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Article 4 of the Rome II Regulation: Identifying the place of damage in cases concerning securities and how the CJEU interprets this notion

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Maša Samardžić

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Abstract:

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The thesis aims to analyse the different legal basis of Private International Law according to which the CJEU made the decision in the landmark case of *VEB v. BP* and why it was considered a ground-breaking decision regarding claims of financial nature. The legal basis mentioned include Article 7(2) of Brussels Ibis Regulation and Article 4 of the Rome II Regulation. Previous case law of the CJEU will also be analysed to compare earlier decisions with *VEB v. BP* and highlight its' significance in relation to the principle of legal certainty. The research paper aims to analyse in depth the application of Article 4 Rome II Regulation in terms of identifying the place of damage in cases concerning securities on the financial market.
The development of the CJEU decision making process on said topic will be showcased through the assessment of their previous case law in comparison to the landmark decision of *VEB v. BP.* The doctrinal and comparative methodology will be used to complete the research in the master thesis. The doctrinal methodology will assist in analysing the wording of the legal basis and the court decisions to give the research a theoretical background. On the other hand, the comparative methodology will be used to highlight the differences in application of the law in different cases and compare the different outcomes in earlier and current cases. This will be used to highlight the development of the courts decision making processes.

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Diese These umfasst zwei grundlegende Punkte. Zum einen werden die verschiedenen Rechtsgrundlagen des internationalen Privatrechts analysiert, auf Grundlage dessen der EuGH seine Entscheidung im wegweisenden Fall VEB gegen BP getroffen hat. Zum weiteren wird erklärt, inwieweit diese Entscheidung/dieses Urteil in Bezug auf Ansprüche finanzieller Natur als wegweisend angesehen wurde. Die genannten Rechtsgrundlagen umfassen Artikel 7(2) der Brüssel-Ia-Verordnung und Artikel 4 der Rom II Verordnung. Die bisherige Rechtsprechung des EuGH wird ebenfalls analysiert, um frühere Entscheidungen mit VEB gegen BP zu vergleichen und ihre Bedeutung im Hinblick auf den Grundsatz der Rechtssicherheit hervorzuheben. Ziel der Forschungsarbeit ist es, die Anwendung von Artikel 4 der Rom II Verordnung im Hinblick auf die Feststellung des Schadensorts in Fällen, die Wertpapiere auf dem Finanzmarkt betreffen, eingehend zu analysieren. Die Entwicklung des Entscheidungsprozesses des EuGH zu diesem Thema wird durch die Bewertung der bisherigen Rechtsprechung im Vergleich zu der wegweisenden Entscheidung VEB gegen BP aufgezeigt. Die doktrinelle und vergleichende Methodik wird verwendet, um die Forschung in der

Masterarbeit zu vervollständigen. Zudem wird die vergleichende Methodik verwendet, um die Unterschiede bei der Anwendung des Gesetzes in verschiedenen Fällen hervorzuheben und die unterschiedlichen Ergebnisse in früheren und aktuellen Fällen zu vergleichen. Dies wird verwendet, um die Entwicklung der Entscheidungsprozesse der Gerichte hervorzuheben.

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List of Abbreviations:

CJEU	*Court of Justice of the European Union*
EU	*European Union*
MS	*Member State*
PIL	*Private International Law*
UK	*United Kingdom*
US	*United States*
WAMCA	*Act on the Settlement of Mass Damages Claims in Collective Actions (en)/ Wet afwikkeling massaschade in collectieve actie (nl)*

1. Introduction

Private International Law is a branch of law which exists in every legal system and deals with issues that in themselves contain a foreign element[1]. A foreign element indicates that the issue has connection to more than one country[2], thereby involving multiple legal systems, leading to the question of which law will be governing the substance of the dispute and will the court apply foreign or domestic law. Such legal issues may concern jurisdiction or applicability of the law to the case. The law aims to determine which state will have jurisdiction over a legal issue or which law will be applicable to such issue, thus highlighting the issue of conflict of laws as the main topic in the sphere of private international law. The main legal basis for determining the jurisdiction of the legal issue are Brussels Ibis Regulation[3] and Brussels II Regulation[4], while the legal basis for establishing the applicability of law are Rome I Regulation[5] and Rome II Regulation[6]. As the following thesis will be dealing with issues relating to financial law and legal issues relating to financial loss on the secondary market, the Brussels Ibis Regulation and Rome II Regulation will be used as the main legal basis for analysing the jurisdiction and applicable law to the issue and related cases. The Brussels Ibis Regulation is applicable to non – contractual obligations in civil and commercial matters relating to determining the jurisdiction and recognition and enforcement of judgments. The Rome II Regulation is also only applicable to non – contractual obligations and is intended to complement Brussels Ibis Regulation.

The following body of work concerns the issue of identifying the place of damage according to article 4 of Rome II Regulation, covering one of the main legal notions in Private International Law. It will also connect a crucial topic in banking and finance law which is identifying the place of damage in cases concerning securities and how the CJEU interprets such. Securities are in themselves intangible which will automatically influence the way in

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[1] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) 2.
[2] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) 2.
[3] 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) [2012] OJ L 351.
[4] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) [2019] OJ L 178.
[5] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177.
[6] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199.

which the law will be applied to those cases. In addition, the CJEU concluded that, for an accurate interpretation, the primary and secondary financial markets must be distinguished, which also affect the outcome of the case as to which state will have jurisdiction over financial claims, according to Article 7(2) of the Brussels Ibis Regulation.

The thesis will analyse the different legal basis of Private International Law according to which the CJEU made the decision in the landmark case of *VEB v. BEP*[7] and the reason for which it was considered a ground-breaking decision regarding claims of financial nature. The legal basis mentioned include Article 7(2) of Brussels Ibis Regulation and Article 4 of the Rome Regulation. Previous case law of the CJEU will also be analysed to compare earlier decisions with *VEB v. BEP* and highlight its' significance in relation to the principle of legal certainty. This is imperative also to be able to compare the decision-making process in each of the cases and determine if there are any new findings.

Section 2 will specifically deal with the landmark case of *VEB v. BEP.* The analysis will firstly evaluate the background and the main legal issues of the case. Such evaluation will highlight the underlying issue of the thesis and the case itself – identifying the place of damage in relation to securities. The decision of the CJEU will be analysed in subsection 2.2 giving an overview of the decision-making process and how the court decided to interpret and apply the Rome II Regulation and Brussels Ibis Regulation to the case. Subsection 2.3 will focus on explaining 'the market theory', a notion finally accepted in the preliminary decision of the CJEU. This theory helps to locate the damage of securities on the financial market by distinguishing the two different financial markets which exist: primary and secondary. By creating this distinction, the court ensures making sound judgments when localising the damage of securities and providing a criterion for similar cases.

The notion of *locus delicti commissi*[8] will be interpreted and assessed in section 3. Subsection 3.1 will interpret the said notion through the analysis of its legal basis, Article 7(2) Brussels Ibis Regulation. It will solely analyse the legal framework of the article, concentrating on the wording and interpretation thereof in theory. The following subsection 3.2 will further analyse the interpretation and application of the said notion and article by the CJEU in actual cases. This analysis will give a theoretical and practical overview of *locus delicti commissi* for one to be able to determine how it will be viewed in cases concerning securities and financial loss. The last subsection will evaluate how the *Hoge Raad* interpreted the same notion. The

[7] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056.
[8] Case 21-76 *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA* [1976] ECR 1735.

Dutch court did not agree with the CJEU on the decision regarding the jurisdiction of the court in the case of *VEB v. BEP* and this subsection will give the reader a comparative overview of the decision-making process of the Dutch court and the CJEU.

Section 4 will analyse the CJEU interpretation of financial loss in landmark cases. This will highlight any discrepancies between judgments which may infringe upon the principle of legal certainty. The analysis will contain the courts' application of the law and any relevant criteria which was used to localise the damage and determine which court will have jurisdiction over the issue. The last subsection 4.3, underlines the importance of distinguishing the two financial markets, primary and secondary. This distinction influences the outcome of court judgments and imposes a criterion how to classify damages in cases of securities. The conclusion of this section aims to show how the distinction of financial markets could have influenced judgments of cases mentioned and why this should be heavily acknowledged for future cases.

Section 5 gives an in-depth analysis of the legal framework of Article 4 Rome II Regulation, diving into the subject matter and purpose of the article itself. Subsection 5.2 will briefly explain the legislative history of the article for an overall understanding of the initial purpose for which the article was written, as damages relating to financial loss were not part of its purpose. The last two subsections evaluate the scope of application, structure and main rule of Article 4 along with its' exceptions. Financial losses in relation to securities are not expressly in the scope of the article, as they are something intangible, therefore, the courts had difficulty applying the law to such cases. The conclusion of this research will prove that the crucial step in determining the location of damage in case of securities is the application of the "market theory" and distinguishing the two financial markets.

The methodology used in this will be in most part the doctrinal methodology. Sections 2,3 and 5 will be analysed using facts of the law itself found in Rome II Regulation and Brussels Ibis Regulation, including the official decision of the CJEU. The legal literature used will highlight the initial standpoint of private international law, which the CJEU applies individually to cases. However, the research will also have a comparative overview of landmark cases in section 4 to highlight the discrepancies between application of laws in different cases and put emphasis on new theories and criteria that evolved through the simultaneous development of the courts' decision – making process.

2. Landmark case of *VEB v. BP*

The Court of Justice of the European Union (CJEU) ruled in the case of *Vereniging van Effectenbezitters (VEB) v British Petroleum PLC* (*BP) plc,* in May 2021 that Article 7(2) of Brussels Ibis Regulation (Regulation No 1215/2012) has to be interpreted as meaning that the direct occurrence of a purely financial loss which resulted from investment decisions will not lead to the fact that the international jurisdiction will be attributed to a court of the Member State in which the bank or investment firm is located[9]. This ruling will be applied even to cases where the investment decision was taken due to misleading information from an internationally listed company that was published worldwide[10]. The ECJ ruled that international jurisdiction resides solely with the courts of member states in which listed companies must comply with their legal reporting obligations – secondary market[11]. Dutch claim associations received this as a serious blow as they intended to sue foreign defendants before domestic courts. The following analysis will give a comprehensive explanation of the courts' decision and the reasons behind it, as well as the reasons behind the opposing opinion of the Dutch domestic courts.

2.1 The background & legal issue of the case

The case at hand concerns an accident which occurred in 2010 on the Deepwater Horizon platform, which caused an oil spill in the Gulf of Mexico[12]. In April 2015, VEB, an association of securities holders registered in the Netherlands, brought a collective action for damages before the Dutch courts, the *Hoge Raad*, against BP[13]. The action for damages was brought before the Dutch Supreme Court concerning the fall in the value of VEB's shares in a company established in the United Kingdom[14], following said oil spill. More specifically, VEB invoked

[9] Priyanka Jain, "No Collective Redress against Foreign Companies in Cases of Purely Financial Damage: Case C-709/19 VEB v. British Petroleum" (*European Law Blog*, June 18, 2021) <https://europeanlawblog.eu/2021/06/18/no-collective-redress-against-foreign-companies-in-cases-of-purely-financial-damage-case-c-709-19-veb-v-british-petroleum/> accessed April 23, 2024.

[10] Priyanka Jain, "No Collective Redress against Foreign Companies in Cases of Purely Financial Damage: Case C-709/19 VEB v. British Petroleum" (*European Law Blog*, June 18, 2021) <https://europeanlawblog.eu/2021/06/18/no-collective-redress-against-foreign-companies-in-cases-of-purely-financial-damage-case-c-709-19-veb-v-british-petroleum/> accessed April 23, 2024.

[11] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 96.

[12] Priyanka Jain, "No Collective Redress against Foreign Companies in Cases of Purely Financial Damage: Case C-709/19 VEB v. British Petroleum" (*European Law Blog*, June 18, 2021) <https://europeanlawblog.eu/2021/06/18/no-collective-redress-against-foreign-companies-in-cases-of-purely-financial-damage-case-c-709-19-veb-v-british-petroleum/> accessed April 23, 2024.

[13] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 11.

[14] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 1.

Article 3:305a of the Dutch Civil Code, filing for a declaratory judgment regarding the alleged liability of BP for disclosing information before and after the oil spill[15]. The disclosure of information by BP resulted in a drop in its share prices, harming the investors, VEB, who bought said supposedly BP provided inaccurate, incomplete and misleading information relating to its security and maintenance programs prior to the oil spill. However, BP's shares are listed only on the Stock Exchange in London, Frankfurt and New York[16], which led to the need of the court to obtain an interpretation of Article 7(2) of Brussels Ibis Regulation to allocate jurisdiction to an appropriate court. In addition, the issue of localizing the damage came about since the Dutch courts dismissed the action on the ground that no damage occurred in the Netherlands, despite the investment account being in the Netherlands.

Following these events, the Dutch Supreme Court submitted several questions for a preliminary ruling to the CJEU concerning the interpretation of Article 7(2) of Brussels Ibis Regulation. The first and main question was:

" Should Article 7(2) of [Regulation No 1215/2012] 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?"[17]

The second follow up question[18] submitted by the *Hoge Raad* is whether the same standard for localizing the loss applied to collective and individual actions[19]. In addition, the Dutch court asked the CJEU, in the case that courts in the Netherlands have jurisdiction to hear the claim based on the mentioned article, do those courts also have international and internal territorial jurisdiction to heal all individual claims for compensation brought by investors who

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[15] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 7.
[16] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 9.
[17] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 19 & 20.
[18] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 75.
[19] Matthias Lehmann, "CJEU in Effectenbezitters v. BP: Jurisdiction for Collective Actions Based on Incorrect Investor Information" (*EAPIL*, May 21, 2021) <https://eapil.org/2021/05/21/cjeu-in-effectenbezitters-v-bp-jurisdiction-for-collective-actions-based-on-incorrect-investor-information/comment-page-1/> accessed April 24, 2024.

suffered damage[20], as stated in the first preliminary question. Lastly, if the Dutch courts have international, but not internal, territorial jurisdiction to hear all individual claims for compensation brought by investors who suffered damage, as stated in question 1, will the internal territorial jurisdiction be determined on the basis of the place of the domicile of the misled investor, the place where the bank is established and in which the investor holds his/hers personal bank account or the place where the bank is established where the investment account is held, or on the basis of another connecting factor[21].

2.2 CJEU decision

The CJEU ruled in 2021, for the interpretation of Article 7(2) Brussels Ibis Regulation, the location of the investment account or the establishment of the account holding bank in a Member State, where the damage is the result of a decisions taken by investors on the basis of allegedly incorrect, incomplete and misleading information distributed globally by the listed company, is not a sufficient connecting factor to confer jurisdiction on to the courts of that state[22]. In addition, the court ruled that the interpretation of said article and jurisdictional standards will apply to both collective and individual actions[23]. The CJEU did not answer the last two questions posed by the Hoge Raad as they concerned individual actions and the court deemed them hypothetical and irrelevant to the issue at hand[24]. The following examination of the CJEU ruling will briefly showcase the main challenges of localizing purely financial loss. Later in section 4, an in-depth analysis will be given of the previous case law acting as precedent.

