

Case C-709/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

25 September 2019

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

20 September 2019

Appellant:

Vereniging van Effectenbezitters

Respondent:

BP plc

Subject matter of the action in the main proceedings

The main proceedings concern a dispute between the Vereniging van Effectenbezitters (Association of Securities Holders; ‘VEB’), a Dutch association which has as its statutory purpose the representation of the interests of securities holders, and BP plc (‘BP’), an oil and gas company operating worldwide, centring on the damage suffered by BP shareholders — in the form of a decrease in the value of their shares — as a result of BP’s allegedly unlawful conduct.

Subject matter and legal basis of the request for a preliminary ruling

The present application under Article 267 TFEU concerns the international jurisdiction of the Netherlands courts. More specifically, the question is whether Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (‘the Brussels Ia Regulation’) must be interpreted as meaning that the direct occurrence of purely financial damage to a Dutch investment account can constitute a sufficient connecting

factor to form the basis for the international jurisdiction of courts in the Netherlands.

Questions referred

1.(a) Should Article 7(2) of [the Brussels Ia Regulation] be interpreted as meaning that the direct occurrence of purely financial damage to an investment account in the Netherlands or to an investment account of a bank and/or investment firm established in the Netherlands, damage which is the result of investment decisions influenced by globally distributed but incorrect, incomplete and misleading information from an international listed company, constitutes a sufficient connecting factor for the international jurisdiction of the Netherlands courts by virtue of the location of the occurrence of the damage (*'Erfolgsort'*)?

(b) If not, are additional circumstances required to justify the jurisdiction of the Netherlands courts and what are those circumstances? Are the additional circumstances referred to [in paragraph 7 below] sufficient to found the jurisdiction of the Netherlands courts?

2. Would the answer to Question 1 be different in the case of a claim brought under Article 3:305a of the BW (Burgerlijk Wetboek: Netherlands Civil Code) by an association the purpose of which is to defend, in its own right, the collective interests of investors who have suffered damage as referred to in Question 1, which means, among other things, that neither the places of domicile of the aforementioned investors, nor the special circumstances of individual purchase transactions or of individual decisions not to sell shares which were already held, have been established?

3. If courts in the Netherlands have jurisdiction on the basis of Article 7(2) of the Brussels Ia Regulation to hear the claim brought under Article 3:305a of the BW, do those courts then, on the basis of Article 7(2) of the Brussels Ia Regulation, also have international and internal territorial jurisdiction to hear all subsequent individual claims for compensation brought by investors who have suffered damage as referred to in Question 1?

4. If courts in the Netherlands as referred to in Question 3 above have international, but not internal, territorial jurisdiction to hear all individual claims for compensation brought by investors who have suffered damage as referred to in Question 1, will the internal territorial jurisdiction be determined on the basis of the place of domicile of the misled investor, the place of establishment of the bank in which that investor holds his or her personal bank account or the place of establishment of the bank in which the investment account is held, or on the basis of some other connecting factor?

Provisions of EU law cited

Articles 4 and 7 of the Brussel Ia Regulation

Provisions of national law cited

Article 3:305a of the Burgerlijk Wetboek ('BW')

Brief summary of the facts and the procedure in the main proceedings

- 1 On 20 April 2010 an explosion occurred on the oil drilling platform Deepwater Horizon, located in the Gulf of Mexico, leased by BP, resulting in deaths and injuries. Damage to the environment also occurred.
- 2 In 2015 VEB brought proceedings against BP before the Rechtbank Amsterdam (District Court, Amsterdam) and instituted a collective action under Article 3:305a of the BW on behalf of all persons who, in the period from 16 January 2007 to 25 June 2010, had bought, held or sold BP shares through an investment account in the Netherlands or through an investment account of a bank and/or investment firm established in the Netherlands ('BP shareholders').

In those proceedings VEB sought a ruling from the Rechtbank:

- (i) that the courts in the Netherlands have international jurisdiction to hear the claims for compensation brought by BP shareholders;
- (ii) that the Rechtbank Amsterdam has territorial jurisdiction in respect of those claims;
- (iii) that Netherlands law is applicable to the claims for compensation;
- (iv) that BP made incorrect, incomplete and misleading statements to BP shareholders about (i) its safety and maintenance programmes prior to the oil spill on 20 April 2010, and/or (ii) the extent of that oil spill, and/or (iii) the role and responsibility of BP in regard to that oil spill;
- (v) that, by its conduct as described in (iv) above, BP acted unlawfully vis-à-vis the BP shareholders;
- (vi) that, had it not been for the unlawful conduct on the part of BP, the purchase or sale of BP shares by the BP shareholders would have been effected at a more favourable market price, or not at all;
- (vii) that there is a *conditio sine qua non* link between BP's unlawful conduct and the purchase/sale (conditions) resulting therefrom, and the exchange-rate loss suffered by the BP shareholders in the period between 16 January 2007 and 25 June 2010 inclusive.

