECLI:EU:C:2011:685, *NIPR* 2011-475 (*eDate and Martinez*), para. 48.

119 CJEU 25 October 2011, Joined cases C-509/09 and C-161/10, ECLI:EU:C:2011:685, *NIPR* 2011-475 (*eDate and Martinez*), para. 49.

120 Recital 147 Brussels Ibis, which reads: '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 (13) should not prejudice the application of such specific rules.'

121 Van Calster 2017, p. 30 (*supra* note 97); Marongiu Buonaiuti 2017, pp. 448-464 (*supra* note 97); Revolidis 2017, pp. 30 et seq. (*supra* note 97); Lundstedt 2018 (*supra* note 108); Mankowski 2023, p. 990 (*supra* note 94).

122 Cf. *Centraal register voor collectieve vorderingen – rechtspraak.nl* (available online at: https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen) (last accessed 26 February 2025).

123 See e.g. Rb. Amsterdam 15 June 2021, ECLI:NL:RBAMS:2021:3670, *NIPR* 2021-599; Rb. Amsterdam 9 November 2022, ECLI:NL:RBAMS:2022:6488, *NIPR* 2022-556 (*TikTok*); Rb. Amsterdam 18 October 2023,

tionship between the GDPR and the Brussels Ibis Regulation.[124] Pursuant to such case law, the provision on jurisdiction provided by the GDPR (Art. 79(2) GDPR) is considered supplementary to the Brussels Ibis Regulation.[125] For example, in a case against Microsoft, the District Court of Amsterdam presented the jurisdiction provision contained in Article 79(2) GDPR as an alternative to the provisions on jurisdiction existing under the Brussels Ibis Regulation.[126] By reference to recital 147 GDPR, the court argued that, in situations where both the Brussels Ibis Regulation and the GDPR apply, the former cannot deprive the parties of the jurisdiction rules available under the latter. In this case, however, the jurisdictional rules of Article 79(2) GDPR were of no avail to the claimant. Microsoft, a company based in Ireland, was considered the controller. Since the claimant did not have his habitual residence or centre of interest in the Netherlands, the court considered that it did not have jurisdiction on the basis of Article 79(2) GDPR. In a subsequent case involving a collective action against Facebook c.s., the District Court of Amsterdam provided a more detailed examination of the relationship between the GDPR and the Brussels Ibis Regulation.[127] The court argued that, given the general nature and broad substantive scope of the Brussels Ibis Regulation, any deviation from its provisions introduced by the EU legislator through a specialised rule would require an explicit exclusion of the Brussels regime.[128] Since neither the text of the GDPR nor its recitals indicate that the jurisdictional rules of Article 79(2) GDPR are intended to supersede those of the Brussels Ibis Regulation, the court concluded that the GDPR should be regarded as supplementary rather than exclusive. In a more recent case against TikTok c.s., the court has reaffirmed this interpretation, rendering the defendant's reliance on the *lex specialis* principle unsuccessful.[129]

The simultaneous application of the GDPR and the Brussels Ibis Regulation results in a patchwork of potential fora for claimants in privacy-related disputes. Given the complex interplay between both instruments, the question arises whether it would have been preferable to rely solely on the provisions of the Brussels Ibis Regulation, rather than introducing additional grounds of jurisdiction in a sector-specific instrument. Yet, the inclusion of Article 79(2) GDPR is readily explained by the fact that the Brussels Ibis Regulation does not extend to defendants domiciled in third states, whereas the GDPR does.[130] By incorporating a jurisdictional provision, the GDPR – albeit somewhat unusually – ensures that data subjects have effective access to justice in cases against controllers and processors that are domiciled outside the EU. Doing so allows the effective enforcement of the GDPR in civil liability cases. If the Brussels

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ECLI:NL:RBAMS:2023:6530, *NIPR* 2024-413; Rb. Amsterdam 12 February 2025, ECLI:NL:RBAMS:2025:885; Rb. Den Haag 27 November 2020, ECLI:NL:RBDHA:2020:12154; Rb. Rotterdam 13 November 2024, ECLI:NL:RBROT:2024:11322; Rb. Zeeland-West-Brabant 6 June 2024, ECLI:NL:RBZWB:2024:4253.