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[20] Matthias Lehmann, "CJEU in Effectenbezitters v. BP: Jurisdiction for Collective Actions Based on Incorrect Investor Information" (*EAPIL*, May 21, 2021) <https://eapil.org/2021/05/21/cjeu-in-effectenbezitters-v-bp-jurisdiction-for-collective-actions-based-on-incorrect-investor-information/comment-page-1/> accessed April 24, 2024.
[21] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 14.
[22] Matthias Lehmann, "CJEU in Effectenbezitters v. BP: Jurisdiction for Collective Actions Based on Incorrect Investor Information" (*EAPIL*, May 21, 2021) <https://eapil.org/2021/05/21/cjeu-in-effectenbezitters-v-bp-jurisdiction-for-collective-actions-based-on-incorrect-investor-information/comment-page-1/> accessed April 24, 2024.
[23] Matthias Lehmann, "CJEU in Effectenbezitters v. BP: Jurisdiction for Collective Actions Based on Incorrect Investor Information" (*EAPIL*, May 21, 2021) <https://eapil.org/2021/05/21/cjeu-in-effectenbezitters-v-bp-jurisdiction-for-collective-actions-based-on-incorrect-investor-information/comment-page-1/> accessed April 24, 2024.
[24] Matthias Lehmann, "CJEU in Effectenbezitters v. BP: Jurisdiction for Collective Actions Based on Incorrect Investor Information" (*EAPIL*, May 21, 2021) <https://eapil.org/2021/05/21/cjeu-in-effectenbezitters-v-bp-jurisdiction-for-collective-actions-based-on-incorrect-investor-information/comment-page-1/> accessed April 24, 2024.

For the CJEU to answer the first question, they regarded the previous judgments in *Kolassa*[25], *Universal*[26] and *Löber*[27], that the location of the bank account in a Member State that recorded the financial loss is not sufficient to attribute international jurisdiction to the courts of that MS[28]. The case at hand would have to have specific circumstance which would enable jurisdiction to be attributed to it. As *VEB v. BEP* does not have any distinctive elements, the court could not depart from previous case law.

In the case of *Universal*, the financial damage was registered in a bank account which was chosen by the applicant for the purpose of settling its debt, while the injured party decided where it suffered the loss, making the location of account a less reliable factor when attributing international jurisdiction[29]. On the other hand, in the present case the financial loss resulting from the fall in value of shares held in the investment account, occurred directly in that same account. The CJEU did not agree and did not want to invoke such an argument because it enhances unpredictability in such cases. There is always a possibility that the shareholder may choose an account where his/her securities are deposited in, making it possible to predetermine the location of that account and establish a link to a particular territory in case they needed to invoke future action against the issuer of the shares. However, such a situation is considered unreliable for the issuer of the shares. Despite the fact that in the present case, the financial loss occurred in the same account and the investor did not choose the location, it does not make it any less unforeseeable for the issuer. For such reasons, the court decided that the financial account located in the Netherlands cannot be accepted as a "sufficient connecting factor for the international jurisdiction" of the Dutch courts[30].

Furthermore, in the second question the Dutch courts wanted to know whether the decision in the first question would be different if the claim was brought under Article 3:305a of BW by an association with the purpose to defend the collective interests of investors who suffered the damage[31], referred to in question 1. This would mean that neither the place of

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[25] Case C-375/13 *Kolassa v Barclays Bank plc* [2015] EU:C:2015:37.
[26] Case C-12/15 *Universal Music International Holding BV v Schilling et al*, EU: C:2016:449.
[27] Case C-304/17 *Löber v Barclays Bank plc*, EU:C:2018:701.
[28] Matthias Lehmann, "CJEU in Effectenbezitters v. BP: Jurisdiction for Collective Actions Based on Incorrect Investor Information" (*EAPIL*, May 21, 2021) <https://eapil.org/2021/05/21/cjeu-in-effectenbezitters-v-bp-jurisdiction-for-collective-actions-based-on-incorrect-investor-information/comment-page-1/> accessed April 24, 2024.
[29] Case C-12/15 *Universal Music International Holding BV v Schilling et al*, EU: C:2016:449.
[30] Priyanka Jain, "No Collective Redress against Foreign Companies in Cases of Purely Financial Damage: Case C-709/19 VEB v. British Petroleum" (*European Law Blog*, June 18, 2021) <https://europeanlawblog.eu/2021/06/18/no-collective-redress-against-foreign-companies-in-cases-of-purely-financial-damage-case-c-709-19-veb-v-british-petroleum/> accessed April 23, 2024.
[31] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 14.

domicile of the investors, nor the special circumstance of individual purchase transactions or of individual decisions not to sell shares which were already held, have been established[32]. The Netherlands deemed themselves as the European jurisdiction for collective redress[33] and stated that organizations have the option to start a class action before the Dutch courts to obtain declaratory relief. The Amsterdam Court of Appeal can declare a judgment universally binding[34] and since the entry into force of the Settlement of Mass Damage in Collective Actions Act[35] in 2020, there is a possibility to bring collective action for damages. Very often, foreign defendants challenge the jurisdiction of the Dutch courts to hear this type of class action. When the CJEU stated that damage occurred in an investment account held in the Netherlands is not a sufficient ground for jurisdiction of the Hoge Raad, according to Article 7(2) Brussels Ibis Regulation, the decision had consequences for the notion of collective redress in the Netherlands[36]. The CJEU ruled that the collective nature brought by VEB is not in itself decisive for localization of the harmful event occurred[37], according to Article 7(2) Brussels Ibis Regulation (para.36). Regardless of whether the claim was brough as a collective action or an individual action, the same jurisdictional standards should apply[38]. Therefore, the Dutch courts had no jurisdiction as the shares were not listed in the Netherlands[39].

The ruling in *VEB* was in conformity with earlier decisions such as in *CDC*[40] and the *Schrems*[41] case. The decision in the *CDC* case stated that the location of the harmful event for

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[32] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 14.
[33] Loyens & Loeff, "Dutch Courts Do Not Have Jurisdiction in Class Action Case VEB v BP" (*Loyens & Loeff*) <https://www.loyensloeff.com/insights/news--events/news/dutch-courts-do-not-have-jurisdiction-in-class-action-case-veb-v-bp/> accessed April 29, 2024.
[34] Loyens & Loeff, "Dutch Courts Do Not Have Jurisdiction in Class Action Case VEB v BP" (*Loyens & Loeff*) <https://www.loyensloeff.com/insights/news--events/news/dutch-courts-do-not-have-jurisdiction-in-class-action-case-veb-v-bp/> accessed April 29, 2024.
[35] Nick Kampschreur, "What You Need to Know about the New Mass Damage Settlement Act in Collective Action" *Taylor Wessing* (February 26, 2021) <https://www.taylorwessing.com/en/insights-and-events/insights/2021/02/the-new-mass-damage-settlement-act-in-collective-action> accessed April 29, 2024.
[36] Loyens & Loeff, "Dutch Courts Do Not Have Jurisdiction in Class Action Case VEB v BP" (*Loyens & Loeff*) <https://www.loyensloeff.com/insights/news--events/news/dutch-courts-do-not-have-jurisdiction-in-class-action-case-veb-v-bp/> accessed April 29, 2024.
[37] Matthias Lehmann, "CJEU in Effectenbezitters v. BP: Jurisdiction for Collective Actions Based on Incorrect Investor Information" (*EAPIL*, May 21, 2021) <https://eapil.org/2021/05/21/cjeu-in-effectenbezitters-v-bp-jurisdiction-for-collective-actions-based-on-incorrect-investor-information/comment-page-1/> accessed April 24, 2024.
[38] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27.
[39] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 2.
[40] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel et al*, EU:C:2015:335.
[41] Case C-498/*16 Schrems v Facebook Ireland Ltd*, EU:C:2018:37.

each claim for damages must be assessed on an individual basis[42]. It is meant to guarantee legal certainty for applicants in similar cases by being able to predict which court will have jurisdiction over their case. The court stated in the *Schrems* case that the interpretation of Brussels Ibis rules relating to jurisdiction apply to actions brought by a consumer on behalf of other consumers, however, the jurisdiction will be assessed on the individual basis of the claimant and not in entirety of the consumers he represents[43]. The CJEU adopted a cautious approach because recognizing the issue on behalf of all consumers would cause legal certainty issues and might pose a risk of forum shopping[44]. This would lead to issues of fragmentation and it would be impossible to establish jurisdiction in one court due to EU-wide "class actions"[45]. Therefore, to establish jurisdiction and legal certainty the court had to opt for a strict interpretation of Brussels Ibis.

The court made an exception to such interpretation of Brussels Ibis in the case of *Henkel*[46], stating that such rules may apply to injunctive proceedings brought by a consumer association that aim to prevent the continuation of unlawful action[47]. The case at hand concerns a consumer association in Vienna, which brought proceedings on the basis that Mr. Henkel was using unfair contract terms in contracts with clients domiciled in Austria. The CJEU ruled in such a case that the Austrian courts have jurisdiction because "the legal stability of Austrian clients was undermined by use of unfair terms"[48]. However, the court did emphasize in the said case that the association is an Austrian non-governmental body and they have a legitimate interest in protecting their consumers[49]. In contrast, the CJEU did not make such a decision in

[42] Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel et al*, EU:C:2015:335, para 36.

[43] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 22.

[44] European Parliament, "Collective Redress in the Member States of the European Union" (*Publications Office of the EU*, October 4, 2018), p 50-60 <https://op.europa.eu/publication/manifestation_identifier/PUB_QA0318324ENN>.

[45] European Parliament, "Collective Redress in the Member States of the European Union" (*Publications Office of the EU*, October 4, 2018), p 50-60 <https://op.europa.eu/publication/manifestation_identifier/PUB_QA0318324ENN>.

[46] Case C-167/00 *Verein für Konsumenteninformation v Henkel*, EU:C:2002:555.

[47] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 22.

[48] Case C-167/00 *Verein für Konsumenteninformation v Henkel*, EU:C:2002:555, para 42.

[49] Case C-167/00 *Verein für Konsumenteninformation v Henkel*, EU:C:2002:555, para 19.

the case of *VEB* and ended up undermining the notion of collective redress within the jurisdiction of the Dutch courts[50].

However, it can be argued that the CJEU did strengthen the possibility of collective redress[51] by limiting the choice of forum where the investors can claim damage. The CJEU decided that the court in the place of listing of the BP shares will have jurisdiction over the matter, disregarding other possibilities such as the domicile or establishment of the bank of the investor. This provides for the best possible solution when assessing the choice of forum as it provides that the investors may claim damages in one court. The said decision rejects the possibility of claiming damages over several courts which would cause inefficient collective actions due to fragmentation and cause further coordination problem[52] as the investors may be domiciled across the world. There were certain cases of dual listings in VEB, however, this was resolved by narrowing down jurisdiction to several courts[53]. With this decision, the CJEU managed to prevent wide-spread collective redress and came to an effective conclusion by concentrated collective proceedings at the place of the stock exchange.

2.3 Breakthrough of *"The market theory"*

The judgment in the case of *VEB v. BEP* represents the latest development concerning the ongoing issue of localizing the damage in case of financial loss. This issue was already a debate in previous cases such as *Kolassa, Universal Music, Löber, CDC*[54] and a few others, in which the court progressed in their judgments to finally accept the importance of distinguishing financial markets before making an appropriate conclusion[55].

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[50] Loyens & Loeff, "Dutch Courts Do Not Have Jurisdiction in Class Action Case VEB v BP" (*Loyens & Loeff*) <https://www.loyensloeff.com/insights/news--events/news/dutch-courts-do-not-have-jurisdiction-in-class-action-case-veb-v-bp/> accessed April 29, 2024.

[51] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 23.

[52] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 23.

[53] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 23.

[54] Case C-352/13,– *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel et al*, EU:C:2015:335.

[55] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 3.

The case of *VEB* had a few similarities to the cases of *Kolassa* and *Löber*[56], in the sense that it also concerned defective information on the capital market. On the other hand, in the precedent cases the misinformation occurred on the primary market, while in the case of *VEB*, the alleged misinformation occurred on the secondary market[57]. In previous cases, such a differentiation was not taken into consideration. The following analysis will differentiate the two financial markets and additional affects it has on circumstantial facts, which lead to a different outcome of the case.

2.3a Differentiation of the financial markets & other relevant factors

For a comprehensive analysis of localizing damage on financial markets, a distinction must be made between the primary and secondary market. The primary market is where new securities are issued for the first time for the purpose of rising capital for entities such ad corporations and governments[58]. The issuers of the shares exchange them for money from investors. On the secondary market, after the securities are issued and stock listings created, they are traded amongst investors[59]. The trading amongst investors is typically done through intermediaries such as banks and exchanges. The markets in question are subject to different regulations. For example, the primary market is regulated by the rules of prospectuses[60] since the prospectus must be notified and published before the financial instrument can be issued. The secondary market is regulated by the rules on continuous and ad hoc investor information[61].

In cases such as *Kolassa* [62]and *Löber*[63], the distinction between the primary and secondary market was blurred because there was a spillover effect from one market to the other. In the mentioned cases, the investors acquired certificates for the said investments on the

[56] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 4.
[57] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 4.
[58] "Britannica Money" (*Britannica Money*) <https://www.britannica.com/money/primary-vs-secondary-markets> accessed April 26, 2024.
[59] "Britannica Money" (*Britannica Money*) <https://www.britannica.com/money/primary-vs-secondary-markets> accessed April 26, 2024.
[60] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 4.
[61] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 4.
[62] Case C-375/13 *Kolassa v Barclays Bank plc*, EU:C:2015:37.
[63] Case C-304/17 *Löber v Barclays Bank plc*, EU:C:2018:701.

secondary market, however, the issue at hand concerned defects in the prospectus published at the time the financial instruments were issued[64]. Therefore, the misinformation, constituting the source of the damage, was on the primary market[65]. In neither case did he court make a specific distinction of the two markets due to the obscurity relating to the localization of where the damage occurred.

The importance of distinguishing the two markets was later shown in the case of *VEB*, in which the central issue concerned misinformation that occurred on the secondary market[66]. In the aforementioned case, the shares of BP were issued before the dispute arose and there were no defects in the prospectus which was published. The claim was concerned with the fact that the issuers failed to publish continuous information to investors on the secondary market[67]. In comparison to the two previously mentioned cases, the CJEU decided that the court which will have jurisdiction can only be the one where the company has complied with statutory reporting obligations[68]. This will be the place of the stock exchange on which the shares are listed. According to Article 3 of the Prospectus Regulation, the Member States are not allowed to offer any securities to the public within their territory without a previously published prospectus[69]. Furthermore, Article 17 of the Market Abuse Regulation states that the issuer has an obligation to inform the public as soon as possible of inside information which directly concerns the issuer[70]. In the case of *VEB*, BP committed a direct violation of said rules on the secondary market. Therefore, the CJEU ruled that the court in the Member State, where the financial instrument is listed for trading on the stock exchange will have jurisdiction over the matter[71]. In the case of *VEB*, this was on the secondary market.

Another important issue to discuss is the relationship between information and damage and how the CJEU interprets such notions. The court interpreted that the misinformation

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64 Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 4.

65 Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 4.

