

ECJ Judgment on Art. 5 (1) (b) Brussels I Regulation - “Color Drack”

Today, the European Court of Justice pronounced its judgment in Case C-386/05 (*Color Drack GmbH v LEXX International Vertriebs GmbH*).

According to the Court, the first indent of Art. 5 (1) (b) Brussels I Regulation is applicable in cases where there are several places of delivery within a *single* Member State.

I.) Background of the Case

The case concerns a reference for a preliminary ruling from the Austrian Supreme Court (*Oberste Gerichtshof*) and relates for the first time to the interpretation of Art. 5 (1) Brussels Regulation.

The Court had to deal with the question whether the first indent of Art. 5 (1) (b) Brussels I Regulation, which provides that in disputes relating to international contracts for the sale of goods the plaintiff may sue the defendant in the court of the place where, under the contract, the goods were delivered or should have been delivered, is applicable – and if yes, in which matter – if the action relates to goods delivered in *several* places in a Member State.

The background of the case is as follows: A company the registered office of which is in Austria (*Color Drack GmbH*) purchased sunglasses from a company (*LEXX International Vertriebs GmbH*) the registered office of which is in Germany. *Color Drack GmbH* paid the sunglasses in full, but had *LEXX International Vertriebs GmbH* to deliver them directly to its customers in different places in Austria. Subsequently, *Color Drack GmbH* returned the unsold sunglasses to *LEXX International Vertriebs GmbH* and asked to repay the respective sum. Since *LEXX International Vertriebs GmbH* did not pay, *Color Drack GmbH* brought a payment action against *LEXX International Vertriebs GmbH* at the District Court in St. Johann (Austria), in the jurisdiction of which its registered office is situated.

While the District Court ruled that it had jurisdiction under Art. 5 (1) (b) Brussels I, *LEXX International Vertriebs GmbH* appealed and the Regional Court Salzburg set aside the judgment due to the fact that the District Court had lacked territorial jurisdiction. The Regional Court argued, Art. 5 (1) (b) Brussels I Regulation provided for a single place of connection for all claims arising from a sales contract. However, the autonomous determination of such a place was not possible where – as in the present case – the goods had been delivered to several customers located in *different* places in Austria. Consequently, jurisdiction could not be based on Art. 5 (1) (b) Brussels I Regulation, but rather – pursuant to Art. 5 (1) (c) – on Art. 5 (1) (a) Brussels I Regulation. According to this provision, *Color Drack GmbH* should have brought the proceedings in Nuremberg (Germany) – and not in Austria.

The Austrian Supreme Court to which *Color Drack GmbH* appealed, decided to stay the proceedings and to submit the following question to the European Court of Justice for a preliminary ruling:

Is Article 5 (1) (b) of Council Regulation (EC) No 44/2001 [...] to be interpreted as meaning that a seller of goods domiciled in one Member State who, as agreed, has delivered the goods to the purchaser, domiciled in another Member State, at various places within that other Member State, can be sued by the purchaser regarding a claim under the contract relating to all the (part) deliveries - if need be, at the plaintiff's choice - before the court of one of those places (of performance)?

II.) Opinion of Advocate General Bot

On February 15th, the Advocate General delivered his Opinion and held:

Where there are several places of delivery, Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is applicable if, as agreed between the parties, the goods have been delivered in different places in a single Member State.

If the action relates to all the deliveries, it is for the law of the Member State in which the goods have been delivered to determine whether the

plaintiff may sue the defendant in the court of the place of delivery of his choice or only in the court of one of those places. If the law of that State does not lay down rules on special jurisdiction, the plaintiff may sue the defendant in the court of the place of delivery of his choice.

In favour of the applicability of Art. 5 (1) (b) Brussels I Regulation where there are several places of delivery within a single Member State, the Advocate General referred in particular to the Regulation's objective to ensure a high degree of predictability. Since the aim is to prevent concurrent proceedings being instituted in *several* Member States and irreconcilable judgments being given in two of those States, the objective pursued by the Regulation is – in the Advocate General's point of view – not jeopardised if there are several places of deliveries *within the same* Member State: “Even supposing that several courts of the Member State concerned may have jurisdiction because of the plurality of places of delivery, it remains a fact that all of these courts are in the same Member State. There is therefore no risk that irreconcilable judgments may be given by courts in different Member States.” (para. 101)

III.) The Court's Judgment

The Court (Fourth Chamber) followed in principle the Advocate General's Opinion by holding that:

The first indent of Article 5(1)(b) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as applying where there are several places of delivery within a single Member State. In such a case, the court having jurisdiction to hear all the actions based on the contract for the sale of goods is that in the area of the principal place of delivery, which must be determined on the basis of economic criteria. In the absence of determining factors for establishing the principal place of delivery, the plaintiff may sue the defendant in the court for the place of delivery of its choice.

The Court's main arguments are as follows:

First of all, the Court observes that the question referred to the Court cannot be

answered by a mere reference to the wording of Art. 5 (1) (b) Brussels I Regulation and that therefore the objectives of the Regulation have to be taken into consideration. (paras. 17, 18)

Thus, the Court examines whether the application of Art. 5 (1) (b) Brussels I where there are several places of delivery within a single Member State complies with the Regulation's objectives of predictability and proximity. This is answered in the affirmative by the Court. With regard to the objective of predictability it is held that the parties of the contract can easily foresee before the courts of which Member State they can bring their dispute. (para. 33) It is, according to the Court, not necessary that the defendant can foresee the particular court of the respective Member State. (para. 44) Rather, the defendant is regarded as sufficiently protected when the Member State before the courts of which he can be sued is foreseeable. With regard to the objective of proximity, the Court holds that also this objective is met where there are several places of delivery within a *single* Member State since "it will in any event be the courts of that Member State which will have jurisdiction to hear the case". (para. 35) Consequently, the Court answers the first part of the question in the affirmative by holding that "the first indent of Article 5 (1) (b) of Regulation No 44/2201 is applicable where there are several places of delivery within a single Member State." (para. 36)

With regard to the second part of the question, namely the question whether the plaintiff may sue the defendant in the court of the place of delivery of his choice, the Court first points out - as the Advocate General did - that *one* court must have jurisdiction to hear all claims arising out of the contract. (para. 38) With regard to the question *which* court has jurisdiction in case of several places of delivery within one Member State, the Court emphasises the significance of a close linking factor between the contract and the court and holds that "place of delivery" has to be understood "as the place with the closest linking factor between the contract and the court". As a general rule, this "point of closest linking factor" will be - according to the Court - the place of the principal delivery, which shall be determined on the basis of economic criteria. (para. 40) "To that effect", the Court holds, "it is for the national court seised to determine whether it has jurisdiction in the light of the evidence submitted to it." (para. 41) Only in cases where it is not possible to determine the principal place of delivery, the plaintiff may sue the defendant in the court of the place of delivery of his choice. (para. 42)

Thus, by establishing a criterion for determining “place of delivery” in cases where there are several places of delivery, the Court’s reasoning differs from the Advocate General’s Opinion who did not establish criteria for the determination of the competent court, but held that this was a matter to be determined according to national procedural law. However, the Court and the Advocate General agree insofar as the plaintiff may sue the defendant in the court of the place of delivery of its choice in the absence of a determinable court.

See also our older post on the Advocate General’s Opinion which can be found [here](#).