124 Rb. Amsterdam 30 June 2021, ECLI:NL:RBAMS:2021:3307, *NIPR* 2021-598 (*Facebook*); Rb. Amsterdam 9 November 2022, ECLI:NL:RBAMS:2022:6488, *NIPR* 2022-556 (*TikTok*)

125 Rb. Amsterdam 30 June 2021, ECLI:NL:RBAMS:2021:3307, *NIPR* 2021-598 (*Facebook*); Rb. Amsterdam 15 July 2021 ECLI:NL:RBAMS:2021:3670, *NIPR* 2021-599 (*Microsoft*); Rb. Amsterdam 9 November 2022, ECLI:NL:RBAMS:2022:6488, *NIPR* 2022-556 (*TikTok*).

126 Rb. Amsterdam 15 July 2021 ECLI:NL:RBAMS:2021:3670, *NIPR* 2021-599 (*Microsoft*).

127 Rb. Amsterdam 15 July 2021, ECLI:NL:RBAMS:2021:3670, *NIPR* 2021-599 (*Microsoft*).

128 Rb. Amsterdam 9 November 2022, ECLI:NL:RBAMS:2022:6488, *NIPR* 2022-556 (*TikTok*), para. 5.42.

129 Rb. Amsterdam 9 November 2022, ECLI:NL:RBAMS:2022:6488, *NIPR* 2022-556 (*TikTok*), para. 5.18.

130 See Art. 3 GDPR.

Ibis Regulation were to be extended to cover third state defendants, one might consider abolishing the jurisdiction provisions in the GDPR, resulting in a consolidation of jurisdictional provisions in a single framework and enhancing legal clarity.

4.2 AI Act

Similar to the GDPR, the recently adopted AI Act[131] has a distinct extraterritorial scope,[132] extending its application to third state providers and users whenever the use of an AI system – or its output – is tied to the EU.[133] The Act itself does not provide any provisions on jurisdiction, nor does it facilitate civil liability claims. Initially, the AI Act was intended to be complemented by two directives on civil liability:[134] the AI Liability Directive[135] and the Product Liability Directive.[136] Both Directives included rules on liability for those who are adversely affected by an AI system. Whereas the (revised) Product Liability Directive[137] entered into force on 9 December 2024, the Commission decided to withdraw its proposal for an AI Liability Directive in February 2025.[138] The Commission could not foresee agreement on this issue[139] and will now evaluate whether to pursue alternative legislative approaches or introduce a new proposal.[140] The withdrawal of the AI Liability Directive does not preclude private enforcement actions for violations of the AI Act. First, the Product Liability Directive provides a framework to facilitate such claims, and second, national laws may allow parties to raise violations of the AI Act in tort cases – where harm directly results from violations of the AI Act.

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131 *Supra* note 10.

132 See Art. 2 AI Act.

133 A.G. Grasso, 'Private (and substantive) international law aspects of European law on artificial intelligence', March 2022, available online at: https://www.researchgate.net/publication/359175058_Private_and_substantive_international_law_aspects_of_European_law_on_artificial_intelligence (accessed 26 February 2025), p. 5; J. von Hein, 'Forward to the Past. A Critical Evaluation of the European Approach to Artificial Intelligence in Private International Law', in: S. Voeneky, *The Cambridge Handbook of Responsible Artificial Intelligence. Interdisciplinary Perspectives*, Cambridge: Cambridge University Press 2022, p. 226; K.C. Henckel, 'Issues of conflicting laws – a closer look at the EU's approach to artificial intelligence', *NIPR* 2023, p. 205.