66 Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056.

67 Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 4.

68 Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 35.

69 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, OJ [2017] L 168, art 3.

70 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (Market Abuse Regulation – MAR), OJ [2014] L 173, art 17.

71 Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056, para 96.

regarding the shares equates to damage[72]. However, providing adequate information regarding financial instrument on the market that is seen as a legal duty[73] and in the case at hand, BP violated said legal duty. In the case of VEB, the misinformation occurred on the secondary market, on the stock exchange where the shares were listed. Therefore, the place of listing on the stock exchange could be better considered as the place of the event giving rise to the damage. Considering this, one must also look at the requirement of transparency when discussing the notion of information in cases concerning financial instruments. Under the Transparency Directive, Article 21[74], it is stated that the inside information must be published: 1) in an Officially Appointed Mechanism at national level, 2) in the European Electronic Access Point and 3) on the website of the issuer. Furthermore, Article 19(1) also states that the information may be published on the competent national authority[75]. Since this information may be accessed from anywhere in the world, it would be impossible to take the approach of attributing jurisdiction to the court of the Member State where the information is published. This would mean that courts across any EU Member State would be competent to have jurisdiction over the matter, therefore, acting contrary to the principle of foreseeability. In addition to foreseeability, the court would have to look at whether there is a close connection between the competent court and facts of the case[76].

In cases which relate to financial instruments, it is difficult to speak about the exact location of such as they are intangible. There is an ongoing discussion about how to localize something that is intangible and has a variety of possible locations of damage. This is why in the case of *VEB*, the CJEU decided that the competent court will be the one where the shares are listed on the stock exchange as this enhances the notion of foreseeability.

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[72] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 6.

[73] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 6.

[74] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [2004] OJ L 390, art 21.

[75] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [2004] OJ L 390, art 19(1).

[76] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 7.

2.3b Necessary application of economic theories to *VEB v. BP*

There are other factors in the case of *VEB* which are opening discussions about what the court constituted as the actual damage. The application of the economic theory of "efficient market hypothesis"[77] helps explain this issue. The theory suggests that share prices reflect all available information and that stocks always trade at their fair value on exchanges, making it impossible for investors to purchase undervalued stocks or sell stocks for inflated prices[78]. This follows the main theory of economics which is that consumers, or in this case investors and issuers of shares will influence market prices with their behaviour. Therefore, false or misleading information would not directly cause damage, but it will influence prices on the secondary market[79]. This is because it is believed that reasonable investors will act on the available information and if said information is false, this will distort prices on the capital market and lead investors to make bad choices[80] which will end up being harmful to them.

To determine what is the said damage, it is suggested to apply the "fraud on the market doctrine"[81], established in the US case of *Afilliated Ute Citizens of the State of Utah et al*[82]. The doctrine states that the damage suffered on the secondary market due to false information by the issuer is the difference between the price paid by the investor and the price they would have received for the stock in the absence of fraudulent conduct[83]. Furthermore, in the case of *Basic Inc. v Levinson*[84], the US court upheld that the stock prices on the efficient market reflect publicly available information, therefore, the investor will rely on the integrity of that price[85]. In an efficient market, investors do not have to rely directly on a company's specific

[77] Lucas Downey, "Efficient Market Hypothesis (EMH): Definition and Critique" *Investopedia* (November 18, 2003) <https://www.investopedia.com/terms/e/efficientmarkethypothesis.asp> accessed April 29, 2024.
[78] Lucas Downey, "Efficient Market Hypothesis (EMH): Definition and Critique" *Investopedia* (November 18, 2003) <https://www.investopedia.com/terms/e/efficientmarkethypothesis.asp> accessed April 29, 2024.
[79] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 8.
[80] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 8.
[81] "Fraud-on-the-Market Theory Is a Market Efficient" (*ABI*) <https://www.abi.org/abi-journal/fraud-on-the-market-theory-is-a-market-efficient#3a> accessed April 29, 2024.
[82] *Afilliated Ute Citizens of the State of Utah et al v U.S*, 406 U.S. 128.
[83] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 8.
[84] *Basic Inc. v Levinson* [1988] 485 U. S. 224, 243.
[85] "Fraud-on-the-Market Theory Is a Market Efficient" (*ABI*) <https://www.abi.org/abi-journal/fraud-on-the-market-theory-is-a-market-efficient#3a> accessed April 29, 2024.

misstatements[86]. Misleading statements can deceive investors even if the investor has never heard the false statement directly because the price of the security reflects that misleading information. It is stated in the *Basic Inc.* case that “the causal connection between the defendants’ fraud and the plaintiffs’ purchase of stock in such a case is no less significant than in the case of direct reliance on misrepresentations”[87]. Therefore, the fact that they bought or sold on the market at the artificial price will be enough to cause them damage and they will not need to show reliance on the false information[88].

The “fraud on the market doctrine” then further clarifies the decision in *VEB*, in which case the court decided to localize the damage at the place of the exchange where the stock is listed where the shares were listed. BP failed to provide adequate information to the investors, which then lead to the distortion of prices on the market. The investors traded the shares at wrongful prices and therefore suffered damage on the stock exchange.

The application of economic theories in cases concerning financial loss is needed to explain the logic behind certain decisions and clarify the functioning of the economic market. Applying the efficient market hypothesis and the “fraud on the market” doctrine, the CJEU emphasized the importance of connecting factors when localizing loss on the stock exchange. This is a forum which can be considered neutral for all investors[89] as all their shares are listed there and once again, limits coordination problems between investors, increasing chances of collective redress. The courts of the Member State where the shares are listed are often specialized for such issues[90] as the courts where the actual damage occurred will have jurisdiction, leading to smoother proceedings. Most importantly, this will lead to synchronicity between the choice of forum and the applicable law as it will also depend on the place of

[86] “Fraud-on-the-Market Theory Is a Market Efficient” (*ABI*) <https://www.abi.org/abi-journal/fraud-on-the-market-theory-is-a-market-efficient#3a> accessed April 29, 2024.
[87] “Fraud-on-the-Market Theory Is a Market Efficient” (*ABI*) <https://www.abi.org/abi-journal/fraud-on-the-market-theory-is-a-market-efficient#3a> accessed April 29, 2024.
[88] Matthias Lehmann, “A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information” (2022) 18:1 Journal of Private International Law 1-27, p 8.
[89] Matthias Lehmann, “A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information” (2022) 18:1 Journal of Private International Law 1-27, p 11.
[90] Matthias Lehmann, “A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information” (2022) 18:1 Journal of Private International Law 1-27, p 11.

exchange[91]. It leads to enhanced legal certainty and as it shows cohesion in CJEU case law[92], such as in the case of *CDC*[93], where the court also decided that the place of loss would be the place of market.

The same decision was made in the *Volvo* case[94], in which a Spanish company purchased five Volvo trucks which were supposedly affected by the truck cartel, condemned by the European Commission. The vehicles were purchased in Cordoba and the company was domiciled in this city. The company brought the claim to the Commercial Court of Madrid, which further referred to the CJEU to define the notion of "the place where the damage occurred", according to Article 7(2) Brussels Ibis Regulation. It was held that said Article "confers directly and immediately international and territorial jurisdiction on to the courts of the place where the damage occurred"[95]. In addition, the ECJ also allows for MS to decide to confer a specific type of dispute to a single court, which would have exclusive jurisdiction irrespective of where the damage occurred in that MS[96]. Centralizing jurisdiction before a single specialized court can be justified with the aim of preserving proper administration of justice[97]. In the decision, the court differentiates the cartelized products as whether they were purchased in places that fall within the jurisdiction of one or several courts in the same MS[98]. The court which will have jurisdiction over an action for damages will be the one of the place where the goods were purchased, regardless of whether they were bought directly or indirectly from the defendant or immediately transferred at the end of a leasing contract[99]. This rule is to be applied to cases where cartelized products were purchased in a place within the jurisdiction of a single court. The case at hand became a precedent for competition law claims. Once again,

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[91] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 11.

[92] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 11.

[93] Case C-352/13,– *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel et al*, EU:C:2015:335.

[94] Case C-30/20,- *RH v AB Volvo and Others*, ECLI:EU:C:2021:604.

[95] Case C-30/20,- *RH v AB Volvo and Others*, ECLI:EU:C:2021:604 para 33.

[96] Marc Barennes, "The Volvo Judgment in Case C-30/20: The Place Where the Damage Occurred in Follow-on Cartel Damages Claims" (*Kluwer Competition Law Blog*, July 22, 2021) <https://competitionlawblog.kluwercompetitionlaw.com/2021/07/22/the-volvo-judgment-in-case-c-30-20-the-place-where-the-damage-occurred-in-follow-on-cartel-damages-claims/> accessed July 30, 2024.

[97] Case C-30/20,- *RH v AB Volvo and Others*, ECLI:EU:C:2021:604 para 36.

[98] Marc Barennes, "The Volvo Judgment in Case C-30/20: The Place Where the Damage Occurred in Follow-on Cartel Damages Claims" (*Kluwer Competition Law Blog*, July 22, 2021) <https://competitionlawblog.kluwercompetitionlaw.com/2021/07/22/the-volvo-judgment-in-case-c-30-20-the-place-where-the-damage-occurred-in-follow-on-cartel-damages-claims/> accessed July 30, 2024.

[99] Case C-30/20,- *RH v AB Volvo and Others*, ECLI:EU:C:2021:604 para 40.

the court decided to locate the place of damage at the place of market, where the goods were bought.

2.4 Introducing Article 4 of the Rome II Regulation to the discussion

The upcoming sections will give an in-depth analysis of Brussels I bis Regulation, looking at the theoretical aspects, its application in general and in cases concerning financial instruments. It is important to note the differences and difficulties in application of PIL instruments in cases involving financial markets. In addition, the research will move onto an in-depth analysis of precedent cases to highlight the evolution of the courts' decision-making process and showing how the decision in *VEB* was reached based on these cases. Only after assessing the courts' reasoning, it may be questioned how Article 4 of the Rome II Regulation will be interpreted in such a case.

The *VEB* case is multifaceted and, as shown in previous sections, requires analysis on multiple fronts, investigating the questions of jurisdiction and applicable law. The Rome II Regulation is intended to complement Brussels I bis Regulation as the consistency in application of these instruments is one of the main EU private international law objectives. Therefore, the decision of the court in *VEB* for the matter of jurisdiction will have certain consequences on the interpretation of Rome II Regulation. Before referring to the localization of damage, under Article 4 of the Rome II Regulation, it must be determined whether the actions for misinformation on the capital markets are covered by the regulation. It is imperative to first analyse the scope and purpose of the regulation, before determining the location of the damage and the applicable law of the place where the damage occurred. The research will deal with these issues in section 5 of the thesis, however, first one must look at the steps the court has taken to reach the decision in *VEB* before the application of Article 4 Rome II Regulation can even be mentioned.

3. The notion of *Locus delicti commissi*

Locus delicti commissi, or the place where the damage occurred, plays a significant role in the realm of private international law becomes crucial in determining how issues of jurisdiction should be resolved. When a damage occurs in a cross-border context, identifying the *locus delicti commissi* helps legal authorities determine which jurisdiction has the authority over the issue and adjudicate the case. The notion establishes international jurisdiction under article 7(2) Brussels I bis Regulation as it deals with disputes relating to "*tort, delict or quasi – delict*"[100].

When discussing said notion in the context of financial instruments, certain issues will arise when attempting to localize the damage. The place of trading of financial instruments is not the same as the place where the account is situated, therefore, there is often confusion about which location we should consider. This is particularly important if there is misinformation on the secondary market. In this case it would be useful to consider the place of exchange where the financial instrument was traded as this is where the issuer has an obligation to comply with statutory reporting obligations. The CJEU made different conclusions in various cases, making it quite difficult for parties involved to have any sort of certainty for the outcome. In the following sections, an analysis will be done on the overall application of Article 7(2) of Brussels I bis Regulation and how the court interprets the law.

3.1 Legal framework of Article 7(2) Brussels I bis Regulation

Article 7(2) of Brussels I bis Regulation states that "*a person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi – delict, in the courts for the place where the harmful event occurred or may occur*", also known as *forum delicti*[101]. The ECJ interprets this rule[102] by stating that when the place of the harmful act and the place of the resulting damage are not identical, the plaintiff may choose between the courts of these two places. This is in addition to the first option which is stated in Article 4 of the Regulation[103] where the plaintiff can sue in the *forum domicilii* of the defendant, that being the main rule in matters of jurisdiction. The court of the place where the harmful act occurred has the jurisdiction to deal with the total resulting damage. On the other hand, the court for the place of the event giving rise to the damage can claim jurisdiction over the entire resulting damage, while the court for the place of damage only has jurisdiction in relation to direct and

[100] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 10.

[101] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p 40.

[102] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 10.

[103] 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) 2012, art 4.

immediate damage arising in the country of the forum[104]. The requirement regarding the said damage must have arisen or there is a risk of it arising in the Member State of the forum is quite significant when the same harmful act causes or risks to cause damage in other Member States as well[105]. This is specifically relating to environmental damage. In this instance the plaintiff may choose between instituting proceedings in each Member State regarding the damage that arose there or suing, based on the total damage, in that Member State of the harmful act or where the defendant is domiciled. According to the *lis pendens* principle in Article 29 of the Regulation[106], the plaintiff may also combine two alternatives, by suing in a chosen Member State regarding the damage caused there and in the Member State of the harmful act or of the defendant's domicile for the rest. The article in question does not prevent such a combination, considering that parallel proceedings do not concern the same damage and do not involve the same cause of action. For example, damage arising on board a ship can be sometimes regarded as having occurred in the Member State where the ship is registered[107]. In such a case it would be enough for the plaintiff to claim that a damage has arisen in the Member State of the forum, because the issue of existence and extent of the damage is a substantial matter that should not be considered when determining the jurisdiction.

Every Member State has a different interpretation of the terms "*tort, delict or quasi – delict",* however, the ECJ has its own interpretation of the concept in question. They stated that Article 7(2) includes all liability which does not relate to a contract and, by consequence falls outside of the field of appreciation of Article 7(1)[108]. According to such a statement, there should not be gaps or overlap between Article 7(1) and Article 7(2)[109]. There is certain judgment with the use of terms in Article 7(2) and it was said that it would be better replace the wording *tort, delict or quasi – delict* with "non – contractual liability" considering that, for example, an action by a sub-buyer against a manufacturer or an action based on *negotiorum gestio*[110] do not deal with tort or delict, despite the fact that they are deemed to be included in

[104] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p 40-50.
[105] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p 40-50.
[106] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p 40-50.
[107] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p 40-50.
[108] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.
[109] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p 40-50.
[110] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p 40-50.

the realm of the Article 7(2) since they are not based on any contractual obligation assumed by the parties.

The said article applies to anticipatory actions as well as action for compensation[111], in cases where the plaintiff petitions the court for an injunction or for example, a restraining order, preventing the defendant to commit harmful acts. A creditor cannot rely on Article 7(2) when challenging the validity of fraudulent transactions made by his debtor. Article 7(2) may be invoked also by plaintiffs other than the victim of the tort, but it can be also invoked against defendants other than the wrongdoer[112]. Such an example would be instituting proceedings against a vicariously liable employer[113]. The Article may also be relied on by the wrongdoer in situations such as when he/she sues for a negative declaratory judgment holding that he is not liable for a certain damage or that he is not obliged to refrain from allegedly harmful behaviour[114].

