



# International Comparative Jurisprudence



## PRACTICAL PROBLEMS OF THE APPLICATION OF ARTICLE 8 (1) OF THE BRUSSELS IA REGULATION

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**Abstract.** The goal of this article is to analyse the practical problems of the application of Article 8(1) of the Brussels Ia regulation which establishes derived jurisdiction for related claims. Firstly, it focuses on the nature of derived jurisdiction in the EU law. Secondly, it analyses in detail the main elements of this provision (connectedness of claims and irreconcilability of judgments) and the doctrine of the abuse of the EU law. Thirdly, it covers the application of Article 8(1) of the Brussels Ia regulation in cases deriving from infringement of competition, patent and design laws.

**Keywords:** the EU civil procedure law, derived jurisdiction, abuse of the EU law doctrine

### Introduction

The place of the defendant's domicile (a registered office) determines jurisdiction in cross-border civil disputes in the European Union (EU)<sup>2</sup>. Accordingly, a plaintiff shall submit a claim to the court of the Member State in which a defendant is domiciled. The Brussels Ia regulation is primarily accustomed to deal with disputes between one plaintiff and defendant. In contrary cases when a plaintiff brings related claims against several defendants in the same court are exceptional and derogate from the general rule of jurisdiction.

Article 6(1) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968) established that regardless of any other criteria a defendant may be sued in the place where one of defendants in the case is domiciled. Such liberal approach could have led to frivolous actions and abuse of the general rule of jurisdiction. The watershed moment in the regulation of jurisdiction of claims against several defendants was *Kalfelis* case in which the European Court of Justice (ECJ) established “connectedness” and “irreconcilability of judgments” criteria: “<...> for Article 6 (1) of the Convention to apply there must exist between various actions brought by the same plaintiff against different defendants 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” (Para. 13, Case C-189/87, 1988). This approach was subsequently codified in Article 6(1) of Brussels I regulation (Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001). Consequently, Article 6(1) of the Brussels I regulation was transferred in Article 8(1) of the Brussels Ia regulation (Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012).

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<sup>2</sup> Art. 4(1) of 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.

Though, the right to bring an action against several defendants has economic and procedural advantages and contributes to the sound administration of justice (Para. 19, Case C-616/10, 2012), the balance between this special rule and the general rule of jurisdiction shall be established. The “principal” words of this provision “so closely connected” and “irreconcilable judgments” give scarce guidance how it should be applicable. Moreover, a bad faith plaintiff may abuse this rule and deliberately centralize actions against multiple defendants. Though, the Court of Justice of the European Union (CJEU) has not expressly accepted the application of abuse of EU law doctrine under Article 8(1) of the Brussels Ia regulation, there are a few judgments of this court which may suggest that this doctrine should be applicable. Therefore, the development of the case law allows assessing the position of this exceptional rule in the EU civil procedure.

This article consists of three parts: i) examines the development of the CJEU case law in applying Article 8(1) of the Brussels Ia regulation in case of several defendants, ii) analyses connectedness of claims and irreconcilability of judgments as the main criteria of Article 8(1) of the Brussels Ia regulation, iii) considers the peculiarities of derived jurisdiction in specific legal disputes in which this article is applicable. This article employs systemic analysis and comparative legal research methods.

### **1. The essence of Article 8(1) of the Brussels Ia regulation**

The right to bring an action against several defendants is established in domestic regulation of the Member States. For instance, in German civil procedure law related actions can be brought against several co-defendants (*Streitgenossenschaft*). In Germany a plaintiff can sue several persons if they form a community of interest with regard to the disputed right, or if they are entitled or obligated for the same factual and legal cause<sup>3</sup>. Moreover, several defendants can be sued if *similar claims* or obligations form the subject matter in dispute and such claims are based on an *essentially similar factual and legal cause*<sup>4</sup>. Similarly, in the French civil procedure a plaintiff can sue several defendants in the court of the place of domicile of any defendant<sup>5</sup>. It is possible when the causes of actions against them “are identical or closely related”. This rule is not applicable if defendants shall be sued in different types of courts (for example, in a regular court and commercial court). Though, it seems that the requirement for possible incoherence in enforcement procedure is not mandatory, but it reasonably derives from connection of claims.

Similarly, to the mentioned domestic regulation, Article 8(1) of the Brussels Ia regulation allows a plaintiff to bring claims against multiple defendants to the same court instead of commencing different cases in each Member State (so called “*derived jurisdiction*”). The court may not enjoy jurisdiction over the certain claim(s) under the general rule of jurisdiction, but it becomes possible due to the close connection between the claims (Magnus and Mankowski, 2007). It is not the only provision which regulates derived jurisdiction in this regulation.