- 3 BP has disputed the jurisdiction of the Netherlands courts and argued that those courts cannot derive international jurisdiction from the Brussels Ia Regulation. The Rechtbank Amsterdam declared that it lacked jurisdiction to hear VEB's claims. The Gerechtshof Amsterdam (Court of Appeal, Amsterdam) upheld the Rechtbank's judgment on appeal. VEB has appealed in cassation against that judgment of the Gerechtshof to the referring court.

Main submissions of the parties to the main proceedings

- 4 It is common ground in the proceedings in cassation that VEB's claims concern matters relating to tort, delict or quasi-delict as referred to in Article 7(2) of the Brussels Ia Regulation, under which jurisdiction lies with the courts of the place where the harmful event occurred or may occur. The plea raises the question whether, under Article 7(2) of the Brussels Ia Regulation, the courts of the Netherlands, as the courts of the place where the damage occurred, have jurisdiction to hear VEB's claims.
- 5 VEB and BP disagree as to the relationship between the judgment of 28 January 2015, *Kolassa*, C-375/13, EU:C:2015:37 ('the *Kolassa* judgment') and the judgment of 16 June 2016, *Universal Music International Holding*, C-12/15, EU:C:2016:449 ('the *Universal Music* judgment') and the consequences thereof for the present case.
- 6 VEB takes the stance, *inter alia*, that the circumstances of the present proceedings are comparable to those of the *Kolassa* judgment and the judgment of 12 September 2018, *Löber*, C-304/17, EU:C:2018:701 ('the *Löber* judgment'). It argues in this regard that the decrease in the value of the shares was not due to the fluctuations in the financial markets, but to the provision of incorrect, incomplete and misleading information by BP about the oil spill referred to in paragraph 1 above, whereby BP failed to fulfil its legal information obligations. As a result, the shareholders took investment decisions that they would not have taken if they had been correctly and fully informed. When the correct information became known, the value of their shares decreased and they suffered damage as a result. Since the shares, or at least the claims of the shareholders in respect of those shares, were administered (credited and debited) and were located in an investment account in the Netherlands or in an investment account of a bank and/or investment firm established in the Netherlands, that damage, taking the form of a decrease in the value of the shares as a result of BP's unlawful conduct, manifested itself directly in the Netherlands in that investment account. That is why the courts of the Netherlands have jurisdiction to hear VEB's claims. In addition, that jurisdiction of the courts in the Netherlands does not require any (other) special or additional circumstances.
- 7 If special or additional circumstances as referred to in the *Universal Music* judgment must nevertheless be brought to bear, the following circumstances may, according to VEB, be accorded secondary importance. First, BP focuses on a

global investment public, including Dutch investors. VEB represents the interests of a large number of investors, the vast majority of whom have their place of domicile in the Netherlands. Second, BP has reached a settlement with other shareholders in the United States of America. That settlement has not been offered to the investors whose interests are represented by VEB and no other similar proceedings are being conducted in Europe. Third, the shareholders for whom VEB is acting include consumers to whom the Brussels Ia Regulation affords special legal protection. Finally, importance should be attached to the fact that the claims brought by VEB under Article 3:305a of the BW were filed in a collective action.

- 8 BP has taken the stance, inter alia, that the mere fact that in the *Kolassa* judgment the damage occurred directly to a Kolassa bank account in Austria was not sufficient to establish the jurisdiction of the Austrian courts. There were further reasons for establishing a connection with Austria. Barclays had published a prospectus in Austria and the certificates were sold (on) by an Austrian bank. BP refers in this regard to paragraph 37 of the *Universal Music* judgment. This shows that the decision in the *Kolassa* judgment was related to circumstances which, taken together, sought to confer jurisdiction on the courts of the applicant's place of domicile. On the basis of the foregoing, BP argues that purely financial damage that occurs directly to a bank account cannot, without additional circumstances, be considered a relevant connecting factor under Article 7(2) of the Brussels Ia Regulation. That also applies where there is no danger of the injured party subsequently manipulating the *Erfolgsort* by choosing a bank account at a location that suits him. In the absence of additional circumstances, the courts of the place where the bank account is held therefore do not have jurisdiction. According to BP, the collective nature of that procedure does not alter the foregoing.

Brief summary of the reasons for the referral

- 9 In the opinion of the Hoge Raad (Supreme Court of the Netherlands), those arguments raise questions of interpretation in relation to the Brussels Ia Regulation, and there may be reasonable doubt as to the correct answer. For those reasons, the Hoge Raad has referred the questions set out above to the CJEU for a preliminary ruling.
- 10 By way of clarification of the first question referred for a preliminary ruling, the Hoge Raad takes the view that the *Kolassa* judgment, the *Löber* judgment and the present case all involve purely financial damage which occurred directly to a bank account or investment account, where that purely financial damage is the result of a decrease in the value of the securities held as credit in that bank account or investment account. That situation differs from the situation in the *Universal Music* judgment. In the latter case, the purely financial damage to the bank account was the result of a payment made from that bank account to compensate damage suffered by victims abroad. However, unlike the case of a decrease in the value of shares held as a credit in a bank account or investment account, in that