The previous analysis is given from a theoretical perspective to understand the base of the article. In the following subparagraph the theoretical notion will be discussed as to how it translates into practice, specifically how the court first interpreted the article 7(2) of Brussels I bis Regulation and how the court reached the reasoning in *VEB*.

3.2 First Interpretation & Application of Article 7(2) Brussels I bis Regulation by CJEU

The definition of Article 7(2) of Brussels I bis Regulation covers a wide range of claims as discussed previously. This also includes actions for defamation and infringement of intellectual property rights[115]. The rationale of the said article is that it facilitates better efficiency of proceedings and administration of justice since the place where the harmful event occurred must have very close connecting factors to the dispute. The courts where the harmful event has occurred often are the most suitable to decide on the case on the grounds that they have the closest proximity to the even and it is easy for them to take evidence relating to the case.

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[111] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p 40-50.
[112] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p 40-50.
[113] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p 50.
[114] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p 50.
[115] Oster J, “RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights” (2012) 26 International Review of Law, Computers & Technology 113.

The CJEU first interpreted the tort rule in Article 7(2) of the Brussels I bis Regulation in the case of *Bier v Mines de Potasse d'Alsace*[116], relating to environmental damage caused by negligence. The court ruled in this case that the claimant may bring an action, by his choice, either before the court where the damage has occurred or before the court of the place of the event which gives rise to and is at the origin of that damage, meaning where the event giving rise to the damage produces a harmful effect upon the victim[117]. The reason the court gave for the double option of jurisdiction is that the place of damage is often the same as the place of the defendant's domicile, according to Article 4(1), and therefore, if the location was the sole factor under Article 7(2), it would be seen as ineffective. In addition, if the court decided only in the favour of the place where the damage occurred, it would exclude a useful connecting factor with the jurisdiction of a court that is near the cause of damage, specifically in cases where the place of the event giving rise to damage is not identical with the domicile of the person liable[118].

The court once again reinforced their decision in the case of *Shevill*,[119] where the scope of *forum damni* was further limited. The ruling stated that the courts of the Member State where the damage occurred may only claim jurisdiction in respect of the portion of damage which occurred in that State[120]. On the other hand, the courts of the Member State where the event giving the rise to the damage that occurred may have jurisdiction over the entire dispute. The reasoning behind this is that the court of the place where the damage occurred would have jurisdiction as they are the most competent to assess the libel committed and extent of the damage in that State[121].

The *Sheville* case concerned an action for non-pecuniary damages resulting from the circulation of a defamatory newspaper article in several Member States[122]. The plaintiff, a British national resident in the UK, considered the article to be defamatory and brought a defamation action in the UK High Court in relation to copies of the newspaper distributed and

[116] Case 21-76 *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA* [1976] ECR 1735.

[117] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.

[118] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.

[119] Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA* [1995].

[120] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.

[121] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.

[122] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.

sold in England and Wales[123]. The publisher, a company incorporated under French law and registered in Paris, challenged the jurisdiction of the High Court on the ground that the harmful event within the meaning of Article 7(2) had not occurred in the UK. The Court held that in such circumstances the aggrieved party may bring a defamation action against the publisher either in the court of the place where the publisher was incorporated[124], such as where the event giving rise to the damage occurred. In this case, the Court has jurisdiction to award damages for all damage caused by the defamation; or in the courts of each Member State where the publication was distributed and where the aggrieved party claimed damage to reputation[125], i.e. where the damage occurred. In this case, the Court has the competence to decide only on damages that occurred in the state of the forum seized. However, these statements are misleading in one respect. The fact that a plaintiff may bring proceedings in the courts of the State where the publisher has its registered office is already in compliance with Article 4 of the Brussels I bis Regulation[126], and not with Article 7(2). However, Article 7(2) means that a plaintiff may bring proceedings in the place where the publication was released. Usually, this will be the country where the publisher is based, but not necessarily. The "Shevill principle" holds that an action for full compensation must be concentrated in one or at most two jurisdictions[127]. It does, however, allow a plaintiff to sue if he has been defamed, but the action is limited to damages incurred within that jurisdiction. *Shevill* strikes a fair balance between the interests of the publisher and the person allegedly defamed[128]. The publisher of a disputed statement can choose the country in which his business is based and, at least to some extent, the country in which he publishes his writings. You can estimate the risk of being sued in these places by looking at the articles. Shevill is also useful because it makes it easy to identify the place of publication, for example by identifying the number of copies of a newspaper sold in a particular country or by identifying where a particular television program was broadcast[129].

[123] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.
[124] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.
[125] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.
[126] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.
[127] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.
[128] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.
[129] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.

Although the previous case is related to an issue related to defamation due to an article in a newspaper, the damages are non-material which showcases similar consequences as when one is discussing misinformation on the secondary market while trading securities. As discussed, trading of securities on the secondary market is an intangible action and makes it difficult to locate the damage, the same way it is difficult to localize damage in the previous case relating to defamation. Therefore, the court is facing issues when applying the law to such cases where the damage cannot be properly located, creating issues with jurisdiction and applicable law.

In the case of *VEB*, it can be seen how the court attempts to apply a similar line or reasoning as in the previously mentioned cases. The CJEU decided in *VEB* that the court where the securities were listed on the stock exchange would have jurisdiction over the case. There can be a line drawn between the *VEB* case and the case of *Sheville*. In the case of *VEB* the court is trying to uphold the principle of legal certainty and transparency. The narrow interpretation of Article 7(2) Brussels I bis Regulation allows for the court to emphasize legal certainty as the localization of damage is only possible at the place where the shares are listed, as this was regarded by the court the place where the harmful event occurred. However, in cases concerning securities, additional factors, apart from a close connection need to be established. The court had to interpret the article as strictly as possible to prevent the possibility of the defendant being sued in front of a court of a Member State, which could not been in any way foreseen by the defendant. The place of listing is deemed the most reasonable since the courts in that Member State would have the most capability to assess the law that governs jurisdictional matters[130]. In the case of *Sheville*, the CJEU decided for the same reason that one of the options for claiming jurisdiction would be the court of the Member State where the publication was distributed[131], also known as the place where the damage occurred. This can also be seen as a localization of damage that is reasonably foreseeable by the defendant as victim suffered the damage and the article was distributed in that place. Even though the two cases are factually different, the CJEU made a similar line of reasoning in both, as it aimed to uphold the principles of foreseeability. The case of *VEB* is different as it concerns the financial market, however, the court managed to apply the law and accommodate it to the issues raised relating to localization of securities, while still upholding the principles of PIL.

[130] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 10.

[131] Oster J, "RethinkingShevill.Conceptualising the EU Private International Law of Internet Torts against Personality Rights" (2012) 26 International Review of Law, Computers & Technology 113.

There are other cases which will be assessed in depth in the upcoming sections to portray the development in the application of Article 7(2) of Brussels I bis Regulation starting from the *Kronhofer* case[132], up to cases such as *Dumez*[133], *Marinari*[134]and *Universal Music* being the most recent in the realm of localizing financial loss. Beforehand, the following subsection will also showcase the interpretation of the mentioned article by the Dutch Court as certain questions and issues were raised to the CJEU in relation to their reasoning.

3.3 Preliminary Question of The *Hoge Raad*

In the VEB case, the Dutch Retail Shareholders' Association sought a declaratory judgment under Article 3:305a of the Dutch Civil Code (BW) regarding BP's liability. The Dutch Supreme Court has submitted a preliminary ruling to the ECJ to clarify whether Dutch courts have jurisdiction over the class action and the subsequent individual actions brought against them[135]. This would of course be beneficial to them as the investment account is located in the Netherlands and it would serve as "home court" advantage, however, the CJEU reinforced the rule of *locus delicti commissi*.

VEB is an association with full legal capacity under Dutch law and, as according to the law, it is supposed to represent the interest of its shareholders. In accordance with Article 3:305 BW it has also the capacity to bring collective actions in front of the Dutch courts. Due to this fact, VEB asked the District Court in Amsterdam if :1) the Netherlands court has international jurisdiction to hear the claims for compensation brought by BP shareholders, 2) the District Court in Amsterdam has territorial jurisdiction to hear those claims, 3) the Dutch law applies for claims for compensation brought by investors who have suffered damage, referring to the first question and 4) if Dutch courts have international territorial jurisdiction to hear all individual claims for compensation brought by investors who have suffered damage…"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,

[132] Case C-168/02 *Rudolf Kronhofer v Marianne Maier and Others* [2004] ECLI:EU:C:2004:364.
[133] Case C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and Others* [1990] ECLI:EU:C:1990:8.
[134] Case C-364/93 *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company* [1995] ECLI:EU:C:1995:289.
[135] Case C-709/19 *Vereniging van Effectenbezitter v BP plc* [2020] EU:C:2020:1056.

or on the basis of some other connecting factor?"[136]. The CJEU answered only the first two questions as they deemed them most relevant to the issue[137].

The reasoning of the CJEU was explained regarding the said questions in section 2.2, however, there are certain aspects to highlight when discussing these questions in relation to the notion of *locus delicti commissi*. Despite the fact that Netherlands is considered to be the European jurisdiction for collective redress and because of the WAMCA, it is also possible to bring a collective action for damages, it will not be possible for Dutch courts to automatically claim jurisdiction in relation to purely financial loss[138]. Additional connecting factors will be required to be established in order for Dutch courts to claim jurisdiction[139], the mere presence of the investment account in the Member State is not enough. The ECJ considers that the occurrence of damage may lead to the courts of the Member States in which the listed company complies with its legal reporting obligations declaring it liable[140]: only in these Member States can the listed company reasonably foresee that an investment market exists and that it may be held liable.

It can be shown from the previous analysis that the *Hoge Raad* was aiming to preserve its position as the European jurisdiction for collective redress, apart from it being more convenient for them to have jurisdiction over the case since the investment account was situated in the Netherlands. On the other hand, this was not a priority in consideration of the CJEU as they were more concerned about classifying the place of listing on the stock exchange and determining whether the jurisdiction will be claimed in the Member State of the place of the event giving rise to a damage (*locus delicti commissi*) or where the damage occurred (*locus damni*)[141]. The case of *VEB v. BP* is multifaceted as the CJEU must adhere to PIL rules and balance them against the parties' interests. Another issue which the court faced is applying said rules onto a case which had no exact precedent. The assets traded on the secondary financial market are intangible which also presents an additional challenge for judges to bridge the

[136] Case C-709/19 *Vereniging van Effectenbezitterv BP plc* [2020] EU:C:2020:1056.
[137] Case C-709/19 *Vereniging van Effectenbezitter v BP plc* [2020] EU:C:2020:1056, para 17.
[138] Loeff L&, "Dutch Courts Do Not Have Jurisdiction in Class Action Case VEB v BP" (*Loyens & Loeff*) <https://www.loyensloeff.com/insights/news--events/news/dutch-courts-do-not-have-jurisdiction-in-class-action-case-veb-v-bp/> accessed April 29, 2024.
[139] Loeff L&, "Dutch Courts Do Not Have Jurisdiction in Class Action Case VEB v BP" (*Loyens & Loeff*) <https://www.loyensloeff.com/insights/news--events/news/dutch-courts-do-not-have-jurisdiction-in-class-action-case-veb-v-bp/> accessed April 29, 2024.
[140] Loeff L&, "Dutch Courts Do Not Have Jurisdiction in Class Action Case VEB v BP" (*Loyens & Loeff*) <https://www.loyensloeff.com/insights/news--events/news/dutch-courts-do-not-have-jurisdiction-in-class-action-case-veb-v-bp/> accessed April 29, 2024.
[141] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 10.

current PIL rules, meant to be applied in regular tort cases, onto financial torts, which was not initially envisaged. The CJEU struggled to make coherent decisions in previous cases, however, they show progress in the decision – making process and how the CJEU arrived at the conclusion they have today in the case of *VEB*.

4. Financial Loss: CJEU interpretation so far

The notion of localizing damage was discussed in the general cases and specifically in the landmark case of *VEB*. It was important to showcase how localizing damage manifests in cases concerning "classical torts" and finally how it specifically manifests in cases concerning financial loss. Due to the financial crisis, there are many ongoing court proceedings across the globe as investors are trying to recuperate their losses and, in such proceedings, the alleged torts are committed by financial intermediaries from other countries. As stated in previous sections, the location of damage is important in order to determine the choice of law which will be applied to the case, according to Article 4(1) of the Rome II Regulation. Under the said Article, the law of the country where the damage occurred will apply to the tort, however, this law also governs "irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country in which the indirect consequences of that event occurred"[142]. This proved to be quite difficult in cases of financial loss as it is difficult to distinguish between two countries, where the direct damage took place.

To adequately determine the location of the damage and the applicable law, the courts have to resolve the issue of jurisdiction and choice of law in a coherent way as the two issues are interconnected[143]. The place of damage is particularly relevant, in cases where Brussels I Regulation applies, where the plaintiff decides to sue at the domicile of the defendant or at the place where the event giving rise to the damage occurred. Rome II Regulation states that the place of damage applies if the parties have their habitual residence in the same country or if the case has a manifestly closer connection to another country. This type of connection arises mainly in concurrent contracts, which are often present in financial cases[144]. In financial cases

[142] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 - 550.
[143] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 - 550.
[144] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 - 550.

today there is a high concentration of trade on the secondary market all over the world, meaning that the notion of place of damage will almost always be present.

In order to properly illustrate the connection between the Brussels I Regulation and Rome II Regulation in financial cases, it is crucial to identify in what type of issue which might pose a problem of localizing damage. Cases concerning misleading information may rise the question of locating economic loss[145]. In the first series of situations, a financial intermediary, such as a bank, provides information to a foreign investor, usually via a letter, email, or telephone[146]. The information could indicate that a consumer is creditworthy or solvent, or that he has enough funds in his account. One may also consider more broadly distributed information, such as erroneous or misleading ratings. Based on this information, the investor invests with a third party. When the information proves to be untrue, he sues the intermediary, typically for fraudulent or negligent misrepresentation. To decide jurisdiction and appropriate legislation, the court must first ascertain where the injury occurred. This was the issue in the case of *VEB*, which the thesis focuses on.

Another type of case that might occur is in the case of false prospectuses and financial statements, issued by a company, which contain false or misleading information[147].
An investor who purchased shares in that firm in the secondary market may file a claim against the issuer. Because the parties never had any direct contact, many legal systems consider this to be a tort claim. There is a debate over whether the legislation applying to prospectus liability should be considered independently of the jurisdiction where the loss happened[148]. Because the Rome II Regulation lacks a clear provision to this effect, implementing it would call for either a modification to its language or a very bold interpretation by the ECJ[149]. However, considering that such an issue did not yet occur, the place where the damage occurred is still the main interest in such cases.

