

ECJ Rules on the Enforcement of Fines under Brussels I

On October 18th, 2011, the Grand Chamber of the European Court of Justice held in *Realchemie Nederland BV v Bayer CropScience AG* (Case C 406/09) that the Brussels I Regulation applies to fines ordered to ensure compliance with judgments given in civil and commercial matters.

Facts

In 2005, German firm Bayer initiated proceedings in Germany against Dutch firm Realchemie for alleged patent infringement. On December 19, 2005, a German Court issued an interim order prohibiting Realchemie from importing into, possessing or marketing certain pesticides in Germany. The Order was issued on pain of a fine. The Court also ordered the Dutch defendant to provide details of its commercial transactions involving the pesticides and to transfer its stock into the custody of the courts.

In 2006, the German Court found that Realchemie had not complied with the order. On August 17, 2006, it thus ordered Realchemie to pay a fine of Euro 20,000 (*Ordnungsgeld*) pursuant to Article 890 of the German Code of civil procedure (ZPO), to be paid to the Court. In October 2006, the Court also ordered a periodic payment of Euro 15,000 (*Zwangsgeld*) pursuant to Article 888 of the German Code of civil procedure to encourage it to provide details of the commercial transactions concerning the pesticides in question. Each time, the Court ordered the Dutch defendant to pay the costs of the proceedings.

In 2007, Bayer sought to enforce the orders in the Netherlands.

Judgment

The Brussels I Regulation only applies to Civil and Commercial Matters. The obvious question was whether a fine ordered to ensure compliance of judgments falls within that category and can thus be enforced under the Regulation.

The Court reiterated that such issues of characterization were to be addressed by looking at the subject matter of the legal relationship between the parties rather

than the nature of the particular remedy. It thus held:

41 In the present case, even if, according to Paragraph 890 of the ZPO, the fine at issue in the main proceedings is punitive and the reasoning in the order imposing it explicitly mentions the penal nature of that fine, the fact remains that, in those proceedings, there is a dispute between two private persons, the object of which is the authorisation of enforcement in the Netherlands of six orders from the Landgericht Düsseldorf, by which the latter, hearing an application lodged by Bayer and based on an allegation of patent infringement, prohibited Realchimie from importing into, possessing and marketing certain pesticides in Germany. The action brought is intended to protect private rights and does not involve the exercise of public powers by one of the parties to the dispute. In other words, the legal relationship between Bayer and Realchimie must be classified as 'a private law relationship' and is therefore covered by the concept of 'civil and commercial matters' within the meaning of Regulation No 44/2001.

The fact that the fine was to be paid to the German state was not regarded as decisive:

42 It is true, as is apparent from the order for reference, that the fine imposed on Realchimie pursuant to Paragraph 890 of the ZPO, by order of the Landgericht Düsseldorf must be paid, when it is enforced, not to a private party but to the German State, that the fine is not recovered by the private party or on its behalf but automatically, and that the actual recovery is made by the German judicial authorities. Those specific aspects of the German enforcement procedure cannot however be regarded as decisive as regards the nature of the right to enforcement. The nature of that right depends on the nature of the subjective right, pursuant to the infringement of which enforcement was ordered, that is, in the present case, Bayer's right to exclusively exploit the invention protected by its patent which is clearly covered by civil and commercial matters within the meaning of Article 1 of Regulation No 44/2001.

The Court therefore concluded:

1. The concept of 'civil and commercial matters' in Article 1 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 meaning that that regulation applies to the recognition and enforcement of a decision of a court or tribunal that contains an order to pay a fine in order to ensure compliance with a judgment given in a civil and commercial matter.

The Court was also asked to characterize the costs of the proceedings to determine whether they were governed by Article 14 of the Directive on the enforcement of IP rights, which provides that they should be borne by the unsuccessful party. It held:

2. The costs relating to an exequatur procedure brought in a Member State, in the course of which the recognition and enforcement is sought of a judgment given in another Member State in proceedings seeking to enforce an intellectual property right, fall within Article 14 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

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