Effectenbezitters: A Flawed Argument to Limit Jurisdiction under Article 7(2) of Brussels I bis [(*)]

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The background of this post

Just a few days after *Vereniging van Effectenbezitters v BP* (C-709/19) was made public, I had the opportunity to publish my views on the decision on an EU Law Live Op-Ed. Some days later, Prof. Matthias Lehman also expressed his opinion on an EAPIL blogpost. Then, Prof. Lehman and I had a cordial conversation over our different views on the judgment, as reflected in the comments to his post. Finally, on the very same theme of that conversation, the EAPIL Blog has published an additional post by Prof. Laura van Bochove and Prof Matthias Haentjens – a post that followed an international seminar at Leiden University where the judgment had been discussed.

Apropos of these posts and exchanges, Prof. Gilles Cuniberti kindly invited me to expand a bit on my critique to the reasoning of the judgment, probably because I seem to be a bit of an outlier here. My sincere gratitude to him and to all the board of Editors of the EAPIL Blog.

On the Judgment Itself

Effectenbezitters is about establishing jurisdiction under Article 7(2) of the Brussels I *bis* Regulation on the basis of the determination of the *place where the harm occurred* (the so-called, in German, *Erfolgsort*) in a case of *purely financial damage*, i.e. any loss of money with no connection with a tangible object (*VKI v Volkswagen*, C-343/19, paras 32-35).

In previous judgments, the CJEU had used the fiction that financial damage occurs where the (bank or investment) account reflecting the damage is held. However, the Court added that the said fiction is not enough to establish jurisdiction under Article 7(2); in addition, looking at Recitals 15 and 16, the Court requires that 'other specific circumstances' confirm that the case is sufficiently connected to the place in question (principle of proximity) and that the forum in question was foreseeable for the defendant (principle of predictability).

In my opinion, *Effectenbezitters* is no exception to this jurisprudence. Firstly, in para 32, the CJEU clearly suggests that the courts in the Netherlands *might* have jurisdiction under Article 7(2), 'on the basis of the place where the damage occurred', because jurisdiction may be allocated to the courts where the bank (or investment institution) holding that account is established. This is reflected in the operative part of the judgment, where the Court acknowledges that the case concerned the 'direct occurrence in an investment account of purely financial loss resulting from investment decisions'.

Secondly, in paragraphs 33-35 of *Effectenbezitters*, the Court moves on to consider the *other specific circumstances*, beginning with those relating to the predictability of the forum. At this point – the assessment of the *predictability* of the forum -, I believe that – contrary to what Prof. Lehman, Prof. van Bochove and Prof. Haentjens seem to indicate in their EAPIL blogposts – the Court does not put the direct focus on the place where BP shares were listed or admitted to trading; nor did the Court even consider the place where the shares had been acquired or sold (an approach that, by the way, would have been similar to the approach in *VKI v Volkswagen*, where jurisdiction under Article 7(2) was attributed to the courts where the diesel vehicles had been purchased). Instead, the direct focus of the Court when assessing the predictability of the forum was the place *where BP had reporting obligations*, ie, the place where BP was subject to the obligation to disclose the information whose

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lack or inaccuracy was at the basis of the cause of action of the plaintiff. This conclusion is also confirmed by the operative part of the judgment, where only the 'statutory reporting obligations' are mentioned, without any reference to the place of listing, trading, acquisition or sale.

Against this background, to my mind, the reasoning of the Court may be summarized as follows: (i) since the claim is based on the lack or the inaccuracy of specific information that BP was obliged to provide in the UK and in Germany, BP could have reasonably foreseen lawsuits related to the said information in the UK or in Germany, *but not in the Netherlands nor in any other EU forum*; and (ii), for this reason, despite accepting the fiction that the purely financial damage inflicted to the Dutch investors occurred in the Netherlands, finally, the Dutch courts were not predictable for the defendant and, hence, they do not qualify as a competent court under Article 7(2) and Recitals 15 and 16.

On the Precedents Used

To support this reasoning, the CJEU turns to *Kolassa* (C-375/13, paras 54-57, to be interpreted as indicated in *Universal*, C-12/15, para 37, and the Opinion of AG Szpunar in this latter case, para 45) and *Löber* (C-304/17, paras 26-36).