Other provisions in the Brussels Ia regulation establish special rules of derived jurisdiction, such as Article 11(1)(c) (claims against the co-insurers), Article 18(3) (counterclaims for consumers’ contracts), Article 22(2) (claims from employment contracts), Articles 7(3) (claims for damages in criminal proceedings). However, they shall be regarded as special rules of derived jurisdiction (*lex specialis*) comparing to the general rule of derived jurisdiction under Article 8(1) of the Brussels Ia regulation. All the mentioned examples derive from special legal relations and serve for specific procedural purposes. In contrast, Article 8(1) of the Brussels Ia regulation is applicable to

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<sup>3</sup> Article 59 of the Code of Civil Procedure of Germany: Mehrere Personen können als Streitgenossen gemeinschaftlich klagen oder verklagt werden, wenn sie hinsichtlich des Streitgegenstandes in Rechtsgemeinschaft stehen oder wenn sie aus demselben tatsächlichen und rechtlichen Grund berechtigt oder verpflichtet sind.

<sup>4</sup> Article 60 of the Code of Civil Procedure of Germany: Mehrere Personen können auch dann als Streitgenossen gemeinschaftlich klagen oder verklagt werden, wenn gleichartige und auf einem im Wesentlichen gleichartigen tatsächlichen und rechtlichen Grund beruhende Ansprüche oder Verpflichtungen den Gegenstand des Rechtsstreits bilden.

<sup>5</sup> Article 42 of Civil Code of Civil Procedure of France: S'il y a plusieurs défendeurs, le demandeur saisit, à son choix, la juridiction du lieu où demeure l'un d'eux.

all legal civil and commercial cases for which this regulation is applicable. Noteworthy, this article employs a word “claim”, but not “an action”. In this sense a claim relates to the *subject matter* of the action (what the court is seized to do) but not a procedural document.

In contrast to other Articles in Chapters II to VII of the Brussels Ia regulation, the rules of jurisdiction under Article 8 of the Brussels Ia are based not on the peculiarities of the subject matter of the case or the parties’ agreement on jurisdiction. They are coupled with procedural efficiency and avoidance of separate judgments of related disputes (Magnus and Mankowski, 2007). The prevention of parallel proceedings and limitation of irreconcilable judgments and non-recognition of judgments have been one of the major goals of the Brussel regime (Para. 11, *AMT Futures Ltd v MMGR* [2017] UKSC 13, 2017).

This provision is applicable only when all defendants are domiciled in the Member States. In *Land Berlin* (Para. 55, Case C-645/11, 2013) case the CJEU found that centralization of claims means that defendants (not domiciled in the EU Member State(s)) cannot be sued with other defendants domiciled in the EU. Thus, though there are rules of jurisdiction under the Brussels Ia regulation which establish jurisdiction of the courts of the Member States, irrespective of the domicile of defendant (primarily, Article 25(1)), Article 8(1) is applicable only when all defendants are domiciled in the EU.

The rule of derived jurisdiction is applicable regardless of the domicile of interested (third) parties to the dispute, witnesses or other person in the case. However, the court may consider their domicile in order to establish whether all conditions for the application of this provision are met. Also, it is applicable in proceedings in which there are multiple co-defendants but not multiple plaintiffs (Fairgrieve and Lein, 2012). Only the “same plaintiff” can invoke article 8(1) of the Brussels Ia regulation (Case C-189/87,1988).

The Brussels Ia regulation is silent whether a plaintiff can rely on the agreement on jurisdiction for the application of Article 8(1) of the Brussels Ia regulation. In *Estasis Salotti di Colzani* (Para. 7, Case C-24/76, 1976) case the ECJ found that the agreement on jurisdiction excluded the application of the rules of jurisdiction based on Articles 2, 5, 6 of the Convention. Even if the court finds that the requirements for the applicant of this article exist, it cannot justify non-application of the agreement on jurisdiction.

The application of Article 8(1) of the Brussels Ia regulation is independent from the nature of the claim (Fairgrieve and Lein, 2012). Nevertheless, it is not applicable in consumption and employment disputes due to the special purposes of the special jurisdiction rules applicable to such disputes. The relationship between Article 8(1) of the Brussels Ia regulation and the claims deriving from employment contract has been analysed in *Glaxosmithkline* case (Case C-462/06, 2008). In this case the plaintiff (employee) concluded an employment contract with the company seated in France. After some time, the plaintiff concluded a new contract of employment with the company registered in the UK. Under this new contract the new employer undertook to maintain the contractual rights acquired by the plaintiff under his initial contract of employment with the previous employer. The plaintiff was dismissed and brought an action before the Employment Tribunal in France against both companies. He argued that both companies were his joint employer and asked to pay jointly compensation and damages for non-compliance with the dismissal procedure.

The ECJ found that the textual interpretation of the special rule of jurisdiction for the claims deriving from individual contracts of employment precludes the application of Article 6(1) of the Brussels I regulation in such disputes. After consideration of the principles of sound administration of justice and protection of employees’ interests, it concluded that the special rule of derived jurisdiction for employment disputes can be found only in Article 20(2) (Para. 27, Case C-462/06, 2008).

