'Place where the harmful event occurred' and financial damage connected to breaches of obligations to disclose information by an issuer of securities: no jurisdiction if the defendant was not subject to such obligations in the State where the investment account was located? (*)

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1. The interpretation of Article 7(2) of the Brussels I-bis Regulation 1215/2012 has led to a number of uncertainties when it comes to determining the place where the harm has occurred (the *Erfolgsort*) and *the harm in question is 'purely financial'*, that is, it is a loss of money with no connection to a tangible object (cf. *VKI v Volkswagen*, C-343/19, paragraphs 32-35). In such cases, claimants have often argued that the harm should be deemed to have occurred at the place of the location of the bank or investment account where the financial loss was directly reflected – this place frequently coinciding with the claimant's domicile.

The Court of Justice has accepted this argument partially since it has also indicated that the location of the account *per se* does not suffice. Additionally, there must be 'other specific circumstances' justifying the attribution of jurisdiction, especially in terms of due regard to the principles of predictability and proximity referred to in Recitals 15 and 16 of the Brussels I Regulation 1215/2012 (*Löber*, C-304/17, paragraphs 31-36, *Universal*, C-12/15, paragraphs 37-40).

2. In the case of *Vereniging van Effectenbezitters v BP* (C-709/19), the Court was, once again, confronted with how to determine the place where the harm occurred in a case of purely financial damage. Vereniging van Effectenbezitters – a Dutch association defending the interests of securities holders – had brought a collective representative action against BP – an oil and gas company whose registered office is in London and whose shares are listed on the London and Frankfurt stock exchanges.

The association had sought a purely declaratory judgment establishing a causal link between the type of information provided by BP in relation to a terrible explosion which had occurred on an oil rig leased by BP in the Gulf of Mexico in April 2010, and the financial losses suffered by the BP shareholders arising out of the fall in the share price within the period from 16 January 2007 to 25 June 2010. The said information – consisting of press releases, statements of BP officials, specific reports or annual financial reports – had been distributed globally via mass media and the internet.

The main question taken up by the Court after the request from the *Hoge Raad der Nederlanden* is whether the Netherlands qualified as *Erfolgsort* for the purposes of establishing jurisdiction under Article 7(2) of the Regulation because the shares, or at least the shareholders' claims relating to these shares, were located in investment accounts held in the Netherlands or in investments accounts of a bank and/or an investment firm established in the Netherlands, so that the damage, taking the form of a decrease in the value of the shares as a result of BP's wrongful act, would have become apparent in the Netherlands in these investment accounts.

(*) Pre-print of the text published on EU Law Live 17 May 2021: https://eulawlive.com/op-ed-place-where-the-harmful-event-occurred-and-financial-damage-connected-to-breaches-of-obligations-to-disclose-information-by-an-issuer-of-securities-no-jurisdiction-i/

3. When looking at the question of jurisdiction, the Court begins by recalling that Article 7(2) is an exception to the general rule of Article 4 of the Brussels I-bis Regulation 1215/2012 and, accordingly, it should be interpreted in a strict and limited manner (paragraphs 24-27). Then, the Court moves on to consider its previous case law about the determination of the *Erfolgsort* where the damage is purely financial. In particularly, the Court focuses on two cases: *Kolassa* (C-375/13, paragraphs 54-57, to be interpreted as indicated in *Universal*, C-12/15, paragraph 37, and the Opinion of AG Szpunar in this latter case, paragraph 45); and *Löber* (C-304/17, paragraphs 26-36). Both in *Kolassa* and *Löber*, the Court found that one of the 'special circumstances' amounting to the predictability of the forum was that the issuer of the securities had communicated information about the offer to the Austrian authorities by way of 'passporting' the corresponding prospectus, which had previously been approved by the German authorities (cf, as of today, Articles 24 ff of the Prospectus Regulation 2017/1129). In such circumstances, the Court argued that Austria was a predictable forum for the issuer because, if the prospectus had been made available to the Austrian investors, the acquisition of securities in Austria and, eventually, litigation arising out of such an acquisition in Austria must have been anticipated.

In its judgment on the case at hand, the Court seems to compare the information provided in the form of a prospectus in the *Kolassa* and *Löber* cases, on the one hand, and the information provided by BP after the explosion in the Gulf of Mexico, on the other. Whereas in *Kolassa* and *Löber* the issuer had communicated the information – in the form of a prospectus – to the authorities in the State where the bank accounts were located, in the case of *Vereniging van Effectenbezitters* BP had distributed the information globally, without targeting the Netherlands. In fact, the Court seems to note that BP was 'not subject to legal obligations of disclosure of information' in the Netherlands. From these circumstances, the Court concludes that BP could not predict that litigation regarding the information relating to the explosion and its influence on the value of its shares could ever take place in the Netherlands and, without considering any other potential 'specific circumstances', rejected the jurisdiction of the Dutch courts under Article 7(2).