134 Explanatory Memorandum AI Liability Directive, p. 2.

135 COM(2022) 496.

136 COM(2022) 495.

137 Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC, *OJ* 2024, L 2024/2853.

138 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Commission work programme 2025 Moving forward together: A Bolder, Simpler, Faster Union, COM(2025) 45 final, p. 11.

139 This is somewhat curious given that the proposal followed a call to action by both the Council and the European Parliament: Council conclusions on shaping Europe's digital future, 9 June 2020, 8711/20, para. 23; European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)).

140 Annexes to the Communication from the Commission and the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission work programme 2025 Moving forward together: A Bolder, Simpler, Faster Union, COM(2025) 45 final, p. 26.

Ensuring effective private enforcement of the AI Act would require rules on jurisdiction that are tailored to AI and the Act's extraterritorial scope. In the absence of any sector-specific rules on jurisdiction, private enforcement actions would be subject to the Brussels Ibis Regulation. However, since this Regulation does not apply to third state defendants, claimants seeking to sue third state providers, operators and users of AI systems before a Member State court will have to rely on residual – national – rules on jurisdiction. These national rules vary greatly across Member States, making it difficult to predict in advance where one might be sued,[141] possibly even leaving claimants without recourse to Member State courts.[142]

The upcoming reform of the Brussels Ibis Regulation presents a clear opportunity to align the rules on jurisdiction with the extraterritorial scope that exists in some sector-specific instruments, such as the AI Act. If the application of the Brussels Ibis Regulation were to be extended to third state defendants, litigants would no longer need to rely on fragmented rules of residual jurisdiction, nor would there be a need to introduce standalone jurisdictional provisions within sector-specific legislation.

5. Collective redress

The Netherlands has a long history of allowing collective redress.[143] In 1994, a general rule on collective actions was first incorporated into the Dutch Civil Code (hereafter: DCC).[144] At present, the Mass Damage Settlement in Collective Actions Act (*Wet afwikkeling massaschade in collectieve actie*, hereafter: WAMCA)[145] allows special interest groups to initiate collective actions for damages. This law, which entered into force on 1 January 2020, facilitates initiating collective actions before the Dutch courts on the basis of Article 3:305a DCC.[146]

The WAMCA does not introduce any rules on international jurisdiction. Instead, the parties rely on the rules provided by the Brussels Ibis Regulation and the DCCP. In the absence of jurisdictional rules tailored to collective redress within these instruments, courts apply the general provisions on jurisdiction.[147] Out of the total of 100 collective actions filed in the period from 1 January 2020 to 10 February 2025,[148] over 25% of cases involved foreign defendants.[149]

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141 Cf. Nuyts 2007 (*supra* note 32).

142 More elaborately: Henckel 2023, pp. 208-209 (*supra* note 133).

143 T. Arons & G. Koster, '20 jaar collectieve actie in het Nederlands BW', *Ondernemingsrecht* 2014/68.

144 Act of 6 April 1994 (*Stb.* 1994, 269), entered into force on 1 July 1994 (*Stb.* 1994, 391).

145 *Stb.* 2019, 447.

146 With the introduction of the WAMCA special interest groups, associations and foundations can defend the interest of certain groups or a general interest, provided these interests are included in their articles of association. The provisions of the WAMCA apply to class actions concerning events that occurred on or after 15 November 2016.

147 Cf. e.g. Rb. Amsterdam 27 December 2023, ECLI:NL:RBAMS:2023:8425, *NIPR* 2024-525 (*Google*), para. 5.13; Rb. Amsterdam 14 February 2024, ECLI:NL:RBAMS:2024:745, para. 5.10; Rb. Amsterdam 17 July 2024, ECLI:NL:RBAMS:2024:4255, *NIPR* 2024-580, para. 4.

148 *Centraal register voor collectieve vorderingen – rechtspraak.nl* (available online at: https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen).

