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Liability of listed companies

CJEU limits forum shopping for investor actions

Par Adeline Michoud le 6 August 2021

On 12 May 2021, the Court of Justice of the European Union (CJEU) issued a ruling in which it restricted the competent courts under Art. 7(2) of the Brussels I bis Regulation (BI bis) for investor actions. According to the CJEU, only the courts of the state in which a listed company must fulfil its legal reporting obligations can be seized for these disputes (C-709/19).

In this case, the *Vereniging van Effectenbezitters* (VEB), a Dutch association of shareholders, had taken legal action in the courts of Amsterdam against the company British Petroleum (BP), accusing it of having disclosed inaccurate and misleading information in Germany and the United Kingdom regarding the oil spill in the Gulf of Mexico that occurred in April 2010. The VEB argued that BP's disclosure had caused the company's share price to fall, causing damage to VEB investors who had bought these shares between 2007 and 2010 through an investment account in the Netherlands.

The Supreme Court of the Netherlands referred several questions to the CJEU for a preliminary ruling in order to determine whether the Dutch courts had jurisdiction to hear a class action and any individual claims subsequently brought by the injured shareholders. The present judgement of the CJEU thus deals with the relevant criteria for determining the location of damage caused by an issuer's failure to fulfil its obligations of transparency towards the market.

General jurisdiction under the Brussels Ia Regulation is determined in accordance with Article 4 of the Brussels Ia Regulation, which provides that the courts of the defendant's domicile have jurisdiction. Nevertheless, Article 7(2) of the Brussels Ia Regulation, which enshrines the *lex loci delicti* rule, allows for the opening of a court in the place where the harmful event occurred or may occur.

In the 1976 case of *Bier v. Mines de Potasse*, the Court of Justice of the European Communities adopted a broad interpretation of the concept of 'place of the damage', recognising that this includes both the place where the unlawful act causing the damage was committed (also called the '*Handlungsort*') and the place where the effects of the unlawful act were felt (the '*Erfolgsort*'). Nevertheless, this notion of 'place of the damage' has been progressively restricted in subsequent case law, as in this judgement C-709/19.

The CJEU emphasises the principle that the application of Article 7(2) RBI bis requires a close connection to be established between the place of the damage and the claimant's domicile, with the aim of promoting a certain predictability, in order to avoid a defendant being sued in the

courts of a jurisdiction where he could not reasonably expect to be sued.

Consequently, in the case in question, the CJEU held that BP had no obligation to disclose information in the Netherlands, and as such, that the company could not have foreseen being sued in the Dutch courts. Consequently, the CJEU considered that the mere localisation of an investment account in a country is not sufficient to establish a close link with that jurisdiction and give it jurisdiction under Art. 7 par. 2 RBI bis.

This argument of the CJEU seems questionable. Indeed, in the regulatory context of Directive 2004/109 on transparency and Directive 2003/6 on market abuse (now replaced by Regulation 596/2014 on market abuse), BP had to make available periodic information that could have a significant effect on its share price. It is true that only the British and German authorities had set up a mechanism for these reporting obligations. However, this information was not only available to the German and English general public. In fact, in accordance with European regulations, this information, disseminated on the Internet, was accessible in all Member States of the European Union.

Therefore, one may question the CJEU's choice to consider that BP could not reasonably have foreseen that the information it communicated would not be disclosed throughout the European Union, and that it could have repercussions in the various Member States.

This strict interpretation of Art. 7 par. 2 RBI bis has been progressively developed in recent years in the case law of the CJEU. In the *Marinari* (C-364/93), *Kronhofer* (C-168/02), *Universal Music International Holding* (C-12/15) and *Löber* (C-304/17) rulings, the CJEU had already considered that the concept of the place where the harmful event occurred could not be interpreted so extensively as to include any place where the adverse consequences can be felt of an event that caused damage actually arising in another place.

In line with this case law, the CJEU therefore confirms its restrictive interpretation of Article 7(2) of the Brussels I bis Regulation in the context of financial losses and favours a desire to avoid forum shopping across the various European jurisdictions.