[145] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 - 550.
[146] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.
[147] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550;
P Kiesselbach, "Prospectus Liability: Which Law Applies under Rome II?" (2011) 26 *Journal of International Banking and Financial Law* 195; Ringe and Hellgardt.
[148] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.
[149] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

Another type of case one might refer to when discussing localization of damage is in instances of bad asset management[150]. This can be a case in which a person has received finds from his/her client and was asked to invest them. A concern that may occur later is that the manager may embezzle the funds or violate another tort. Whatever the misbehaviour, the court must determine where the injury happened for both jurisdictional and choice-of-law grounds[151]. Additionally, we have cases concerning breach of statutory duties, in which a persons' behaviour and actions are illegal which leads to the adverse effect on others[152]. An intermediary, for example, may have breached a regulated business behaviour requirement[153]. Another example is a bank engaging in money laundering. National laws frequently establish a special cause of action, allowing plaintiffs to pursue claims for a violation of the law in these instances[154]. Again, before deciding on the jurisdictional issue and the appropriate law, the court must first ascertain the location of the damage. Lastly, there is the type of case in which a party has been induced into a contract with a third party that is very unfavourable to her[155]. This can be in the case of an ordinary sale, option contract or subscription of warrants[156]. In the case that the innocent party cannot set aside or terminate the contract, their liabilities are now higher without the assets being increased[157]. The party will incur a loss; however, it still must be determined where the said loss took place.

In the following subsection, the thesis will give an in-depth explanation of how economic loss is viewed in Europe and the landmark cases which showcase how Rome II Regulation was interpreted and applied.

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[150] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

[151] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

[152] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

[153] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

[154] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

[155] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550; *London Helicopters Ltd v Heliportugal LDA-INAC*, [2006] EWHC 108.

[156] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

[157] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

4.1 How is Economic Loss defined?

Although the general term which is used is economic loss, in continental Europe it is usually called "patrimonial loss"[158]. This is derived from the logic that economic loss presents the victim's "patrimony", encompassing "all rights and obligations of a person"[159]. According to this theory, the location of financial loss would occur where the patrimony of the victim is located. In reality, there is no physical place where ones sum of rights and obligations may be found. A more logical approach would be to define patrimony as the "totality of a person's assets"[160]. However, even in this case the same problem ensues as assets, whether they are money, securities or real estate, can be located in different countries, meaning that patrimony also cannot be attributed to a single country either[161].

Although economic loss is seemingly difficult to locate, it can be done by, for example, identifying a particular asset or sum of money that was lost. In cases concerning prospectus liability, usually the location of the money that has been invested is looked at or in case of asset management, if the valuable bonds were replaced with junk bonds, one might look at the place of bonds that were lost as the place of damage[162]. Therefore, in cases of financial law there is no general place of patrimony, but the transaction needs to be assessed in parts to see which asset is actually affected[163]. One has to apply the rules of banking and financial law as well as rules of private international law in order to properly localize the damage, as well as to find a place for the financial instrument.

Financial instruments are intangible products sold on the financial market. In the European Union the term financial instruments is more often used than the term securities as it covers a broader range of instruments, including derivatives[164]. Financial instruments exist in moth countries in dematerialized form. In many states there is no longer a document to prove

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158 Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

159 Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550; G Cornu, *Droit civil* (Montchrestien, 11th edn, 2003), [807], 362; K Larenz and G Wolf, *Allgemeiner Teil des Bürgerlichen Rechts* (Beck, 8th edn, 1997), § 21, no 13, 411; L Díez-Picazo, *Instituciones de derecho civil*, vol. I/1 (Tecnos, 2nd edn, 1998), p 241.

160 Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

161 Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

162 Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

163 Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

164 Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

the proprietary interest in them or to validly transfer them. Other countries continue to use paper to physically evidence shares but substitute the individual documents with what are known as jumbo certificates[165], which collectively reflect all the instruments issued in a single transaction. Investor rights are managed by financial intermediaries, who hold the jumbo certificates for their benefit, hence the phrase “indirect holding system”[166]. However, considering there is no longer a physical document where one could find the specified location of the financial instrument, other methods have to be used in order to track the instruments. The Hague Convention on Securities held with an Intermediary[167], which has yet to enter into force, took the approach that the key rule is that the parties may agree on the appropriate legislation[168]. The Convention purposely avoids any attempt to “localise” security because its drafters were aware that such an undertaking would face serious barriers[169]. The law applicable to the financial instruments held with an intermediary is chosen by the parties, however, the rules of private international law do not determine their location[170]. In an ideal circumstance, one might apply the law of the country chosen by the parties as the “place” of the damage[171]. However, once again this is impossible as the financial instruments are traded across the decentralized market and one cannot be certain that this shall be the location of the damage.

The judicial system aims to provide a coherent set of rules which will apply to such situations, making it easier to localize damage once the rules are applied. The place of damage might be different when cases are assessed on an individual basis. In the following section there will be an analysis of how the court approached cases concerning financial instruments, specifically how did they deal with localizing the damage.

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165 Matthias Lehmann, “Where Does Economic Loss Occur?” (2011) 7 Journal of Private International Law, p 527 – 550.
166 Matthias Lehmann, “Where Does Economic Loss Occur?” (2011) 7 Journal of Private International Law, p 527 – 550.
167 Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, done at The Hague on 5 July 2006.
168 Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, done at The Hague on 5 July 2006.
169 Matthias Lehmann, “Where Does Economic Loss Occur?” (2011) 7 Journal of Private International Law, p 527 – 550.
170 Matthias Lehmann, “Where Does Economic Loss Occur?” (2011) 7 Journal of Private International Law, p 527 – 550.
171 Matthias Lehmann, “Where Does Economic Loss Occur?” (2011) 7 Journal of Private International Law, p 527 – 550.

4.2 Leading Cases in The Realm of Economic Loss

4.2a Cases of *Dumez & Marinari*

The ECJ decision that the domicile of the victim will not be taken into account when locating economic loss is reaffirmed in the cases of *Dumez*[172] and *Marinari*[173]. In the *Dumez* case, the French court referred to the CJEU for a preliminary ruling on the interpretation of Article 5(3) of the Brussels I bis Regulation in regard to establishing quasi – delictual liability brought before French courts brought by French companies Dumez France and Oth Infrastructure, against German banks[174]. Dumez claims to have suffered damage due to the insolvency of subsidiaries established in Germany, which came about by suspending a property development project in Germany, allegedly due to cancellation of loans by the German banks, which were initially granted to the prime contractor[175]. The claimant argued that the cancellation caused the insolvency of the German subsidiaries and as a result they suffered loss in France, due to the fact that their interests as shareholders were adversely affected. Furthermore, the claimant tried to use the *Bier* formula to justify suing the defendant in French courts, although the court denied this possibility[176]. The CJEU stated that the reasoning in *Bier* applies only to cases of direct harm and not indirect harm[177]. Specifically, the court stated that "*The Convention cannot be interpreted as permitting a plaintiff pleading damage which he claims to be the consequence of the harm suffered by other persons who were direct victims of the harmful act to bring proceedings against the perpetrator of that act in the courts of the place in which he himself ascertained the damage to his assets*"[178]. Therefore, if the initial damage was suffered by another person in another country, it will not be possible for the claimant to claim jurisdiction in their home courts if they suffered consequential loss in their own country[179]. Once again, the CJEU denied localizing damage or economic loss at the place where the victim is domiciled.

The court further strengthened their position on the matter in the *Marinari* case. This case concerned the same issue, meaning the interpretation of Article 5(3) of Brussels Convention. Mr. Marinari, an Italian citizen lodged a bundle of promissory notes with a

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[172] Case 220/88 *Dumez France and Tracoba v Hessische Landesbank* [1990] ECR I-49.
[173] C-364/93 *Marinari* [1995] ECR I-2719.
[174] Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.
[175] Case 220/88 *Dumez France and Tracoba v Hessische Landesbank* [1990] ECR I-49, para 3.
[176] Case 220/88 *Dumez France and Tracoba v Hessische Landesbank* [1990] ECR I-49, para 6.
[177] Case 220/88 *Dumez France and Tracoba v Hessische Landesbank* [1990] ECR I-49, para 15.
[178] C-364/93 *Marinari* [1995] ECR I-2719.
[179] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 2.

Manchester branch of Lloyd Banks[180]. The bank staff refused to return the promissory notes and informed the police of their existence, stating that they are of dubious origin. This led to the arrest of Mr. Marinari and sequestration of promissory notes[181]. Once released, the claimant sued Lloyd Banks and demanded compensation for the damage caused by conduct of the staff[182]. The claimant wanted compensation for damage he suffered because of his arrest, breach of several contracts and damage to his reputation. Lloyd bank objected that Italian courts had jurisdiction since the damage in question occurred in England[183]. The Corte di cassazione posed a preliminary question to the CJEU regarding the interpretation of Article 5(3), which once again took the position that the term "place where the harmful event occurred" cannot have such a broad interpretation as to include "any place where the adverse consequences can be felt of an event that has already caused damage actually arising elsewhere"[184]. Therefore, the article could not be interpreted in such a way as to confer jurisdiction to the Italian court over the English bank.

Additionally, this case shows the restated limitation of the *Bier* rule[185], where the CJEU stated that what is now Article 7(2) of Brussels I bis Regulation, does not include the location where the victim claims to have suffered financial harm as a result of primary damage incurred and sustained by him in another Member State[186]. The only difference between the *Dumez* and *Marinari* case is that in *Dumez*, the initial damage was suffered by other persons, there was indirect damage, whereas in *Marinari*, the damage was suffered by the claimant himself[187]. In both cases the court rejected possibilities of conferring jurisdiction to the place of the domicile of the victim. It would be contrary to foreseeability and legal certainty, especially if the damage incurred had no other connecting factor to the home court of the victim, apart from the fact that they are domiciled in that Member State. This would put the defendant in a weaker position as the decision would be unforeseeable to them[188].

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180 C-364/93 *Marinari* [1995] ECR I-2719, para 3.
181 C-364/93 *Marinari* [1995] ECR I-2719, para 3.
182 C-364/93 *Marinari* [1995] ECR I-2719, para 3.
183 C-364/93 *Marinari* [1995] ECR I-2719, para 4.
184 Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.
185 Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 2.
186 Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 2.
187 Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 2.
188 Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 3.

The following subsection will examine the *Kronhofer*[189] & *Kolassa*[190] case as the leading case concerning pure economic loss. It will showcase whether rules differ in application if there is only pure economic loss. How does the *Bier* rule apply, and even more so, does it apply at all?

4.2b Cases of *Kronhofer & Kolassa*

The following case deals with the interpretation of Article 5(3) of Brussels Convention in a situation concerning investment loss. Investment loss is one of the main areas in which one might encounter the issue of localizing damage. If the investment does not turn out to be fruitful, the investor can sue the managers of the fund for mismanagement or he can claim to have invested based on faulty information which was provided by the defendant[191]. If the managers do not fulfil their obligations regarding the provision of information, the investor may bring proceedings in tort[192]. In such as case the investor would suffer only financial loss, however, where would one localize the said loss?

This question was raised in proceedings brought by Mr Kronhofer, domiciled in Austria, against Ms Maier, Mr Möller, Mr Hofius, and Mr Karan, each domiciled in Germany, in which Mr Kronhofer seeks to recover damages for financial loss which he claims to have suffered as a result of the wrongful conduct of the defendants in the main proceedings as directors or investment consultants of the company Protectas Vermögensver, which office is also registered in Germany[193]. The said party of people telephoned Mr Kronhofer in Austria and persuaded him to enter a high-risk contract without warning him of the consequences[194]. Mr Kronhofer transferred the funds to the investment company's account in Germany, however, the investment did, in fact, turn out badly, and the claimant lost a part of his money[195].

According to this, the Austrian Supreme Court posed a question to the CJEU whether Article 7(2) of Brussels I Bis Regulation gives jurisdiction to the courts for the place where the claimant is domiciled and where his assets are concentrated "by reason only of the fact that the claimant has suffered financial damage there resulting in the loss of part of his assets which

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189 Case C-168/02 *Kronhofer* [2004] ECR I-6009.
190 Case C-375/13 *Kolassa v Barclays Bank plc* [2015] EU:C:2015:37.
191 Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 3.
192 Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 3.
193 Case C-168/02 *Kronhofer* [2004] ECR I-6009, para 2.
194 Case C-168/02 *Kronhofer* [2004] ECR I-6009, para 2.
195 Matthias Lehmann, "Where Does Economic Loss Occur?" (2011) 7 Journal of Private International Law, p 527 – 550.

arose and was incurred in another Member State"[196]. The CJEU have a negative answer, stating that Article 5(3) of the Regulation must be interpreted in such a manner that the wording: "place where the harmful event has occurred" does not encompass the place where the claimant is domiciled or where "his assets are concentrated" due to the fact that he suffered financial damage there "resulting from the loss of part of his assets which arose in another Contracting State"[197]. Furthermore, the CJEU stated in *Marinari* that the term "place where the harmful event occurred" cannot be interpreted in such a way that in includes any place where the adverse consequences can be felt as a result of an event which already caused damage arising elsewhere[198]. If the court made such a decision, it would pose uncertainty and would allow the claimant to bring proceedings in the court of his domicile or any other place, which is not allowed in most cases, according to the Regulation.

The CJEU, however, gave a different answer in the case of *Kolassa,* which also concerns an Austrian investor and an issue of investment loss. The *Kolassa* case involved a British bank, Barclays Bank, issuing investment certificates in the form of bearer bonds. Barclays issued a prospectus in England, which was made available to Austrian investors[199]. Mr Kolassa, who was domiciled in Austria, purchased bonds from an Austrian bank. The investment failed, and Mr Kolassa lost the majority, if not all, of his money. He sued Barclays Bank in Austria. He stated that he would not have made the investment if Barclays had fulfilled its obligations to provide accurate information about the investment[200].

The case raised various issues, like ones in the previously discussed case. One issue was whether Austrian courts had jurisdiction under mentioned Article 7(2) of Brussels I Bis for the tort claim regarding prospectus liability and other legal information obligations. The Austrian court inquired whether the courts of the claimant's domicile had jurisdiction[201]. The CJEU gave a positive answer, specifically stating: "*The courts where the applicant is domiciled have jurisdiction, on the basis of the place where the loss occurred, to hear and determine such an action, particularly when the damage alleged occurred directly in the applicant's bank*

[196] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 5.
[197] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 5.
[198] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 5.
[199] Case C-375/13 *Kolassa v Barclays Bank plc* [2015] EU:C:2015:37, para 2.
[200] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 5.
[201] Case C-375/13 *Kolassa v Barclays Bank plc* [2015] EU:C:2015:37, para 20.

account held with a bank established within the area of jurisdiction of those courts[202]". This conclusion assumed that the actions or omissions alleged against Barclays Bank occurred prior to Mr Kolassa's decision to invest, and that he claimed they were decisive in that decision[203].