Another problem arises when a third party to the agreement on jurisdiction invokes it to rebut the application of Article 8(1) of the Brussels Ia regulation. *Georgios* (Case C-436/16, 2017) is one of the latest cases concerning the application of this provision. In this case the plaintiff, Malcon Navigation (a company registered in Malta),

owned the ship. The defendant Brave Bulk Transport seated in Greece was represented by Mr Leventis and Mr Vafeias who reside in Greece. Malcon Navigation and Brave Bulk Transport concluded a charter agreement pursuant to which the plaintiff chartered the ship to the defendant. The defendant sub-chartered the ship to the Iraqi Ministry of Trade. Brave Bulk Transport returned the ship five months later than the date agreed in the charter contract. The plaintiff commenced arbitration proceedings against the defendant for the compensation of damage. Consequently, the defendant sued Iraqi State, because its delay in returning the ship caused the delay in Brave Bulk Transport returning the ship to the plaintiff. The parties concluded the agreement that the pending arbitration proceedings would be stayed for six months and, if a settlement with the Iraqi State was reached, the plaintiff would receive financial satisfaction. The agreement provided that it was 'governed by English law' and was subject to 'English jurisdiction'. When the amicable settlement had been agreed by the defendant with the Iraqi State, the plaintiff continued the arbitration which satisfied the claim. However, it appeared that the representatives of Brave Bulk Transport deprived the latter of its assets and prevented the plaintiff from receiving its compensation. Consequently, the plaintiff brought an action against the defendant and its representatives in Greece claiming for the damage caused by joint tortious actions. The domestic court doubted whether the contract between the plaintiff and the defendant can be relied upon by the representatives of one of them to dispute the jurisdiction of a court over an action for damages. The CJEU found that the agreement conferring jurisdiction under Article 23(1) of the Brussels I regulation allows the parties to derogate from the special jurisdiction in Article 6 (Para. 40, Case C-436/16, 2017). However, in such case the representative of the defendant cannot rely on the agreement between the plaintiff and the defendant (Para. 43, Case C-436/16, 2017).

Article 8(1) of the Brussels Ia regulation is silent when connectedness of the claims shall be established and whether it shall be maintained throughout the whole civil proceedings. How the court should assess connectedness when one of the co-defendants has gone bankrupt or has been liquidated after the initiation of the proceedings? This provision does not include any express reference to the application of domestic rules or any requirement that an action brought against multiple defendants should be admissible by the time it is brought. This question was analysed in *Reisch Montage* (Case C-103/05, 2006) case in which the claim for the payment was brought against two defendants: a natural person (domiciled in Austria) and a legal person (registered office in Germany) in the court in Austria.

The court of the first instance dismissed the claim against the natural person because bankruptcy proceedings concerning his assets had been instituted earlier and were not completed at the time that action was brought. Under the national insolvency regulation in Austria, after commencement of bankruptcy proceedings, proceedings to enforce or secure claims to the debtor's estate shall not be commenced<sup>6</sup>. Consequently, the second defendant argued that the plaintiff cannot rely on Article 6(1) of the Brussels I regulation to justify the jurisdiction in Austria since the action brought against the natural person was dismissed under the national law. The ECJ dismissed the argument that the fact that the claim against one defendant was dismissed at the beginning of the judicial proceedings has any impact on the application of Article 6(1) of the Brussels I regulation. It found that it is applicable even if, after the claim is lodged to the court, the claim against one co-defendant in its country is declared inadmissible": "*<...> an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant*" (Para. 33, Case C-103/05, 2006).

The rationale of this approach is that the domestic law of the Member States does not make impact on the application of Article 8(1) of the Brussels Ia regulation. A co-defendant cannot rely on the national law to avoid being sued in another Member State even if the claim against another co-defendant is declared inadmissible. It seems that the similar approach could be applicable to legal persons, for instance, in situation when one of the co-

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<sup>6</sup> Article 6(1) of the Insolvency Regulation of Austria established that 'Litigation intended to enforce or secure claims to assets forming part of a bankrupt's estate shall be neither commenced nor pursued after the commencement of bankruptcy proceedings'.

defendants is liquidated. Thus, even if the claim against one co-defendant becomes inadmissible after it is lodged to the court, the court shall still apply Article 8(1) of the Brussels Ia regulation.

## **2. Connectedness of claims and irreconcilability of judgments**

The analysis of connectedness of claims and irreconcilability of judgments intertwine (Para. 30, Case C-98/06, 2006). The CJEU has acknowledged that when the claims against several defendants have different subject-matters and bases and which are not connected by a link of subordination or incompatibility, Article 6(1) of the Brussels I regulation is not applicable even if the upholding of one of those actions may affect the extent of the right whose protection is sought by the other action (Para. 67, Case C-366/13, 2016).