149 *Centraal register voor collectieve vorderingen – rechtspraak.nl* (available online at: https://www.rechtspraak.nl/Registers/centraal-register-voor-collectieve-vorderingen).

The majority of these cases involve claims for privacy violations,[150] and include defendants that are domiciled outside the EU; most often, these defendants are part of a larger group. In establishing jurisdiction over such defendants, the Dutch courts rely on the residual rules of jurisdiction set out in the DCCP.[151] Jurisdiction is typically assumed on the basis of the rule for multiple defendants (Art. 7(1) DCCP) or the provision on tort (Art. 6(e) DCCP). As a result, third state defendants are subject to the jurisdiction of the Dutch courts whenever there is a sufficiently close connection between the claims to justify joint adjudication for reasons of efficiency – or when the harmful event occurred in the Netherlands.

While the number and frequency of collective actions in the Netherlands continue to increase, the issue of collective redress is also gaining increased attention within the EU. A notable development is the adoption of the 2020 Directive on collective redress for consumers,[152] which provides minimum harmonisation for representative actions across Member States to the benefit of consumers. Although the Directive does not contain specific provisions on jurisdiction, the rising practical significance of collective redress has led to its inclusion as a topic of discussion under the Brussels reform.[153] Several authors have proposed rules on making the Brussels regime more amenable to collective actions, ranging from addressing issues of pendency[154] to including a special rule on jurisdiction to the benefit of the qualified entity (i.e., the special interest group pursuing the collective action)[155] or expanding some of the existing rules to third state defendants.[156]

In Dutch practice, establishing international jurisdiction over collective actions does not present any particular challenges that would justify a desire for the introduction of a specific jurisdiction rule on collective redress. When seeking to harmonise the rules on jurisdiction for collective redress across the Member States, it is important to realise that the Dutch courts rarely fully rely on the Brussels Ibis Regulation in establishing their jurisdiction in class actions. This is due to the fact that such cases are predominantly lodged against multiple defendants, often including parties that are located outside the EU. A solution to the divergence in juris-

150 See e.g. Rb. Amsterdam 30 June 2021, ECLI:NL:RBAMS:2021:3307, *NIPR* 2021-598 (*Facebook*); Rb. Amsterdam 9 November 2022, ECLI:NL:RBAMS:2022:6488, *NIPR* 2022-556 (*TikTok*); Rb. Rotterdam 13 November 2024, ECLI:NL:RBROT:2024:11322 (*Amazon*).

151 Arts. 1-14 DCCP.

152 *OJ* 2020 L 209/1.

153 D-G for Internal policies, Policy department for citizens' rights and constitutional affairs, D. Amaro et al., 'Study on collective redress in the Member States of the EU', (2018) PE 608.829; T. Arons, 'Cross-border dimension of collective proceedings in the Brussels Ibis regime: jurisdiction, lis pendens and related actions', in: P. Mankowski (ed.), *Research Handbook on the Brussels Ibis Regulation*, Cheltenham: Edward Elgar 2020, pp. 1-38; P. Leupold, 'Private International Law and Cross-Border Collective Redress. A Legal Analysis of Jurisdiction, Applicable Law, Pendency, Recognition and Enforcement under the Representative Actions Directive 1828/2020', *BEUC* (2022), available online at: https://www.beuc.eu/reports/private-international-law-and-cross-border-collective-redress (last accessed 26 February 2025).

154 Arons 2020, pp. 1-38 (*supra* note 153); Hess 2021, pp. 7-8 (*supra* note 12); Rielaender 2022, pp. 133-134 (*supra* note 55).

155 E. Lein, 'Cross-Border Collective Redress and Jurisdiction under Brussels I: A Mismatch', in: D. Fairgrieve & E. Lein (eds.), *Extraterritoriality and Collective Redress*, Oxford: Oxford University Press 2012, pp. 141-142, paras 8.33-8.34; Hess et al. 2022, p. 13 (*supra* note 5); Hess et al. 2024 (*supra* note 5).