The court further elaborated on their decision in *Kolassa* in the case of *Universal Music International Holding*[204], which will be explained in more detail in the next subsection. In *Kolassa*, the CJEU stated that it found the place where the damage occurs for the purposes of the Bier formula is the applicant's domicile if the damage manifests directly in his bank account held with a bank established within the jurisdiction of the courts of his domicile[205]. On the contrary, in the case of *Universal*, it was said that this conclusion was reached due to specific context of the case as there was a distinctive feature being the existence of other facts contributing to the jurisdiction of those courts[206]. The court did not specify what these facts were in the case of *Universal* although it did refer to the Opinion of the Advocate General Szpunar in *Kolassa*. The Advocate General stated that in Kolassa, the Barclays Bank published a prospectus concerning the financial certificates in Austria and it was an Austrian bank that sold these certificates, which in result was "an indicator of a harmful event which could establish jurisdiction under Article 5(3) of the Rome II Regulation"[207]. This was an additional fact which enabled the jurisdiction of the Austrian courts. It can be concluded from *Kolassa* that there is no universal rule, but rather that facts are assessed on a case – by – case basis. The ground of decision, as interpreted by *Universal Music*, is that, while the claimant's domicile is not sufficient in and of itself, it does confer jurisdiction in a prospectus-liability case if the defendant also publishes the prospectus in that country[208]. It may also be necessary for the claimant to make the investment by transferring funds from his bank account in the place of this domicile.

A major question in relation to mentioned cases is whether, in a prospectus liability case, the harm suffered by the investor should be regarded as the fall in the value of the

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[202] Case C-375/13 *Kolassa v Barclays Bank plc* [2015] EU:C:2015:37, para 3.
[203] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 5.
[204] Case C-12/15 *Universal Music International Holding BV v Schilling et al* [2016] EU: C:2016:449.
[205] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 6.
[206] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 6.
[207] Case C-12/15 *Universal Music International Holding BV v Schilling et al* [2016] ECLI:EU:C:2016:161.
[208] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 6.

investment[209]. On could rather say that it was an issue of inaccurate information, which was the fault of the defendant as they failed to comply with its obligations under the law. The fact that there was a fall in value of the investment would be seen as a consequential loss of the misinformation[210]. However, such reasoning was not included in the rule established in *Dumez* and *Marinari*. If the issue is assessed in this way, it still takes into consideration that the investor does not claim that the inadequate or inaccurate information caused the investment to decrease in value[211]. The investor simply claims that if he was properly informed, he would not have made the investment in the first place.

The case of *Kolassa* is about prospectus – liability and case of *Kronhofer* concerned misinformation, however the core issues were the same, meaning that the investors would not have invested if they were aware of the risks in the first place. It is suggested that in such cases, the courts of the investor's domicile should have jurisdiction if the investor received faulty information in that country. This allows the protection of interests of the claimant, while also being fair to the defendant. The decision represents both principles of legal certainty and foreseeability which positively serves both parties of a case.

4.2c Case of *Universal Music*

In the case of *Universal Music International Holding*[212], a Dutch company agreed to buy shares in a Czech company. The lawyers of the Czech company prepared the legal documents, however, one of the employees of the company made a mistake when drafting the document and this resulted in Universal Music having to pay a larger sum for the shares than what was initially agreed[213]. The two companies tried to settle the matter firstly through arbitration in Czech Republic, through which an agreement was reached. Universal Music paid the agree sum by transferring money from their bank account in the Netherlands[214], to which they

[209] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 7.
[210] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 7.
[211] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 7.
[212] Case C-12/15 *Universal Music International Holding BV v Schilling et al* [2016] ECLI:EU:C:2016:161.
[213] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 8.
[214] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 8.

claimed the loss they suffered occurred in the Netherlands where it was domiciled and where the bank account was located.

The Hoge Raad referred a preliminary ruling to the CJEU[215] for the interpretation of Article 5(3) of the Brussels I bis Regulation and whether the Dutch court may claim jurisdiction over the case. The CJEU once again reaffirmed the decisions made in previously discussed cases by rejecting this possibility. The court stated that in Kolassa did not lay down a general rule that financial loss will be localized at the place of the claimant's bank account[216]. There need to be additional factors[217] which would lead to such a decision. The CJEU stated that since the contract to buy the shares was negotiated and concluded in the Czech Republic and this was the contract that created the obligation to pay more than had been intended, the obligation to pay the additional sum arose in Czech Republic[218]. The exact amount that had to be paid became clear during the settlement reached between the parties before an arbitration board in the Czech Republic. This created a "irreversible burden" on assets of Universal Music[219]. The CJEU concluded that the damage occurred in the Czech Republic. The claimant making the payment by transferring funds from its Dutch bank account was irrelevant[220]. According to the CJEU, an entity may have the option of making a payment from one of multiple bank accounts, therefore the location of that account does not always serve as a legitimate connecting factor[221]. This argues that the substance of injury sustained by Universal Music was the assumption of a duty to pay the additional sum[222], rather than the actual payment of the sum, however the payment appears to have been made in the Czech Republic.

It can be argued that the decision of the CJEU to identify the "place where the damage occurred" at the place where the contract was concluded would be more foreseeable and give the parties certainty. The principle was interpreted strictly to uphold consistency with previous cases and avoid debate of whether "place where the damage occurred" is in the place where

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[215] Case C-12/15 *Universal Music International Holding BV v Schilling et al* [2016] ECLI:EU:C:2016:161, para 20.
[216] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 8.
[217] Case C-12/15 *Universal Music International Holding BV v Schilling et al* [2016] ECLI:EU:C:2016:161, para 1.
[218] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 8.
[219] Case C-12/15 *Universal Music International Holding BV v Schilling et al* [2016] ECLI:EU:C:2016:161, para 31.
[220] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 8.
[221] Case C-12/15 *Universal Music International Holding BV v Schilling et al* [2016] ECLI:EU:C:2016:161, para 38.
[222] Hartley TC, "Jurisdiction in Tort Claims for Non-Physical Harm under Brussels 2012, Article 7(2)" (2018) 67 International and Comparative Law Quarterly 987, p 8.

the contract, that led consequently to the damage, was concluded or, in contrast to trace the payment that was made by Universal Music.

4.2d Case of *Löber*

In the case of *Helga Löber v. Barclays Bank plc*[223], the ECJ had to rule over another claim arising out of prospectus liability, as according to Article 7(2) Brussels Ibis Regulation. The claimant, Helga Löber is domiciled in Vienna and invested 28 000 euros in bearer bonds[224]. This amount was transferred from her bank account in Vienna into two securities accounts in Graz and Salzburg. The bonds were bought from the Fund Allocation GbmH, which has is registered in Germany. The bonds Ms Löber bought were first issued on the primary market at Barclays Bank London. After Ms Löber suffered financial losses, she started proceedings against Barclays Bank at the Commercial Court in Vienna, arguing that Barclays Bank misrepresented the investment in the prospectus[225].

Ms Löber lodged an appeal before the Supreme Court of Austria because the commercial and higher district court did not want to claim jurisdiction. In her appeal Ms Löber argued that courts in Vienna should have jurisdiction over the matter[226], considering that the place of her domicile should fall within the definition of "the place where the harmful event occurred" under Article 7(2) of Brussels Ibis Regulation. The Supreme Court referred to the CJEU for a preliminary ruling on whether a prospectus liability claim falls under the scope of the mentioned Article and if it applies, "where should the place where the damage occurred be located"[227]. The court first referred to their decision in *Kolassa*, stating that proceedings based on prospectus liability of the issuer cannot be considered as contract – related matters where

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[223] Case C-304/17 *Löber v Barclays Bank plc*, EU:C:2018:701.
[224] Michiel Poesen, "Locating Pure Economic Loss: Jurisdiction over Prospectus Liability under Article 7(2) of the Brussels I Regulation Recast" (*Corporate Finance Lab*, September 17, 2018) <https://corporatefinancelab.org/2018/09/17/locating-pure-economic-loss-jurisdiction-over-prospectus-liability-under-article-72-of-the-brussels-i-regulation-recast/> accessed July 30, 2024.
[225] Michiel Poesen, "Locating Pure Economic Loss: Jurisdiction over Prospectus Liability under Article 7(2) of the Brussels I Regulation Recast" (*Corporate Finance Lab*, September 17, 2018) <https://corporatefinancelab.org/2018/09/17/locating-pure-economic-loss-jurisdiction-over-prospectus-liability-under-article-72-of-the-brussels-i-regulation-recast/> accessed July 30, 2024.
[226] Michiel Poesen, "Locating Pure Economic Loss: Jurisdiction over Prospectus Liability under Article 7(2) of the Brussels I Regulation Recast" (*Corporate Finance Lab*, September 17, 2018) <https://corporatefinancelab.org/2018/09/17/locating-pure-economic-loss-jurisdiction-over-prospectus-liability-under-article-72-of-the-brussels-i-regulation-recast/> accessed July 30, 2024.
[227] Michiel Poesen, "Locating Pure Economic Loss: Jurisdiction over Prospectus Liability under Article 7(2) of the Brussels I Regulation Recast" (*Corporate Finance Lab*, September 17, 2018) <https://corporatefinancelab.org/2018/09/17/locating-pure-economic-loss-jurisdiction-over-prospectus-liability-under-article-72-of-the-brussels-i-regulation-recast/> accessed July 30, 2024.

parties freely assumed obligations towards one another[228], when an investor acquired bonds on the secondary market. According to this decision, Ms Löber's claim would be considered as a tort within the scope of Article 7(2).

Moreover, the court stated that *"the place where the harmful event occurred"* refers both *to locus damni* and *locus delicti commissi*[229]. Both notions are covered by the ground for jurisdiction, however, only *locus damni* will be relevant for the preliminary proceedings. Once again, the court was facing the question of how to localize "the place where the damage occurred" if the damage is purely economic loss. As stated in the case of *Universal Music,* Article 7(2) Brussels Ibis Regulation does not attribute jurisdiction over pure economic loss to the court of the domicile of the claimant. The only way jurisdiction could be attributed to the court of the domicile of the claimant is if "the damage occurs directly in the applicant's bank account held with a bank established within the area of jurisdiction of those courts"[230]. The case also needs to have special connecting factors that would justify attributing jurisdiction to the forum of the victim's domicile. The court found that these specific circumstances in the case would be: "the distribution of the prospectus in the country of the investor, authorization of the prospectus by authorities of the same country and the signing of the contract there"[231]. It can be seen how the CJEU, once again, used the combination of the domicile of the investor and the place of establishment of her bank, to deduce additional connecting factors for locating pure economic loss.

The assessment of previously mentioned cases serves as a demonstration of how the CJEU interprets the notion of "place where the damage occurred" and how they make decisions as to which court will have jurisdiction over claims concerning purely economic loss. There is a consistency of strict interpretation of legal principles to balance the interests of the claimant and defendant. The next question one might ask themselves is how the court would interpret

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[228] Michiel Poesen, "Locating Pure Economic Loss: Jurisdiction over Prospectus Liability under Article 7(2) of the Brussels I Regulation Recast" (*Corporate Finance Lab*, September 17, 2018) <https://corporatefinancelab.org/2018/09/17/locating-pure-economic-loss-jurisdiction-over-prospectus-liability-under-article-72-of-the-brussels-i-regulation-recast/> accessed July 30, 2024.

[229] Michiel Poesen, "Locating Pure Economic Loss: Jurisdiction over Prospectus Liability under Article 7(2) of the Brussels I Regulation Recast" (*Corporate Finance Lab*, September 17, 2018) <https://corporatefinancelab.org/2018/09/17/locating-pure-economic-loss-jurisdiction-over-prospectus-liability-under-article-72-of-the-brussels-i-regulation-recast/> accessed July 30, 2024.

[230] Michiel Poesen, "Locating Pure Economic Loss: Jurisdiction over Prospectus Liability under Article 7(2) of the Brussels I Regulation Recast" (*Corporate Finance Lab*, September 17, 2018) <https://corporatefinancelab.org/2018/09/17/locating-pure-economic-loss-jurisdiction-over-prospectus-liability-under-article-72-of-the-brussels-i-regulation-recast/> accessed July 30, 2024;
Case C-12/15 *Universal Music International Holding BV v Schilling et al* [2016] ECLI:EU:C:2016:161.

[231] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18 Journal of Private International Law 1, p3.

Article 4 of the Rome II Regulation to decide which law applies to the claim. There is a consensus made that the said Article has to be interpreted in line with Article 7(2) of Brussels I bis Regulation for the entire case decision to be coherent. In the upcoming section there will be an in – depth analysis of Article 4 of the Rome II Regulation and how it is applied in the realm of pure financial loss.

5. Legal framework of Article 4 Rome II Regulation

In order to analyse in detail Article 4 of Rome II Regulation[232], one has to dive into the scope and purpose of the Regulation as a whole. The Rome II Regulation is meant to complement the Brussels I Regulation, which, as seen from previous analysis, deals with the jurisdiction of courts and enforcement of judgments[233], and to complement Rome I Regulation, dealing with applicable law, although only in the realm of contractual obligations. The Rome II Regulation must be interpreted consistently with these two instruments to fulfil the aim of EU private international law and its' principles[234]. However, for the purpose of this thesis and analysis of the case *VEB v. BP*, the research will only focus on how Rome II Regulation complements Brussels I Regulation.

The Rome II Regulation deals with non – contractual obligations which arise out of a tort or delict, unjust enrichment, *negotiorium gestio* (agency without authority) and *culpa in contrahendo* (pre – contractual dealings)[235]. It applies to compensation for damage that has already arisen and actions to prevent future damage. As stated in Article 3, the conflict rules of Rome II Regulation do not require reciprocity and any law specified by the Regulation will be applied, irrespective of whether it is the law of the Member State[236]. The scope of the regulation is defined in Article 1(1) of the Regulation, stating that it applies to conflict of law regarding non – contractual obligations in civil and commercial matters, excluding matters of revenue, customs or administrative law and the liability of the state for acts or omissions in the exercise

[232] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199, art 4.
[233] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) , p 148.
[234] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019), p 148.
[235] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 148.
[236] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 148.

of state authority[237]. Article 15 of the Regulation contains a non – exhaustive list of issues that are governed by the law applicable to non – contractual obligations, i.e., the basis and extent of liability, the existence, nature and assessment of damage or the remedy claimed, etc[238]. This regulation also governs the measures by which the court has power to take to prevent or terminate injury or ensure that compensation is provided, however, only within the limit of the court's powers according to procedural law[239]. Article 27 of the Regulation determines its' relationship with other provisions of EU law[240] and generally it gives priority to other conflict rules in other EU instruments dealing with particular matters.

In comparison to obligations arising out of contracts, parties to a non – contractual liability dispute do not have the opportunity to agree on the applicable law in advance[241]. although the parties can agree on a law of their choice after the damage has occurred. Article 14 of the Regulation states that such a choice must be respected without any geographical limitation, provided that the choice is expressed with reasonable certainty in accordance with the circumstances of the case and does not impose a disadvantage or is unfair to third parties[242]. The choice of law may be made only after the event giving rise to the damage occurred. In addition, if all elements of the issue were located, at the time the loss occurred, in one country other than that whose law was chosen, the choice of the parties must not affect mandatory rules of that country, and "the parties' choice of law of a non – member state must not affect the application of mandatory EU law where all the other elements of a situation were at the time of the loss located in the EU"[243]. While speaking about application of mandatory EU provisions, it is important to note that the entire Union is treated as one single country[244].