Though the Brussels Ia regulation does not establish when both elements should be assessed (when the action is received at the court, the court receives respondent(s) memorials), from the procedural point of view, it seems that both criteria should be determined as early as possible in the proceedings. If the court can (has enough information) decide that both elements are met, it should apply the rule of derived jurisdiction. Another question is whether the court, seized of the claim, should propose the plaintiff to include other co-respondents, if it seems reasonable from the facts of the case? Probably this question should be primarily answered relying on the national law. Nevertheless, the case law of the CJEU suggests that the application of Article 8(1) of the Brussels Ia regulation shall not result in the abuse of the EU law, allowing a plaintiff to bring frivolous claims, though the court has expressly referred to this doctrine yet.

### **2.1. Connectedness of claims**

*Kalfelis* was the first case in ECJ's docket in which it analysed connectedness of claims against several defendants. The court found that there must be connection between the claims brought by the same plaintiff: "<...> *such a kind that it is expedient to determine the actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceeding*" (Para. 13, Case C-189/87, 1988). The rationale of such interpretation was to reaffirm the importance of the general rule of jurisdiction based on defendant's domicile. Though the court did not mention the abuse of law doctrine as the basis for this argument, some authors believe that this case has been particularly important for avoidance of the abuse of EU law and frivolous actions (De la Feria and Vogenauer, 2011). *Hoffmann* (Case C-145/86, 1988) is another case which shaped the interpretation of the jurisdiction over the claims against multiple defendants. In this case the court found that under Article 27(3) of the Convention the court shall examine whether they entail legal consequences that are mutually exclusive to establish that judgments are irreconcilable (Para. 22, Case C-145/86, 1988).

Article 8(1) of the Brussels Ia regulation allows a plaintiff to choose the Member State in which one co-defendant (so called "anchor" or "local" defendant) has a domicile (a registered office) and join other defendants to the proceedings in this state. Shall the court assess the merits of the claim against an anchor defendant when a plaintiff seeks to involve a "foreign" defendant(s) into the proceedings? Is it necessary to analyse whether a plaintiff has submitted an admissible claim against an anchor defendant and it is a legitimate reason to oust the non-anchor defendants from their jurisdictions of domicile? Is this article applicable even if the court dismisses the action against an anchor defendant? Following *Reisch Montage* approach such assessment should be incompatible with the rationale of Article 8(1) of the Brussels Ia regulation.

The problem of the so called "*anchor (local)*" defendant is addressed neither in Article 8(1) of the Brussels Ia regulation, nor in the case law of the CJEU. Nevertheless, the Advocate General Mengozzi argues in his opinion in the *Freeport* case that the assessment of the likelihood of admissibility of a claim brought against a "local" defendant is acceptable under the EU law. In such case the claim shall be found "manifestly inadmissible or unfounded in all respects" (Para. 70, Advocate General Mengozzi opinion in case, Case C-98/06, 2007).

The problem regarding the assessment of the merits of the claim brought against an anchor defendant was addressed in the UK case law (*Sana Hassib Sabbagh v. Wael Said Khoury and others* [2017] EWCA Civ 1120, 2017). The plaintiff submitted the claim against multiple defendants for the alleged misappropriation of her late father's assets. She argued that the courts in England have jurisdiction over the anchor defendant since he was domiciled in England though the other nine defendants all domiciled abroad. The defendants challenged the jurisdiction of the English courts. The Court of Appeal rejected the position that for establishing jurisdiction under Article 6(1) of the Brussels I regulation, there is no need to consider the merits of the claim against the anchor defendant.

The court found that the ECJ case law does not preclude considerations of the substantive merits of the claims brought against the anchor defendant. It also made distinction between the anchor defendant and non-anchor defendants: “<...> *if the claims against one or more non-anchor defendants fell away, there would be no effect upon the claim against the anchor defendant or the claims against other non-anchor defendants. In contrast, without a legitimate claim against the anchor defendant, there was no reason to oust the non-anchor defendants from their jurisdiction of domicile*” (Para. 66, *Sana Hassib Sabbagh v. Wael Said Khoury and others* [2017] EWCA Civ 1120, 2017). Thus, even if the court found that the claims against the “non-anchor” co-defendant are groundless, it would not make impact of the application of this article and the proceedings.

The court emphasised that jurisdiction over an anchor defendant is a mandatory basis for the jurisdiction over other co-defendants. Consequently, the court, dealing with claims against several co-defendants, should first check lawfulness of a claim against an anchor defendant. If the court lacks jurisdiction over the claim against such defendant, there is no reason to analyse the admissibility of the claims against other defendants. In other words, non-admissibility of a claim against an anchor defendant leads to the non-application of Article 8(1) of the Brussels Ia regulation. Also, the court established that Article 6(1) of the Brussels I regulation can be applicable only if there is no evidence of abuse or fraudulent intention to create artificially this requirement. Nevertheless, the UK case law is not unanimous over this point. For instance, in *Aeroflot case* (Para. 107, *Joint Stock Company Aeroflot Russian Airlines v Berezovsky and others* [2013] EWCA Civ 784, 2013), the court stated that there is no need to analyse the merits of the claims against the “anchor” defendant.