situation the injured party had an influence on the decrease in the credit balance in his or her bank account because he or she was free to choose to make a payment from that bank account. A difference between the facts in the *Kolassa* judgment and the *Löber* judgment and the facts in the present case is that the claim in the present case is not based on misleading information in a prospectus distributed in the Netherlands. According to VEB's submissions, which were not rejected by the Gerechtshof and which must therefore presumably serve as the starting point in cassation, BP allegedly made public incorrect, incomplete and misleading information through press releases, reports published on its website, annual accounts and annual reports as well as public statements made by directors. In its dubious provision of information, BP did not address Dutch investors separately or specifically. In addition, this does not appear to relate to the sale and purchase of financial products on the secondary market in the Netherlands, but to the purchase of ordinary BP shares, listed on the London or Frankfurt stock exchange, through an investment account in the Netherlands or through an investment account of a bank and/or investment firm established in the Netherlands. The unforeseeability of the forum for the defendant — which could be the case if the place in which a bank or investment account is held were to be classified as the *Erfolgsort* — is not in all cases an obstacle to the granting of jurisdiction to the court of the *Erfolgsort*. In its judgment of 25 October 2011, *eDate Advertising and Others*, C-509/09 and C-161/10, EU:C:2011:685, paragraph 51, the CJEU conferred jurisdiction on, inter alia, the courts in each Member State within the territory of which content placed online is or has been accessible, at least in so far as it concerns jurisdiction in respect of the damage caused in the territory of the Member State of the court seised. The question arises as to whether there are grounds for a comparable jurisdictional rule for claims aimed at recovering shareholders' losses resulting from incorrect, incomplete or misleading information that has been made public by international listed companies.

- 11 By way of clarification of the second question referred for a preliminary ruling, the Hoge Raad considers that the fact that the present case concerns a collective action under Article 3:305a of the BW may give rise to (additional) problems in locating the *Erfolgsort*. Because the collective action seeks to protect similar interests, inferences are not drawn from the individual circumstances of the victims whose interests are involved in the collective action. The details of the individual (purchase) transactions are not dealt with in the collective action, and neither are the individual decisions not to sell shares already held. The question is whether, and, if so, how, additional specific circumstances, if required, should be established in such a case. In the judgment of 21 May 2015, *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, paragraphs 35, 36 and 56, the CJEU ruled that the transfer of claims by the initial creditor cannot, by itself, have an impact on the determination of the court having jurisdiction under the (the precursor of) Article 7(2) of the Brussels Ia Regulation and that the harmful event must be assessed for each claim for damages independently of any subsequent assignment or consolidation. The question is whether such strict rules also apply to the location of the *Erfolgsort* in a collective action under Article 3:305a of the BW, since such a procedure does not involve assignment or consolidation of claims,

but merely relates to a collective interest and those rules would undermine the effectiveness of the instrument of Article 3:305a of the BW.

- 12 By way of clarification of the third question referred for a preliminary ruling, the Hoge Raad considers that, if the Netherlands courts do have jurisdiction and if they were to declare that BP acted unlawfully in respect of the BP shareholders, those shareholders would, on that basis, be able to bring an action for damages on an individual basis in fresh proceedings. If that happens, it is important to determine whether such claims could be brought before the court that had jurisdiction in the collective action. That question could arise if the place of domicile of the BP shareholder or the location in the Netherlands of his or her bank and/or investment account is outside the jurisdiction of the court seised. In that regard, reference is also made to Question 4 and the explanatory notes to that question set out below.
- 13 By way of clarification of the fourth question referred for a preliminary ruling, the Hoge Raad states that in the *Löber* judgment, paragraph 31, the CJEU refers to the attribution of jurisdiction to the Austrian courts. The special jurisdictional rules of Article 7 of the Brussels Ia Regulation govern not only international jurisdiction, but also internal territorial jurisdiction. The *Löber* judgment left open the question of the bank account to which the damage occurred directly. On the one hand, it appears to follow from the *Löber* judgment, paragraph 32, that the use of the term ‘bank accounts’ does not make a relevant distinction between a ‘personal’ bank account and investment accounts. It could be deduced from this that both accounts could be eligible. On the other hand, it appears from the Opinion of Advocate General Bobek in that case, point 13, that Ms Löber held her personal bank account in Vienna, which was also her place of domicile, and that the investment accounts were held in Salzburg and Graz. Apparently, in the *Löber* judgment, in order for the court in Vienna to be held to have jurisdiction, it was sufficient that Vienna, apart from being Ms Löber’s place of domicile, was also the place of establishment of the bank in which she held her bank account. This raises the question of which factor(s) determine(s) internal territorial jurisdiction. Is it the place of domicile of the misled investor, the place of establishment of the bank in which that investor holds his or her personal bank account or the place of establishment of the bank in which the investment account is held, or some other connecting factor?