

Anchor defendants and exclusive distribution agreements under Article 8(1) of the Brussels I bis Regulation - CJEU in Beverage City Polska, C-832/21

How does the anchor defendant mechanism operate in the realm of EU trade marks and actions on trade mark infringement? Is the existence of an exclusive distribution agreement between the defendants sufficient to rely on this mechanism? Those are the questions that the Court of justice addresses in its judgment handed down this morning in the case Beverage City Polska, C-832/21.

Factual context and preliminary question

A Polish company manufactures, advertises and distributes an energy drink. Its managing director is domiciled in the city where this company is based.

A German company is connected to the Polish one through an exclusive distribution agreement for Germany - on this basis, it sourced the energy drink from the Polish Company. Its managing director is also domiciled in Germany, in a different state of that country.

Another German company being a proprietor of an EU trade mark brings an action for injunctive relief throughout the entire EU and supplementary claims against the Polish and German companies as well as against their managing directors before a court in Germany, with jurisdiction over the place where the managing director of the German company is domiciled.

The German court bases its jurisdiction over the Polish defendants (the company and its managing director) on Article 8(1) of the Brussels I bis Regulation, referring to the principles established in the judgment of the Court of

Justice in Nintendo.

As a reminder, Article 8(1) of the Brussels I bis Regulation – applicable in the case via Article 122 of the EU trade mark Regulation – states: ‘A person domiciled in a Member State may also be sued [...] where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.’

This decision is contested by the Polish company and its managing director.

The second instance court refers the following question to the Court of Justice for a preliminary ruling:

‘Are claims “so closely connected” that it is expedient to hear and determine them together to prevent irreconcilable judgments, within the meaning of Article 8(1) of [Regulation No 1215/2012], where, in infringement proceedings for infringement of an EU trade mark, the connection consists in the fact that the defendant domiciled in a Member State (here, Poland) supplied the goods which infringe an EU trade mark to a defendant domiciled in another Member State (here, Germany) whose legal representative, against whom infringement proceedings have also been brought, is the anchor defendant, if the parties are connected to each other only through the mere supply relationship beyond which there is no legal or factual connection?’

Opinion of Advocate General

In his Opinion delivered this March, AG Richard de la Tour proposed the Court to answer the preliminary question in a following manner:

‘Article 8(1) of the Brussels I bis Regulation [...] must be interpreted as meaning that more than one defendant, domiciled in different Member States, may be sued in the courts for the place where one of them is domiciled that are seised, in the context of infringement proceedings, of claims brought against them by the proprietor of an EU trade mark where the defendants are alleged to have infringed that trade mark in a materially identical manner through each

of their acts in a supply chain. It is for the court seised to assess whether there is a risk of irreconcilable judgments resulting from separate proceedings, taking into account all the relevant material in the case file.'

Answer of the Court

In its judgment handed down this Thursday, the Court reminds that according to its case law in order for Article 8(1) to apply, it must be ascertained whether, between various claims brought by the same applicant against various defendants, there is a connection of such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings. For decisions to be regarded as irreconcilable, it is not sufficient that there be a divergence in the outcome of the disputes, but that divergence must also arise in the context of the same situation of fact and law (para. 28).

Concerning the first requirement (ie. the same situation of law) the Court bases its reasoning on the universal effect of an EU trade mark within the territory of EU Member States. As such, for the Court, this requirement does not seem to be problematic in the situation at hand (para. 29 to 31).

This is the second requirement (ie. the same situation of fact) that is put under more scrutiny. The Court notes that - according to the information provided by the referring judge - the Polish and German companies do not belong to the same group. Furthermore, there is no link between the Polish company and its director, on the one hand, and the director of the German company described by the referring courts as an 'anchor defendant', on the other hand (para. 32).

Hence, the sole element potentially connecting the defendant companies seems to be the exclusive distribution agreement. The question is therefore whether such an agreement is sufficient to meet the requirement of 'the same situation of fact'.

The Court starts its reasoning with a reminder: the purpose of the jurisdiction rule referred to in Article 8(1) of Brussels I bis Regulation is to facilitate the proper administration of justice, to reduce as far as possible the possibility of concurrent proceedings and thus to avoid solutions that might be irreconcilable if the cases

were tried separately (para. 34). In order to assess whether there is a connection between the various claims brought before it, it is for the national court to take into account, in particular, the fact that several companies established in different Member States are accused, each separately, of the same acts of infringement in respect of the same products (para. 36).

Echoing the Opinion of its Advocate General, the Court states that the existence of a connection between the claims in question is based primarily on the relationship between all the acts of infringement committed, rather than on the organizational or capital links between the companies concerned. Similarly, in order to establish the existence of a single factual situation, particular attention must also be paid to the nature of the contractual relations existing between the companies involved (para. 37).

For the Court, the existence of the exclusive distribution agreement renders it more foreseeable that multiple actions on trade mark infringement will be considered as meeting the requirement of 'the same situation of fact' (para. 38).

The Court also noted that - as it transpires from the case file and the hearing - the close cooperation between the companies manifested itself in the operation of their websites, the domains of which belonged to only one of the co-defendants, through which the products at issue in the main proceedings were marketed by means of cross-references between these sites (para. 39). This also reveals the foreseeable nature of the obligation to respond to allegations of infringement from the same source before the same court (para. 40).

Probably to nuance those considerations, the Court adds that the circumstances justifying the reliance on the anchor defendant mechanism cannot be created in an artificial manner just in order to establish jurisdiction over co-defendants; that is, however, not the case if a 'close link' exists between the defendants - such a 'close link' exists in presence of an interest in hearing and judging them together to avoid solutions that might be irreconcilable if the cases were judged separately (para. 43-45).

Ultimately, the Court answered the preliminary question by stating that:

'[...] a number of defendants, domiciled in different Member States, may be sued in the courts for the place where one of them is domiciled before which, in the context of an infringement action, claims have been brought against all of

those defendants by the proprietor of an EU trade mark where they are each accused of having committed a materially identical infringement of that trade mark and they are connected by an exclusive distribution agreement.'

Some highlights and remarks...

At least three aspects of the case merit particular attention:

- first, the requirement of 'the same situation of fact' appears to hinge on the defendant's foreseeability that he may be summoned to a court with jurisdiction over other individuals or entities he collaborate with. In other terms, the closer the contractual link and the more intensive the cooperation are, the more one exposes himself to the risk of being sued outside of the court of his domicile through the anchor defendant mechanism;
- second, while the judgment stresses the relevance of contractual relations between the defendants and the fact of them being bound by an exclusive distribution agreement, it remains to be seen how this can translate into the situation of the managing director of a company against which the action is also brought through the anchor defendant mechanism; there is also even more fundamental the question of the possibility to consider that an action brought against the director of a company can 'anchor' via Article 8(1) the actions against another company and its director; those inquiries received consideration in the Opinion (points 68 et seq.);
- third, echoing the possibility to rely on the interdiction of the abuse of EU law from *Vinyls Italia* (para. 54 and 55) in the realm of private international law, the Court underscores that the facts underpinning a case should not be artificially fabricated just in order to justify the reliance on the anchor defendant mechanism.

The judgment can be found here.