Though the nature (grounds) of claims is irrelevant pursuant to the general rule for the application of Article 8(1), does it mean that it lacks relevance in any case? For instance, are the claims “*connected*” if one of them is based on contractual liability and the other (s) is (are) based on delict? The ECJ answered this question in *Réunion Européenne SA* (Case C-51/97, 1998) case. The plaintiff brought a claim for damage it suffered from carrier relations. The goods (fruits) were carried by sea from Melbourne to Rotterdam under a bearer bill of lading issued by the company, whose registered office is in Sydney, then by road under an international consignment note, to France, where the plaintiff discovered the damage (the fruit had ripened prematurely owing to a breakdown in the cooling system).

The insurers paid compensation for the damage suffered by the plaintiff and subrogated company's right to the claim. They brought proceedings to recoup their loss against three defendants: the company which issued the bill of lading for the sea voyage, the company which actually carried the goods by sea and the company which owed and chartered the vessel in France. The principal question was, whether the insurers can bring a claim against all three defendants to the same court? The ECJ followed *Kalfelis* approach and declared that relying on Article 5(3) of the Convention: “<...> *two claims in one action for compensation, directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected*” (Para. 50, Case C-51/97, 1998). Therefore, lack of interconnectedness appears when a plaintiff invokes two different substantial violations of law (delict and contractual liability). However, such reasoning is rather formalistic. First, in each case only the court decides what law is applicable (*jura novit curia*) and it is not restrained by the parties' arguments and legal assessment of the situation. Second, only the fact that legal basis of claims differ shall not mean they are not connected. It should not alone outweigh procedural efficiency and

expedite legal proceedings. Unsurprisingly, *Réunion Européenne SA* approach has been altered in the further case law (*Freeport* case).

In *Freeport* (Case C-98/06, 2007) the plaintiff brought the claim against the company and its subsidiary because of the failure to pay the fee which was agreed to pay between the plaintiff and the company. The plaintiff and Freeport (a company incorporated under English laws) concluded an agreement that the plaintiff would receive a success fee when the Freeport's project is done (a factory shop is opened in Sweden). The factory shop was opened and incorporated under Swedish law (Freeport AB). Freeport AB is a fully owned Freeport's subsidiary. The plaintiff asked both Freeport AB and Freeport to pay the fee on which he agreed with Freeport. However, Freeport AB dismissed the request because it is not a party to the agreement and it did not exist when the agreement was concluded. The plaintiff brought the claim against Freeport AB to the court in Sweden and sought to involve Freeport into the proceedings.

Though the court in *Freeport* basically dealt with the same dilemma as in the *Kalfelis* case, these cases differ. First, in *Freeport* one of the parties argued that misapplication of Article 6(1) of the Brussels I regulation may lead to the abuse of EU law and secondly, this article was substantially amended after *Kalfelis* case (De la Feria and Vogenauer, 2011).

The court considered that the wording of Article 6(1) of the Brussels Regulation does not mean that claims should have identical legal bases (Para. 38, Case C-98/06, 2007) and established that all the necessary factors of the case may be relevant for the assessment, including the legal bases of the actions (Para. 41, Case C-98/06, 2007). Consequently, it found that different legal basis does not preclude the application of this article (Para. 47, Case C-98/06, 2007). Therefore, the court changed the rationale it employed in *Réunion Européenne SA* and decided that claims against several defendants can be joined even if they are brought on different legal basis: tort and breach of contract. This approach has been also accepted by some authors (Fairgrieve and Lein, 2012).

A particularly interesting question in *Freeport* was whether the court shall assess whether the plaintiff brings the claim against several co-defendants only to oust the jurisdiction of the courts of the Member State where the co-defendants are domiciled. Following the *Kalfelis* approach the court found that the "connectedness" criterion serves for procedural efficiency and avoidance of the risk of irreconcilable judgments (Para. 53, Case C-98/06, 2007). If the proceedings are instituted against several defendants (the court has determined that the "connectedness criterion" is applicable), there is no "<...> need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled" (Para. 54, Case C-98/06, 2007). Thus, the ECJ did not accept the argument that the doctrine of the abuse of the EU law is applicable in interpretation of Article 6(1) of the Brussels I regulation. Nevertheless, some authors consider that the court did not dismiss the application of this doctrine in such disputes either (De la Feria and Stefan Vogenauer, 2011).