156 Rielaender 2022, pp. 112-131 (*supra* note 55).

dictional grounds between EU defendants and non-EU defendants, as well as individual and collective actions, would be to extend the alternative grounds of jurisdiction – predominantly Art. 7(2) Brussels Ibis – and the rule on multiple defendants (Art. 8(1) Brussels Ibis) to include third state defendants.[157] Such an expansion would facilitate a consistent application of jurisdictional rules in class actions across the EU – regardless of the domicile of the defendants. A similar result would be reached by creating a separate head of jurisdiction for class actions. To this effect, Hess et al. propose the introduction of a *forum actoris* at the domicile of the special interest group initiating the claim. While this solution would promote clarity and ease of application, it raises some concerns about the careful balance of interests that the Brussels Ibis Regulation seeks to maintain. Establishing jurisdiction based solely on the domicile of the representative group could be perceived as an overextension of the limited exceptions that rely on the domicile of the initiating party – currently restricted to weaker socio-economic parties – that the Regulation allows. Although special interest groups may represent vulnerable parties, the groups themselves do not classify as such. Any deviation from the general jurisdictional rules must therefore be carefully considered to prevent the imbalance of interests that could arise from excessive flexibility.

In cases of cross-border collective redress, the issue of pendency poses a significant challenge. In fact, the inadequacy of the current *lis pendens* rules has been widely discussed in academic literature.[158] The issue is best illustrated by two cases brought before the Dutch courts: (1) a scenario in which a class action was initiated in the Netherlands while an individual action for the same harm was pending before the German courts,[159] and (2) a scenario in which a class action was initiated in the Netherlands while similar class actions were pending in Germany (and South Africa).[160] In general, the different identities of the parties involved in collective redress proceedings challenge the application of *lis pendens* rules. Article 29 of the Brussels Ibis Regulation, which governs *lis pendens*, requires that the later-seized court stay its proceedings and ultimately decline jurisdiction only if the proceedings before the different Member State courts involve the same parties. This provision offers little assistance in the scenarios outlined above. In the first case, the District Court of Amsterdam discounted the application of the *lis pendens* rule of Article 29 Brussels Ibis because the case in Germany involved an individual claim, while the Dutch case was a class action.[161] The difference in the nature of the parties effectively excluded the possibility of staying proceedings under this provision. In the second scenario, concerning the provision of incorrect financial information in a prospectus, the annual financial statements, interim figures and various press releases, the Dutch court stayed

157 Similarly: Rielaender 2022, p. 111 (*supra* note 55).

158 A. Stadler, 'The Commission's Recommendation on common principles of collective redress and private international business law issues', *NIPR* 2013, pp. 483-488; A. Pato, *Jurisdiction and Cross-Border Collective Redress*, Oxford: Hart Publishing 2019, pp. 207 et seq.; Arons 2020, pp. 1-38 (*supra* note 153); Hess 2021, pp. 7-8 (*supra* note 12); L. Hornkohl, 'Up- and Downsides of the New EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers – Comments on Key Aspects', *EuCML* 2021, p. 189; Hess et al. 2022, p. 13 (*supra* note 5); Leupold 2022, p. 5 (*supra* note 153); Rielaender 2022, pp. 133-134 (*supra* note 55).