Moreover, referring to the specifics of Article 4, in situation where parties have not agreed on the law to be applied to a tort/ delict, Article 4(1) states that the law applicable is the law of the country in which the direct damage occurs (*locus damni*), irrespective of the country

[237] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 148.
[238] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 149.
[239] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 149.
[240] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 150.
[241] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 150.
[242] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 150.
[243] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 150.
[244] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 151.

in which the event giving rise to the damage occurred or in which the indirect consequences of that event arose[245]. According to this provision, the law of the country of the immediate resulting damage is preferred to the law of the country where the harmful act occurred or in which indirect consequences of that event arose[246]. If the harmful act that occurred, caused damage in several countries, or if it is presumed that the damage caused by the harmful act will arise in several countries, the rule in Article 4(1) has to be construed in such a manner that the laws of all countries concerned have to be applied in a parallel manner to various parts of the damage[247]. Article 4 also contains two exceptions in subsections (2) and (3), which will be analysed in – depth in the last subsection.

In the following section, the research will focus on the theoretical aspect of Article 4 and the problems arising out of localization of pure economic loss. Guidance on such issues is found in case law, as seen from previously analysed cases. The following section will aim to bridge the theory and case law to create a coherent conclusion regarding the application of Article 4 to cases concerning pure economic loss.

5.1 Subject matter and purpose of Article

Article 4 of the Regulation opens Chapter II which consists of rules relating to tortious acts[248]. It is the conflict rule for international torts if there are no prevailing international conventions, no choice of the parties and no more specific conflict rules of the Rome II Regulation or other European rules which are applicable[249]. Article 4(1) present the most general rule for torts and it is generally said that the law of the place of the tort should govern all aspects of tortious liability (*lex loci delicti commissi*). In such cases, the tortfeasors' and the victims' interests clash, and it appears appropriate to apply the law of the area[250]. Both parties must abide by the laws, rules, and customs of that place, abiding by the principle of reciprocity as both parties

[245] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 152.
[246] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 152.
[247] Bogdan M and Sender MP, *Concise Introduction to EU Private International Law* (4th edn, Europa Law Publishing 2019) p. 152.
[248] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 143.
[249] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 143.
[250] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.

have to do the same. Because most torts involve unintentional damages between parties, there is rarely a more convenient and preferred link than with the location where the tort occurs[251].

The place of the tort is defined in Article 4(1) as "the country in which the event giving rise to damage occurred". In most cases, therefore, the law of the country where the victim suffered the damage will usually prevail over the country where the tortfeasor acted[252]. Recital 16 of Rome II states that this remedy "strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage"[253]. Article 4(1) is primarily concerned with achieving such a balance and establishing legal certainty as it fails to include the solution that the victim may choose between the law of the place of action and the law of the place of damage, which is approved by the CJEU in the jurisdictional context[254]. On the other hand, Art. 4(1) makes it clear that any additional 'indirect' consequences of the harmful occurrence in other areas have no bearing on the applicable legislation[255]. Contrarily, the victim might readily select a favourable country.

Article 4(2) Rome II Regulation allows for an exception to the general principle of paragraph (1). Where the tortfeasor and victim have their habitual residence in the same country at the time of the injury, the law of that Member State applies[256], according to Article 23. This *lex domicilii communis* is viewed as the law with which the parties are more inextricably linked than the law of the country where the damage happened[257]. The law of common habitual residence is the usual registered place of living of both the tortfeasor and the victim, and, therefore, this law shall apply. Moreover, Article 4(3) contains an escape clause. If the parties to a tort claim are more closely associated with another law, other than the law presumed by Article 4(1) and (2), the other law will be applied[258]. As Article 4(3) suggests, this may be the law applicable to a contract between the parties that is directly related to the tort. The clause is

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[251] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.
[252] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.
[253] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.
[254] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.
[255] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.
[256] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.
[257] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.
[258] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.

based on and embodies the basic idea that underpins the entire Regulation and Private International Law, specifically the application of the law that is most closely related to the factual situation[259]. It also provides the required flexibility when the conflict resolution principles outlined in paragraphs (1) and (2) are deemed overly strict[260]. Art. 4(2) and (3) are exceptions to the general rule in paragraph (1) that have to be interpreted and applied strictly[261]. To be specific, the wording "manifestly more closely connected" indicates a significant barrier to its applicability[262] in paragraph (3). Taking into consideration all three paragraphs, Art. 4 attempts to achieve legal certainty by defining a clear conflict rule for the majority cases while still allowing adequate flexibility if the individual case requires it[263]. In applying the structure of Article 4, paragraph (2) takes precedence over paragraph (1) and must be reviewed first[264]. Paragraph (3) is always the last in the row and can only be applied once a result from the previous two paragraphs has been reached[265].

This Article and the interpretation thereof, gives guidance and implications for aspects and tort conflict rules such as the *lex domicilii communis* rule of Art. 4(2)[266], which remains applicable also in product liability cases (Art. 5 (1)). The escape clause in both Articles is the same, stating that in cases where an act of unfair competition solely impacts the interests of a particular competitor, Art. 4 must be applied (Art. 6 (2))[267]. Additionally, claims for environmental damage are governed by Art. 4 (1) unless the claimant chooses to apply the law of the location where the damaging event occurred (Art. 7)[268]. The *lex domicilii communis* rule

[259] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.
[260] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.
[261] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 144.
[262] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145.
[263] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145.
[264] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145.
[265] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145.
[266] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145.
[267] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145.
[268] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145.

of Art. 4 (2) remains reserved (Art. 9)[269] in cases where the damage claims are based on industrial action.

5.2 Legislative history of Article

The legislative history of Article 4 Rome II dates to the early 1970s[270]. The Preliminary Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations of 1972[271] was the first European precedent for Article 4. Article 10 of the draft previously stated: "non-contractual obligations arising out of an event which has resulted in damage or injury shall be governed by the law of the country in which that event occurred"[272]. Article 10 of the Draft Convention stated that in the event of a more closely related law, this law would be applicable[273]. It also stated that the closer connection must stem from circumstances common to the concerned parties, and that in the case of several victims, the appropriate applicable legislation must be assessed independently for each of them[274]. The Preliminary Draft Convention resulted in the Rome Convention on the Law Applicable to Contractual Obligations in 1980[275], although the attempt to unify the law applicable to non-contractual obligations at that time was not successful.

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[269] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145.

[270] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145.

[271] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145;
Commission of the European Communities Document No. XIV/398/72 Rev.: 1; the text is published in Lando/von Hoffmann/Siehr (eds.), European Private International Law of Obligations (1975) 220 et seq. (French version), 230 et seq. (English version) with a Rapport by Giuliano, Lagarde and van Sasse van Ysselt (p. 241 et seq.).

[272] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145;
The Commission (Explanatory Memorandum p.11) argued that this formulation would include the place where the tortfeasor acted as well as the place where the victim sustained the damage. The Commission inferred this understanding from the CJEU's decision in Bier v. Mines de Potasse d'Alsace (Case 21/76) [1976] ECR 1735 although this decision interpreted the place of damage only in the jurisdictional context and allowed the victim to sue at the own choice either at the place of tortious action or at the place where the damage was sustained. The Commission rejected this solution because of its uncertainty and because it "would go beyond the victim's legitimate expectations" (Explanatory Memorandum p. 11 et seq.).

[273] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 145.

[274] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 146.

[275] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 146.

The EU reinstated its effort to unify the law applicable to non – contractual obligations shortly before the millennium[276]. The preliminary first proposal was presented by the Commission[277] on 3rd of May 2002. At the time, it contained Article 3, resembling the current Article 4 of Rome II Regulation. Finally, the Commission Draft of 22nd of July 2003[278] contained an amended version of Article 3, which then took the form of the present Article 4.

5.3 Scope of application and structure

Firstly, to properly assess Article 4, one must look at how torts/delicts are qualified. The provision holds the double expression because in Scottish law the term delict is what is the term tort in English law[279]. Other language versions of the Regulations do not use two different terms for the same meaning; however, this does not have any substantive effect[280]. The Rome II Regulation does not contain a definition of what is a tort. It is states in Recital 11 in Chapter II of the Regulation states that the term tort / delict has to be given a European – autonomous interpretation[281]. This interpretation is supposed to include all possible factual situations which are regarded as torts in different national laws[282].

For a situation to qualify as a tort, the CJEU case law regarding Article 7(2) of Brussels Ibis Regulation useful as seen from analysis in previous sections[283]. There is a minimum requirement that stems from Article 4(1), which is also inferred from CJEU case law, stating that the condition that the tort liability is a liability not based on a contract so that all contractual

276 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 146.

277 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 146;
Draft Proposal for a Regulation on the Law Applicable to Non-Contractual Obligations; the English version is published in: Eur. Bus. L. Rev. 13 (2002) 382; the French version in: Kadner Graziano, Euro- päisches Internationales Deliktsrecht (2003) pp. 156.

278 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 146.

279 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 146.

280 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 146.

281 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 146.

282Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 146.

283 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 146.

liability is excluded from Article 4[284]. It was held by the court that "tort, delict and quasi – delict' covers all actions which seek to establish the liability of a defendant and which are not related to a "contract'"[285]. The CJEU defined a contract as "an obligation freely assumed by one of the parties towards another"[286] tort liability cannot be assumed freely, although it needs to be mandatory by statute or judge – made law. In cases where the law imposes a contract, the obligations arising out of that contract will not fall within the scope of Rome II.

In order for something to constitute as a tort, someone has to be made liable for an act or omission that gives rise to damage, meaning an injury to a person or damage to property[287]. The main aspect of torts is the non – contractual infringement of a legally protected interest of another person combined with liability for damage caused or threatened to be caused by infringement. A tort is defined as an act or omission that causes or threatens to create damage and for which the law holds a person accountable[288]. A good example is competition (stated in Art. 6 Rome II), which can cause harm to other rivals. Most national economies firmly embrace the concept of unlimited competition as they aim to improve their market. The law only prohibits the consequent harm if a competitor makes use of unfair means[289]. Tortious responsibility can be result-oriented[290], in that it seeks compensation for a loss produced by the tortfeasor's act or omission. It can also be behaviour-oriented[291], in that it seeks to prevent behaviour that may lead to damage.

Torts are distinguished from other non-contractual responsibilities primarily by their behavioural aspects[292]. While torts require an unlawful entry into the legally protected sphere of the victim, a claim based on unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*

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284 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 146.

285 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 147;
Athanasios Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst & Co. and others (C-189/87) ECLI:EU: C:1988:459 para. 17.

286 *Handte v. TMCS* (C-26/91) [1992] ECR I-3967 para. 15.

287 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 147.

288 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 147.

289 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 147.

290 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 147.

291 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 147.

292 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 147.

does not require such[293]. Referring to the notion of damage, Recital 17 states that "where the injury was sustained or the property was damaged". The notion of damage in Article 4 is narrower than that of Article 2(1) according to which "damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio*, or *culpa in contrahendo*"[294]. The term damage under Article 4 has to arise from violation or threatened violation of the victim's sphere, however, unjustified moving of property from a person to another is not sufficient or any damage arising from the acting in another's interest or in the preparation of a contract[295].

It could be questioned if the phrases "torts/delicts" and "damage" in Article 4 include infringements of pure pecuniary interests[296]. Recital 17 of Rome II only mentions "cases of personal injury or damage to property". However, the phrase "property" does not always preclude pure economic situations. It covers non-material property interests as well[297]. Even if the term "property" in Recital 17 solely referred to physical goods, this Recital says "cases of personal injury or damage to property" in a broader sense, leaving possibility for other types of damage. Furthermore, Articles 6 and 9 address unique torts that typically result in only pecuniary harm. This shows that torts which cause pure economic loss fall under Chapter II and are covered by Article 4 of the Regulation. Torts are defined further by Article 2 (2) and (3), as well as Art. 15(d), which states that injury does not have to have occurred previously. It is required that a tortious obligation or damage is imminent[298]. Article 4 so applies to instances in which an injunction or similar remedy against threatened damage is claimed and does not require tortious liability to be fault-based[299]. As expressed in Recital 11 and indicated in Recital 16, "systems of strict liability" are also covered. The term tort does not imply that the behaviour

[293] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 147.
[294] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 148.
[295] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 148.
[296] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 148.
[297] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 148.
[298] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 148.
[299] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 148.

is unlawful in a strict legal sense[300]. It is sufficient that the law disapproves of the outcome of the conduct, as in the case of strict liability[301].

The structure of Article 4 consists of three elements: a general rule, an exception and an escape clause[302]. Paragraph 1 establishes the general rule and fundamental principle that "the law of the country in which the damage occurs"[303] will apply. In addition, paragraph 1 defines "damage". Paragraph 2 makes an exception to the general rule: if the parties are more closely connected by habitual residency in the same nation, the law of that country applies[304]. Finally, the escape clause in paragraph 3 provides for the application of another law if all of the circumstances indicate that the situation is "manifestly more closely connected" to the nation of this legislation.

Art. 4 designates the applicable substantive national law[305]. In addition to Art. 20 Rome I Regulation, Art. 24 Rome II prohibits any *renvoi*[306]. Article 25(1) requires that the law of the relevant state be applied immediately in cases where the state whose law is applicable consists of different territorial units with different tort law, such as United Kingdom[307]. As per the Rome I Regulation, special conflict laws of that state for interstate dispute matters do not need to be considered[308]. According to this, "one must assess the territory in which the damage occurred, the common habitual residence was located or to which unit the manifestly closer or closest connection exists"[309]. On the other hand, one must assess the principle of *ordre public*, because Article 26 allows to disregard the applicable law if it is "manifestly incompatible with the

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300 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 148.
301 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 148.
302 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 158.
303 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 158.
304 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 158.
305 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 159.
306 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 159.
307 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 159.
308 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 159.
309 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 159.

public policy of the forum"[310]. The rule is verbally similar to Article 21 of the Rome I Regulation and must be construed with the same caution[311]. While national public policy concerns of the forum state may overturn the legislation that is applicable under Article 4[312], this is the rare exception. If the application of foreign law results in a great discrepancy from the law of the forum, the latter may prevail[313].

The interpretation of Article 4 and any issues raised by the provision must be resolved in accordance with the customary European procedural laws[314], which, in addition to the wording, considers the context and the aims. An interpretation or qualification based only on the national viewpoint is not acceptable where the respective regulation "makes no express reference to the law of the Member States"[315], which is not referenced in Article 4 of the Regulation.

Art. 15 specifies what are matters[316] that the law covers in Article 4. The applicable law governs "the extent of liability" and "the assessment of damage"[317], as well as the determining the amount of damages. This means that the applicable law decides how much the victim will receive as compensation. On the other hand, Recital 33 suggests the exception to the rule in Article 4, that in case of traffic accidents in a country other than in the state of the victim's habitual residence, the assessment of damages for personal injury will "take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention"[318]. This recommendation will prevent victims of such accidents from being over- or under-compensated[319], and the amount of damage will be

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[310] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 159.

[311] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 159.

[312] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 159.

[313] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 159.

[314] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 159.

[315] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 159.

[316] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 160.

[317] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 160.

[318] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 160.