Pursuant to the *Freeport* approach, if the court decides that the claims against several defendants are "connected", even the abusive will of the plaintiff becomes irrelevant. It means that the connectedness criterion itself decides whether the institution of proceedings against several co-defendants abuses the EU jurisdiction rules or not. Also, such interpretation confirms that connectedness criterion and the application of Article 8(1) of the Brussels Ia regulation depends only on the objective criterion and has nothing to do with the parties' will. However, such interpretation may not fully protect co-defendants' rights when a plaintiff and/or other co-defendants abuse Article 8(1) of the Brussels Ia regulation even though all objective criterion of this article are met.

A rather objective, but doubtful *Freeport* precedent has been changed in the further case law. In (*CDC*) *Hydrogen* (Case C-352/13, 2015) the CJEU dealt with the application of Article 6(1) of the Brussels I regulation when the claim for the damages suffered from the violation of EU competition was brought against several defendants. One of the major issues in this case was the argument submitted by one of the parties that the plaintiff in the national case colluded with one of the defendants to deliberately delay the formal conclusion of their out-of-court

settlement. Before the action was brought, an out-of-court settlement was reached between the applicant in the main proceedings and one of the co-defendants, whose seat is in Germany, and the parties allegedly delayed the formal conclusion of that settlement until proceedings had been instituted, for the sole purpose of securing the jurisdiction of the court seized of the case as against the other defendants in the main proceedings.

The Advocate General in the case acknowledged that interpretation of Article 6(1) of the Brussels I regulation is limited to the abuse of EU law. However, this doctrine should not be applicable as a general rule but limited in case when the “*deceitful tactics*” to abuse the EU law is not probable but confirmed (Para. 88, Advocate General Jääskinen opinion in case, C-352/13, 2014). Consequently, the court made one step further than in the *Freeport* case and found that the application of this article can be excluded in case the parties deliberately sought to circumvent the application of the general rule of jurisdictions. However, there must be “firm evidence” that the parties abused the EU law. A simple holding of negotiations for conclusion of a non-court settlement should not lead to this conclusion. Therefore, this article should not be applicable when “<...> *the applicant and that defendant had colluded to artificially fulfil, or prolong the fulfilment of, that provision’s applicability*” (Para. 33, Case C-352/13, 2015).

In general, the ECJ case law has witnessed substantial changes regarding interpretation of Article 8(1) of the Brussels Ia regulation. *Kalfelis*, *Réunion Européenne SA*, *Freeport* and *(CDC) Hydrogen* judgments reveal that the court is willing to broaden the application of this provision. First, it has accepted that legal basis of the claims does not hinder the application of this provision. Second, it seems that the court is willing to accept that the national courts may consider the abuse of the EU law doctrine. Following the *(CDC) Hydrogen* rationale, the court may refuse to apply Article 8(1) of Brussels Ia only if there is significant evidence that the plaintiff (the parties) deliberately abuses the EU law. Though the CJEU has not expressly referred to the doctrine of abuse of EU law, such interpretation adds an additional element for the application of Article 8(1) of the Brussels Ia regulation which means that together with the objective criterion recognised in *Kalfelis* and *Freeport*, the court could (should) also assess good faith of the parties in the proceedings.

## 2.2. Irreconcilability of judgments

One of the major goals of the Brussels Ia regulation is to ensure smooth circulation of judgments within the EU. This aim is achieved if there are no obstacles in fast recognition and enforcement of judgments (Recital 27 of the Brussels Ia regulation). The regulation defines judgments broadly, including protective and provisional judgments (Art. 2(a) of the Brussels Ia regulation). Nevertheless, regarding the application Article 8(1) of the Brussels Ia regulation, only judgments which should be enforced and recognized matter.

Irreconcilability of judgments occurs when there are two or more related judgments that must be enforced or recognized (Calster, 2016). It is possible due to connectedness of claims against several defendants in separate cases and contradiction between judgments. If the court deals with the application of Article 8(1) of the Brussels Ia regulation, the assessment of further recognition and enforcement procedure is indispensable. When claims are closely connected, irreconcilability of judgments becomes highly possible. However, the fact that the claims are connected does not mean that the irreconcilability of judgments is inevitable *per se*. In any case, the phrase „irreconcilable judgments“ should be interpreted in the light of the goals of the Brussels Ia regulation and no reference to the national regulation is (should be) allowed. The basic principles which should be considered in this case are efficiency of judicial proceedings and smooth enforcement procedure. Irreconcilability of judgments shall be interpreted “<...> *in the broad sense of contradictory decisions*” (Para. 25, Case C-539/03, 2006).