4. In my view, the judgment in *Vereniging van Effectenbezitters* is not convincing. First, I have the impression that the Court failed to consider a number of 'specific circumstances' related to the *proximity* of the case to the Netherlands. Paraphrasing the Court in *Löber* (C-304/17, paragraphs 32-33), all the transactions at issue were made from accounts located in the Netherlands and, in connection with those transactions, the investors had dealings only with Dutch banks or Dutch investment firms that were domiciled in the Netherlands. Furthermore, the Netherlands might have likely been the place to look for part of the evidence that would have eventually been required to assess the extent to which the information provided by BP at a global scale provoked financial losses in relation to the said transactions (for example, evidence regarding the particular circumstances of each investor affected).

Second, I believe that the argument linking the States where BP's shares are listed – which would be the States where BP would have obligations to disclose information – with the predictability of the forum is inaccurate. To me, it is naive to say that, because BP's shares were only listed on the London and Frankfurt stock exchanges, BP could only foresee that its shares will be acquired and, eventually, litigated in the UK and Germany. BP is a global company and its shares are acquired by investors from all the EU Member States, who give the purchase/sale orders to their banks or investment firms in their home jurisdictions. Thus, as a global company, BP could perfectly anticipate litigation over its shares outside the UK and Germany, irrespective of its obligations to disclose information.

Third, something seems to be missing in the arguments of the Court relating to the obligations to disclose information. In particular, my impression is that the Court has looked at those obligations as though their application were limited to each Member State's national level. In doing so, it seems that

the Court failed to consider that the bulk of the rules on information duties relating to the trade of securities stems from EU law, and is designed to have an EU-wide effect. In this regard, with the caveat of my limited knowledge here, the following considerations may apply:

a) The obligations under the Prospectus Regulation 2017/1129

When an issuer wants to offer securities within the EU, the issuer must prepare a prospectus in accordance with the Prospectus Regulation 2017/1129 (which replaced the Prospectus Directive 2003/71). This prospectus must be submitted for approval by the national authority of the 'home Member State' – which is normally the Member State where the issuer has its registered office (Article 2(m) and (r) and Article 3(1)). Once approved, the prospectus shall be made available to the public in general via the internet – not just to the public of the home Member State (Article 21). In addition, the prospectus will be valid in any other Member State if it is notified (or 'passported') pursuant to Articles 24 ff.

b) The obligations under the Transparency Directive 2004/109 and the Market Abuse Regulation 596/2014.

While the securities are being traded within the EU, the issuer must make available the information referred to in the Transparency Directive 2004/109, as well as in Articles 7 and 17 of the Market Abuse Regulation 596/2014 (which replaced the Market Abuse Directive 2003/6). This information includes periodical information (such as annual financial reports), as well as any particular piece of information that is likely to have a significant effect on the prices of the securities offered by the issuer. The information must be made available in a manner that guarantees the 'effective dissemination to the public *throughout the Community*', that is, '*at Union level*'. To this aim, an 'officially appointed mechanism' (which, to the best of my knowledge, it is normally a specialised news-provider, like Reuters or Bloomberg) should be used, along with the website of the issuer in question (Articles 21-22 Directive 2004/109 and Article 17 Regulation 596/2014).

As may be seen, the information disclosed under the Prospectus Regulation 2017/1129 or under the Transparency Directive 2004/109 and the Market Abuse Regulation 596/2014 are far from being limited to the territory of the Member State of the regulated market where the securities have been listed and admitted to trading; the reality is that this information is made available 'at the Union level', so that all investors located in the EU may look at the information before making their investment choices and decisions.

This reality is what, in my view, the Court has seemingly overlooked in the judgment in *Vereniging van Effectenbezitters* (and, to some extent, also in *Kolassa* and *Löber*). When the Court argues that, because of predictability concerns, the courts for the place of the location of the investment account where the financial damage occurred may only have jurisdiction under Article 7(2) if the defendant was subject to obligations of disclosure of information in that place, the Court seems to be forgetting that these obligations transcend the specific Member States and deploy its effects in the whole territory of the EU, for the sake of all the European investors.

In the particular case at hand, BP was obliged to disclose accurate information about the explosion in the Gulf of Mexico under the rules of Market Abuse (which, in 2010, were essentially the rules on Articles 1(1) and Article 6 of the Market Abuse Directive 2003/6). Even though BP had to comply with this obligation by way of any of the 'officially appointed mechanisms' indicated by a particular Member State (be it the UK or Germany), the truth is that the addressees were all the investors of the EU and, accordingly, BP could have foreseen that any litigation related to such information might have taken place in any EU Member State.

5. In light of the above, in my opinion, the judgment in *Vereniging van Effectenbezitters* is not a decision that contributes to clarifying Article 7(2). The judgment does confirm the previous case law of the Court, in terms of requiring 'special circumstances' securing proximity and, above all, predictability of the forum when the location of a bank or investment account where financial harm has occurred is used as a ground for jurisdiction. This is, I believe, the main takeaway of the judgment. The rest – and, particularly, the argument that an issuer of securities cannot predict the forum where it does not have information obligations in that forum – is, as explained, very unconvincing in the EU regulatory context.

New cases will require the Court of Justice to rule on the interpretation of Article 7(2) (cf the request in C-498/20). The EU legislature might also, at some point, consider a legal modification of Article 7(2) – perhaps finally permitting non-professional investors to litigate in the place of their domicile, as has often been suggested. But, in any of these scenarios, I believe one must handle with care the conclusions reached in the judgment given in *Vereniging van Effectenbezitters*.