159 Rb. Amsterdam 26 September 2018, ECLI:NL:RBAMS:2018:6840, *NIPR* 2018-440.

160 Rb. Amsterdam 5 February 2020, ECLI:NL:RBAMS:2020:555, *NIPR* 2020-241.

161 Rb. Amsterdam 26 September 2018, ECLI:NL:RBAMS:2018:6840, *NIPR* 2018-440, paras. 4.5-4.6.

proceedings on the basis of Article 30 Brussels Ibis in favour of proceedings in Germany.[162] In addition to the case before the Dutch court, cases were also pending in Germany and South Africa. Despite the differences in the applicable Dutch and German law, the Court held that both laws in the competing proceedings aimed at determining whether the corporations at issue were liable for having released misleading financial information. At present, Article 30 Brussels Ibis offers Member State courts discretion in deciding whether to stay proceedings or decline jurisdiction in cases involving related actions. Given the unique nature of collective redress – where it is highly likely that overlapping collective claims will be brought before the courts of different Member States – the upcoming revision of the Brussels Ibis Regulation presents an opportunity to consider removing the discretion currently afforded to Member State courts under Article 30 Brussels Ibis, ensuring greater consistency in handling related collective actions across jurisdictions and reducing the risk of irreconcilable judgments.[163]

6. Concluding thoughts

The discussion on the inclusion of third state defendants within the framework of the Brussels Ibis Regulation has gained increasing relevance due to recent global developments, such as enhanced digitalisation and the rise of sectoral EU laws with extraterritorial reach. This has resulted in a landscape in which legal relationships with ties to the EU are increasingly subject to residual rules on jurisdiction. Residual jurisdiction within the EU is inherently fragmented. To promote equal access to justice, regardless of the defendant's domicile, (some of) the provisions of the Brussels Ibis Regulation require extension to third state defendants. Although such an extension was proposed – and abandoned – during the 2010 Brussels I reform, new developments underscore its renewed significance.

First, more so than in 2010, European parties are engaging in transactions with parties outside the EU. This trend is largely driven by rapid technological developments. For example, the rise of blockchain technology has enabled decentralised and borderless (financial) transactions, while social media has further amplified interactions with parties outside the EU. Digital marketplaces allow European companies to engage with suppliers, consumers, and business partners outside the EU, while platforms such as Amazon, Alibaba, and Shopify have made it possible for smaller companies to expand their market reach to and beyond Europe. The adoption of remote work and virtual meetings further allows EU businesses to manage international relationships.

Second, sectoral EU regulations such as the GDPR and the AI Act exemplify a growing trend of extending legal obligations to parties located in third states. This extraterritorial application further underscores the necessity for coherent jurisdictional rules governing third state defendants within the Brussels Ibis Regulation. Such an approach is to be favoured over including specific provisions on jurisdiction in sector-specific instruments.

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162 Rb. Amsterdam 5 February 2020, ECLI:NL:RBAMS:2020:555, *NIPR* 2020-241, paras. 5.5-5.13; N. Touw, 'Conference Report: The Netherlands: a forum conveniens for collective redress?', *NIPR* 2021, pp. 53-67.

163 Similar: Stadler 2013, pp. 483-488 (*supra* note 158); Arons 2020, pp. 1-38 (*supra* note 153); Hess 2021, pp. 7-8 (*supra* note 12); Hess et al. 2022, p. 13 (*supra* note 5); Rielaender 2022, pp. 133-134 (*supra* note 55).

Third, collective redress mechanisms, which frequently involve multiple parties, often from outside the EU, are becoming more prevalent. The cross-border nature of such proceedings highlights the practical need for clear jurisdictional provisions that accommodate multi-party litigation involving third state defendants.

The Netherlands provides an example of a system of residual jurisdiction that is largely derived from the Brussels regime and contains no exorbitant grounds of jurisdiction, except for the *forum arresti*. Consequently, the Netherlands is well-equipped to deal with issues of jurisdiction concerning third state defendants. Yet, an extension of the Brussels Ibis Regulation to include jurisdiction over third state defendants would have little impact on how Dutch courts assume jurisdiction over these parties, while simultaneously contributing to greater uniformity of jurisdictional rules across the EU. Dutch case law shows that jurisdiction over third state defendants is primarily assumed on the basis of the Dutch equivalents of Articles 7 and 8(1) Brussels Ibis. Consequently, any potential expansion of the rules on jurisdiction to third state defendants should first address these provisions.