If the claims are connected, the execution of future judgments would be incoherent or even impossible in practice. It may also lead to the refusal of recognition and enforcement (Art. 45(1)(c) of the Brussels Ia regulation). From the practical perspective it is more difficult to determine this element at the beginning of the civil proceedings (when the plaintiff brings a claim). Since the irreconcilability criterion relates to the possible difficulties in the



recognition and execution of the judgment, the court encounters with dilemma to assess what will be the procedural situation when the judgments are rendered. Though the Brussels Ia regulation significantly increased the effectiveness of the execution of foreign judgments, it does not address *how* judgments are executed and recognized. Thus, the national rules of the execution of judgments are applicable. It lays down only the requirements for the non-recognition and non-execution. But since there is no reference to the national law in this case, it would not be compatible with the Brussels Ia regulation to analyse the requirement for the application of Article 8(1) of the Brussels Ia regulation relying on the national law.

The basic principles for the assessment of irreconcilability of judgments were established in *Roche Nederland* (Case C-539/03, 2006). The plaintiffs were the proprietors of European patent (European patent holder) domiciled in the USA. They brought a claim to the court in the Netherlands against Roche Nederland BV, a company established in the Netherlands and eight other companies of Roche group in different EU Member States and also the USA, Switzerland claiming that those companies infringed the rights conferred on them by the patent of which they are the proprietors. As the basis for the infringement they mentioned the placing on the market of immuno-assay kits in countries where the defendants are established. The defendants (not established in the Netherlands) opposed the jurisdiction of the courts in the Netherlands. In contrast, the applicants argued that the broad interpretation of 'irreconcilable' shall be employed.

The ECJ refused to distinct between a "broad" or "narrow" interpretation of Article 8(1) of the Brussels Ia regulation (Para. 25, Case C-539/03, 2006). Instead it followed the argument of the Advocate General that contradiction between judgments itself is not enough for the application of this provision: "<...> *in order that decisions may be regarded as contradictory it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact*" (Para. 25, Case C-539/03, 2006). Thus, in order to apply Article 8(1) of the Brussels Ia regulation, the same legal and factual circumstances should be determined. The ECJ concluded that both elements are missing in this case. First, it declared that the context of the same factual situation is absent in this case since the defendants are different entities and the alleged infringements have been made in different Member States (Para. 27-28, Case C-539/03, 2006). Second, it found that this provision shall not allow the plaintiff to abuse jurisdiction rules and its application shall not result in forum shopping (Para. 38, Case C-539/03, 2006).

### **3. Special cases of the application of Article 8(1) of the Brussels Ia regulation**

Though Article 8(1) of the Brussels Ia regulation is applicable in all civil and commercial cases, there are some peculiarities when this article is applicable in certain disputes. It may occur due to the specific subject-matter of the dispute and legal regulation. From the development of the case law of the CJEU three different types of disputes could be distinguished: claims deriving from the infringement of the EU competition, patents and design laws.

#### **3.1. Claims deriving from infringement of competition law**

Claims deriving from the infringement of competition law may involve multiple defendants and cause wide-scope negative economic consequences in the market. In *(CDC) Hydrogen* (Case C-352/13, 2015) the CJEU analysed whether Article 6(1) of the Brussels I regulation is applicable when a plaintiff brings a claim against several defendants in different Member States for the damage caused by the continuous infringement of the EU competition law<sup>7</sup>. The infringement had been already found by the European Commission. However, it did not determine the requirements for holding the defendants liable in tort, jointly and severally as the case may be, since this is to be determined by the national law of each Member State. The court found that due to the different requirements for the liability of participation in the unlawful cartel in the Member States, the risk of irreconcilable judgments is possible if the plaintiff brings the claims in different Member States (Para. 22, Case C-352/13, 2015).

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<sup>7</sup> The defendants were liable for the implementation of continuous infringement of EU competition law (anti-competitive agreements, decisions and concerted practices), infringing of Article 101 TFEU.

Regarding the risk of irreconcilable judgments resulting from separate proceedings, the CJEU established that it may materialise if the claims “<...> were brought before the courts of various Member States by a party allegedly adversely affected by a cartel” (Para. 22, Case C-352/13, 2015). In such case each participant liable for the loss resulting from the infringement could have expected to be sued in the courts of the Member State in which one of them is domiciled. Consequently, if the claims in different Member States are brought by the plaintiff it could give rise to the risk of irreconcilability of judgments (Para. 25, Case C-352/13, 2015). Therefore, if the claims derive from the infringement of the EU competition law and the infringement took place in different Member States, it may be a strong argument in favour of the application of Article 8(1) of the Brussels Ia regulation.

### **3.2. Claims deriving from infringement of patents law**

Two main cases regarding derived jurisdiction for infringement of patent rights are *Solvay SA* (Case C-616/10, 2012), *Roche Nederland BV* (Case C-539/03, 2006). The latter has been already discussed in this article. In *Solvay SA* the problem was whether judgments are irreconcilable when multiple claims are submitted for the alleged violation of patents rights.