In both cases, similarly to the case of *Effectenbezitters*, an investor had also claimed compensation for purely financial damages based on the inaccuracy of financial information – the information contained in a prospectus required for securities to be admitted to trading in a specific State. In these two cases, the Court argued (i) that the place where the investors held their accounts *might* indeed qualify as the place where the harm occurred for the purposes of establishing jurisdiction under Article 7(2); and (ii) that the forum for that place was predictable because the information whose inaccuracy was at the basis of the cause of action had been specifically distributed at that place as a result of the legal obligation to submit a prospectus. Thus, in *Kolassa* and *Löber*, the Court took the fact that reporting obligations were due in a specific Member State as an indication of the predictability of the jurisdiction of the courts of that Member State. Shortly put, the equation of the Court was: reporting obligations = predictability.

In *Effectenbezitters*, the Court tried to apply the same logic, but the other way around. It certainly looked at the place of reporting obligations and, since it found none in the Netherlands, it concluded that the Dutch courts were not a predictable forum. Thus, it took the fact that BP had *no* reporting obligations in the Netherlands as an indication that the Netherlandish courts were not a predictable forum. In short, the equation of the Court was, now, the following: no reporting obligations = no predictability.

On my Critique

My main criticism of *Effectenbezitters* is that this second equation (no reporting obligations = no predictability) is not at all convincing in the current EU regulatory context. In my opinion, the logic applied in *Kolassa* and *Löber* does not work the other way around within the EU. I find it acceptable to conclude that the fact that there exist reporting obligations in a Member State may be taken as an indication that this Member State is a predictable forum for any litigation relating to such obligations. Yet, I challenge the argument whereby the lack of reporting obligations in a Member State necessarily entails that that Member State is not a predictable forum. The way I see things, a person may have to report information in a specific Member State and, nevertheless, it may still predict litigation related to that information in another Member State *so long as the citizens and companies of the other Member State were also legal addressees of the information in question.*

This is exactly what, in my view, happened in *Effectenbezitters*. BP was subject to reporting obligations in the UK and Germany only, but the *legal addressees* of the information were *all the investors in all the EU Member States*. Within the regulatory context under the Transparency Directive 2004/109 and

the Market Abuse Directive 2003/6 (today, replaced by the Market Abuse Regulation 596/2014), BP had to make available periodical information (eg, annual financial reports), as well as any particular piece of information that was likely to have a significant effect on the prices of its shares. Even though the information had to be published via a 'mechanism' which had been 'officially appointed' by the British and the German authorities, the truth is that this mechanism had to ensure that the information was made available in a manner that guaranteed the *'effective dissemination to the public throughout the Community'*. See, in this regard, Article 21(1) Directive 2004/109, in relation to Article 2(1)(k) of the said Directive and Articles 1(1) and 6 of the Market Abuse Directive 2003/6 (today, Articles 7 and 17 of the Market Abuse Regulation 596/2014); also, in the same vein, the current wording of Article 22 of Directive 2004/109 emphasizes that the information must be accessible '*at Union level*'.

Thus, when BP provided – or failed to provide – information in the UK and in Germany under the EU rules on transparency and market abuse, the company knew that the information due had to reach all EU investors – '*all the public throughout the Community*', as Article 21(1) of Directive 2004/109 puts it. Consequently, BP could have perfectly foreseen that any of the legal addressees of the information could have made investment decisions from their home Member States on the basis of that information. And this, in my view, entails that BP could have also perfectly predicted that information-related litigation could have taken place in any of the EU Member States from where those investment decisions were made.

To sum up, contrary to Court's reasoning in *Effectenbezitters*, I find that, within the EU, it is inaccurate to say that an issuer of securities cannot predict the forum where it does not have reporting obligations in that forum. Such an issuer is aware – or, at least, must be aware – of the fact that EU law requires that the reported information reaches all the citizens and companies across all Member States, irrespective of where and how the information is provided. As a result, the issuer must count on the possibility that the information is used in any Member State, as well as on the possibility of damages – and subsequent lawsuits – arising out of such a use in any Member State.

Looking Ahead

That said, I should add that I understand the concerns about the need to limit jurisdiction under Article 7(2) and to avoid an EU-wide jurisdiction to hear cases relating to purely financial damage at the place where the plaintiff holds her bank account. But I believe that a flawed argument – such as the one used in *Effectenbezitters* – should not be the means to achieve such a goal. Instead, other avenues could be explored, preferably by the EU law-maker, with a view to an amendment of Brussels I-bis that may provide more certainty on the rule of special jurisdiction applying to matters relating to tort, delict or quasi-delict.