[319] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 160.

adjusted to reflect the genuine costs at the victim's home. This rule should be applied to similar circumstances in which a victim of personal damage must deal with consequences in a country whose law is not the applicable law. In such circumstances, the amount of damage should reflect the costs incurred there[320]. This does not imply that the victim should not be compensated for the types of damages foreseen by the applicable law, however, the applicable law would not be the one of the habitual residence of the victim[321].

It is also important to mention that judicial *dépeçage* is not allowed when discussing Rome II Regulation and applicability of law[322]. The Regulation itself does not contain information whether the court may apply different laws to different parts of the tort, however, the fact that it is not mentioned in the regulation, will be construed in the sense that *dépeçage* is not allowed[323]. Article 15 broadens the application of the law to include every facet of tortious liability[324]. Additionally, the *dépeçage* provision in the Rome Convention was purposefully removed by the Regulation Rome I[325]. As a result, the judge cannot apply different rules to different aspects of the same occurrence under the Rome II Regulation. On the other hand, the parties may choose a different law for one or more aspects of the damaging incident[326]. Although Article 14 does not specify it, it is widely accepted that Article 3(1) of the Rome I Regulation, which allows for *dépeçage* by the parties, can be applied by analogy[327]. Such *dépeçage* is only acceptable for a reasonably separable component of the harmful occurrence[328], such as compensating for immaterial damage, while the law objectively applicable to the basic tort remains unchanged or is selected otherwise.

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320 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 160.

321 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 160.

322 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 161.

323 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 161.

324 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 161.

325 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 161.

326 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 161.

327 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 161.

328 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 161.

5.4 Main rule of Article 4 and pure economic loss

To better understand Article 4(1), one must assess the basic rule stipulated in this provision, specifically the applicability of the *lex loci delicti commissi*[329]. The rationale behind *the lex loci damni* is explained by "a connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability"[330]. In cases where the tortfeasor and victim had no prior interaction, the law at the place of the injury or damage shall be seen as the starting point of the legal relationship between them, at least if the tortious activity and subsequent damage occurred in the same location[331]. Both parties have to abide by the law of this location. The justification for the *lex loci damni* is less obvious when the places of conduct and damage are in different countries[332], as in the already - discussed *Bier* case of the CJEU, which was already discussed in previous sections. Recital (16) of the Regulation serves as explanation for "the modern approach to civil liability and the development of strict liabilities"[333], addressing the tendency of tort law to increase victim protection. Tort law has made a change of focus from defending the realm of freedom of members of society to victim protection[334]. This result suggests that the basic conflict of law rule may favour the victim, and hence the location where the victim's rights are violated, over the location where the tortfeasor acts. For cases of strict liability, this rule is considered more adequate, as the risk will only manifest itself at the point of damage, regardless of where the risk was produced. The notion that persons have the right to expect that the rules of behaviour are followed in the area where the persons are, applies more to victims, then to tortfeasors, seeing as victims are more affected by the violation of their rights than tortfeasors[335]. On the other hand, a tortfeasor, being the one who violated the rule,

[329] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 162.

[330] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 162;
Recital 16 of Rome II Regulation.

[331] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 162.

[332] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 162.

[333] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 162.

[334] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 162.

[335] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 163.

can much more readily control whether and how the consequences of their own actions will influence victims[336].

Moreover, the basic conflict rule for torts gives the victim the choice of the most favourable laws which are involved in the case[337]. This possibility was accepted in the *Bier* case for the purpose of European international procedural law, where the claimant can initiate action either where the accused tortfeasor acted or where the loss was experienced[338]. There is no option for this under Article 4(1); only Article 7 allows for the distinction between the *lex locus damni* and the location where the tortfeasor acted[339]. The rule in Article 4 has varied from the CJEU notion for Article 7(2) Brussels Ibis Regulation. The reason for this is the need to improve legal certainty since the applicable law and the decision of the court is more foreseeable. The tortfeasor would not be able to foresee which law would be applicable if the claimant could choose between the law at the place of the damage or at the place of tortious act[340]. It would be impossible for the tortfeasor to comply with both sets of laws if both laws prescribe contrary requirements. The *lex loci damni* has a practical advantage in that it is easier to apply when damage is caused by omission[341]. In such cases one does not require an answer to the question of whether the tortfeasor was required to perform a duty of care but failed to do so.

To determine the applicable law of the country, "in which the damage occurs", two questions have to be answered: what is meant by the term "damage" and when did it occur?[342] The notion of damage and the time when it occurred has to be determined according to European laws and interpretation[343], while any reference to national law would be inadmissible. As analysed in previous sections of the thesis, the case law of the CJEU on Article 7(2) Brussels Ibis Regulation provided guidance on the EU understanding of said notions, particularly in

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336 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 163.
337 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 163.
338 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 163.
339 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 163.
340 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 163.
341 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 163.
342 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 164.
343 Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 164.

cases of pure economic loss on the financial market[344]. In such cases, where mere financial interests are infringed it is usually difficult to determine when the damage occurred and especially where it occurred. Usually, the loss occurs at the moment when the fortune of the victim is directly diminished[345]. For example, if the tortfeasor fraudulently withdraws money from the victim's bank account, the loss will occur at the moment when the bank transfers the money from the account[346]. In that moment, the loss has materialised even though the victim may still be able to take back the money[347]. The fact that the tortfeasor can create pure economic harm but has not yet made use of the opportunity should not be sufficient because it is still uncertain whether any damage will occur.

Finally, the case of *VEB v. BP* must be assessed as it represents the most recent development the CJEU had in relation to the interpretation of Article 4(1) of the Rome II Regulation. In order to address the development the court made in this regard, it must be assessed whether actions for misinformation on the capital market are all covered by the Rome II Regulation[348], because of the exclusions stated in Article 1(2)(c) and (d) of the same Regulation. The first exclusion in Article 1(2)(c) concerns non - contractual obligations arising from different types of financial instruments, which can be seen as negotiable instruments[349]. Financial instruments and obligations arising from them are also included in the scope of the Regulation as Article 1(2)(c) applies only "to the extend that the obligations under such other negotiable instruments arise out of their negotiable character". This article, however, does not cover actions based on regulatory law, such as in the case of *VEB*[350].

[344] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 164.
[345] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 166.
[346] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 166.
[347] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 166.
[348] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 23.
[349] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 23.
[350] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 24;
Matthias Lehmann, "Private international law and finance: nothing special?" (2018) 3 Nederlands Internationaal Privaatrecht, 7–8.

The second exclusion, under Article 1(2)(d) Rome II Regulation relates to non – contractual obligations arising out of company law[351]. It can be said that the obligation to inform the secondary market is stated in corporate law, however, this was not the case in *VEB*. Despite the fact that in the case of *VEB*, BP acted unlawfully vis – a – vis shareholders[352], the action is not to be brought under English corporate law, but rather MAR (Market Abuse Regulation)[353]. It is an EU Regulation on capital markets law, applying to issuers, regardless of the legal structure of their business entity. Therefore, this issue does not fall under exclusions of Article 1(2)(d) Rome II Regulation, meaning that the regulation will be applicable to the issue at hand.

In the case at hand, the court stated that the Brussels Ibis Regulation and Rome II Regulation are to be interpreted in sync[354]. There is no special rule in Article 5 of the Regulation that creates divergence between the two texts in cases concerning financial instruments[355]. Therefore, the general rule of Article 4 Rome II Regulation may apply. The last-mentioned Article refers to the "place where the damage occurred", as formulated in the *Bier* judgment. This judgment was used for the further interpretation of Article 7(2) of Brussels Ibis and the court decided to transpose it to Article 4(1) Rome II Regulation[356].

However, using the term "damage occurred" for the place of listing of financial instruments turned out to be quite problematic. The CJEU did not further discuss any connecting factors to identify the place of damage in the judgment of *VEB*. The court simply created new case law in which an investor may sue at the place of listing, in case of misinformation on the secondary capital market[357]. Such a decision is comparable to the application of Article 6 Rome II Regulation. Said Article establishes the market as a special

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[351] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 24.
[352] CJEU, *VEB*, para 20.
[353] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 24.
[354] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 24.
[355] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 24.
[356] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 24.
[357] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 24.

connecting factor for cases of competition law and this is supported by Recital 21, which states that this serves as a clarification to the general rule in Article 4(1) Rome II Regulation[358]. One might say this explanation is quite lacking in precision as it does not make any distinctions between financial tort and competition law claims[359]. Therefore, due to the lack of detail in connecting factors to financial torts, there is room for the court to interpret facts on a case – by – case basis[360], which was what they were trying to avoid.

The CJEU will achieve certain aims if they solve the problem of wording and establish more specificity[361]. One major improvement would be improved legal certainty, as the number of applicable laws will be reduced[362]. The court would not consider the applicable law to be the one of the investor's domicile or their bank account. Localizing the occurrence of damage at the place of listing would result in a parallel between applicable law and law of the forum which, as stated in previous sections, would lead to more efficient court procedure and easier way to invoke collective redress[363]. In the case of *VEB*, there is also an alignment between US and European law[364] because the US Supreme Court ruled[365] that US law would be applicable in cases concerning 1) securities listed on domestic exchanges and 2) domestic transactions in other securities. Such a decision removes the major issue in cross – border cases[366], as there would be no more confusion in security cases and arguments over which court has jurisdiction.

The exception, Article 4(2) Rome II Regulation, may apply in certain cases stating that if "the person claimed to be liable and the person sustaining damage both have their habitual

[358] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 24.
[359] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 24.
[360] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 24.
[361] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 25.
[362] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 25.
[363] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 25.
[364] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 25.
[365] *Morrison v National Australia Bank*, 561 U.S., 247, 267 (2010).
[366] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 25.

residence in the same country at the time when the damage occurs, the law of that country shall apply"[367]. This would mean that in the case of VEB, it would result in the application of English law to the claim of English investor against BP, even if the investor bought the shares on the Frankfurt stock exchange[368]. This does not provide a sufficient explanation as to why a different law should be applicable to the claim, other "than one of a Dutch or German investor who bought BP shares on the same stock exchange for the same price"[369].

Article 4(3) also present an exception and is regarded as the escape clause. This rule allows for the application of another law other than the one usually applicable under Article 4(1) and (2), if the tort is "manifestly more connected" to the country of this other law[370]. It is said that "a manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question"[371]. This provision introduces certain flexibility to the usual strict application of Article 4, to establish a balance "between legal certainty and justice in the individual case"[372]. However, to apply Article 4(3) a strict threshold needs to be passed when discussing the "manifestly closer connection"[373]. The connection is considered sufficient only if it is clear and manifestly closer. A merely closer connection does not suffice to replace the usually applicable law as it would impair the legal certainty and foreseeability which Article 4 aims to ensure[374]. If one was to apply this rule to cases of capital market misinformation, in which one argues that there is manifestly closer connection with the place of listing, it would defeat the purpose of applying this rule to only exceptional cases[375]. Once again, there would be a lack of legal certainty and foreseeability.

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[367] Rome II Regulation, art 4(2).

[368] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 25.

[369] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 26.

[370] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 183.

[371] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 183.

[372] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 183.

[373] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 183.

[374] Bogdan M and others, *Magnus/Mankowski, European Commentaries on Private International Law: Volume 3 Rome II Regulation - Commentary* (Sellier European Law Publishers 2019) p 183.

[375] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 25.

Ultimately, Article 4 of Rome II Regulation could give certain results in cases of financial loss, however, it did not solve all problems. In the decision of VEB, court made progress when interpreting Brussels Ibis Regulation and Rome II Regulation in sync and making the applicable law, the same as the law of the forum, also known as the place of listing. It created a new pathway of legal certainty for future financial cases, going from an individualistic approach to a market – based localization of damage according to the Brussels Ibis Regulation[376]. On the other hand, the goal would be to create a new rule specifically regarding financial torts into the Rome II Regulation. It would establish more specificity for cases of financial torts while also creating distance from the rule in Article 6 Rome II Regulation concerning unfair competition[377]. Nowadays, there are more and more cases of financial torts on the secondary market. Most of them have a cross – border element due to rapid globalization and therefore, the legislation needs to be brought up to date to keep up with current developments.

6. Conclusion

The research conducted throughout this thesis aims to showcase the difficulties of localizing economic loss on the secondary financial market. This is an ongoing issue for courts as the economic loss on the digital market is not tangible and therefore, the damage also has no physical form by which the exact place of its occurrence.

Section 2 discussed the case of *VEB v. BP*, being the landmark case for economic loss on the secondary financial market. It presents, not only an innovation in applicability of Article 7(2) Brussels I bis Regulation, but also improvement in legal certainty and foreseeability as now, parties to a claim regarding financial tort can expect the jurisdiction of the claim to be at the place of the listing of the shares. There will be no more individualistic approach to such cases, making it easier for involved parties to predict the outcome. In addition, the interests of claimant and defendant are balanced since the jurisdiction or applicable law to the case will not be the one of the habitual residences of the tortfeasor or the victim. The court also stresses the importance of applying the market theory and looking into economic factors to properly solve cases of economic loss. Such cases would be impossible to solve, or the judgment would not

[376] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 26.
[377] Matthias Lehmann, "A New Piece in the Puzzle of Locating Financial Loss: The Ruling in VEB v BP on Jurisdiction for Collective Actions Based on Deficient Investor Information" (2022) 18:1 Journal of Private International Law 1-27, p 26.

be sound if one was to only assess the legal aspect, without consulting "the laws" of economics and market theory.

The notion of *locus delicti commissi* is analysed in section 3, as Article 7(2) of Brussels I bis Regulation sparked a debate as to how it would be applied to cases of pure economic loss. This section shows the courts' evolution in their decision - making process from trying to apply rules form precedent cases such as *Bier* and *Shevill* case to combining them with economic theories and coming up with new ways to decide on the forum for non – material damage. While trying to assess all aspects of the mentioned article and apply it to a new sphere of cases, the court managed to find a solution for collective redress and uphold principles of private international law, by making the forum the place of listing. Although Netherlands, prides itself for being the country with most favourable conditions to seek collective redress, the CJEU did not accept this as an option as it would favour the one party more than the other.

Section 4 helps to further go into analysis regarding the definition of economic loss and how it was defined in landmark cases. The court assessed what is economic loss and different connecting factors to the case to decide the forum. It is crucial to determine the type of damage that occurred and how exactly it relates to the affected parties. Lastly, the last piece of the research and, at the same time, the starting point of new theories in PIL, is the application of Article 4 of Rome II Regulation. This is the most difficult assessment for the court as determining the applicable law to cases of immaterial damage has proven to be most difficult. The Rome II Regulation does not contain a specific rule for financial tort and therefore, the CJEU was innovative in its interpretation of Article 4. By deciding the applicable law to be the law at the place of the listing, which is also the place of forum, the court upheld principles of legal certainty and foreseeability. Future cases will have more predictable outcomes as Brussels Ibis and Rome II Regulation are interpreted in sync and this puts all parties at fair advantage. However, it can be said that the decision is not a permanent solution. Due to the increasing number of cases on the secondary financial market and constant developments in the sphere of digital assets, the laws on such need to be updated accordingly. In an ideal scenario, a new rule designed specifically for financial torts would be created and this would solve many problems for such multifaceted issues. Until this happens, legal professionals have to consult recent court decisions and the applicable rules, to reach the best possible outcome in cases of economic loss.

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