*Solvay SA*, the proprietor of European patent, brought an action for the infringement of the national parts of the patent in various EU Member States against Honeywell Fluorine Products Europe BV and Honeywell Europe NV of performing the reserved actions in the whole of Europe. The plaintiff also lodged an interim claim against the Honeywell companies, seeking provisional relief in the form of a cross-border prohibition against infringement. The question was whether in case in which several defendants have allegedly infringed the same national part of a European patent, Article 6(1) of the Convention shall be applicable.

The CJEU found that according to Articles 2(2) and 64(1) of the Convention on the Grant of European Patents (“Munich Convention”), a European patent is governed by the national law of each of the Contracting States for which it has been granted. Also, any claim for the infringement of a European patent shall be examined in the light of the relevant national law in force in each of the States for which it has been granted (Para. 26, Case C-616/10, 2012). In such disputes the national court shall apply the national law and it may result in the divergence in the outcome of the case. Therefore, the peculiarity of claims deriving from the infringement of patent law is that in such cross-border disputes the national laws of different Member States are applicable. This is a significant precondition for the application of Article 8(1) of the Brussels Ia regulation which may lead to irreconcilability of judgments. Unsurprisingly, the court concluded that there is a risk of irreconcilable judgments in such cases: “<...> potential divergences in the outcome of the proceedings are likely to arise in the same situation of fact and law, so that it is possible that they will culminate in irreconcilable judgments resulting from separate proceedings” (Para. 27, Case C-616/10, 2012). Therefore, due to the peculiarities of the applicable law in the disputes when the claim is brought for the infringement of patent rights, Article 8(1) of the Brussels Ia regulation may be applicable.

### **3.3. Claims deriving from infringement of design law**

The peculiarities of Article 8(1) of the Brussels Ia regulation when the claim is brought against the infringer of design law were examined in *Nintendo* case (Joined case C-24/16 and C-25/16, 2017). Nintendo is a multinational company and the holder of several registered Community designs relating to Wii accessories. BigBen Germany (a company incorporated under German laws) and BigBen France (the parent company of BigBen Germany) also use images of goods corresponding to the protected designs held by Nintendo. Nintendo brought a claim in the German court and argued that BigBen Germany and BigBen France’s sale of certain goods made by BigBen France infringes its rights under the registered Community designs held by it. BigBen France argued that the German courts lack jurisdiction in this case.

The enforcement of the design holder’s rights was important in this case. According to Article 29 of the Regulation No. 6/2002 (Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs), one of the objects

of this act is to ensure that the enforcement of the rights conferred by a Community design are protected effectively throughout the European Union. Community designs have unitary character and equal effect throughout the European Union<sup>8</sup>. These goals are achieved with the uniform sanctions provided by this regulation and national laws (Para. 56, Joined case C-24/16 and C-25/16, 2017).

The CJEU decided that in such situation when the claim is brought against the parent company and its subsidiary and both infringements relate to the same protected designs and both defendants have acted in the same group, it constitutes the same situation of fact (Para. 51 Joined case C-24/16 and C-25/16, 2017). The territorial scope of the rights of the Community design holder, conferred under Regulation No 6/2002, extend to the entire area of the European Union on which designs enjoy uniform protection and have effect (Para. 59, Joined case C-24/16 and C-25/16, 2017). Thus, the design holder enjoys the same protection against the violation of design holder's right in the whole EU.

## Conclusions

The CJEU has established rather strict rules for the interpretation of Article 8(1) of the Brussels Ia regulation. The major practical difficulties appear when the national courts apply “connectedness” and “irreconcilability of judgments” criteria. Both elements must be established. Pursuant to the latest CJEU case law, different legal bases of the claims against different defendants shall not mean that the claims are not connected. The importance of the admissibility of a claim against an “anchor” defendant has been debatable. Though the CJEU has established that admissibility of a claim against such defendant should not exclude the application of Article 8(1) of the Brussels Ia regulation. There is national case law which supports the approach that when the court is seized with an action against multiple defendants it shall firstly analyse admissibility of a claim against an “anchor creditor”.

Though the CJEU has not directly accepted, Article 8(1) of the Brussels Ia regulation shall not give rise to the abuse of the EU law. Since this article gives significant procedural advantage to the plaintiff, the courts should assess whether there are any proofs that the plaintiff (or the parties) deliberately sought to circumvent the general rule of jurisdiction. There is significant development of the CJEU case law in this area. The court has found that the objective criteria of this article should be also coupled with the subjective assessment of the abuse of the EU law. Nevertheless, according to the (*CDC Hydrogen*) approach, there must be irresistible proof that a plaintiff (or the parties) sought to abuse EU law. Also, the application of this article differs in some civil proceedings (claims deriving from the infringement of the EU competition, patent and design law) due to the specific subject matter of the dispute and peculiar legal regulation.

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<sup>8</sup> Article 1(3) of Regulation No. 6/2002 of 12 December 2001 on Community designs.

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