

Case C-912/19

Request for a preliminary ruling

Date lodged:

13 December 2019

Referring court:

Oberlandesgericht Düsseldorf (Germany)

Date of the decision to refer:

4 December 2019

Defendant and appellant:

Agrimotion S.A.

Applicant and respondent:

ADAMA Deutschland GmbH

OBERLANDESGERICHT DÜSSELDORF (HIGHER REGIONAL COURT,
DÜSSELDORF, GERMANY)

ORDER

In the case of

Agrimotion S.A., ... Bydgoszcz, Poland,

defendant and appellant,

...

v

ADAMA Deutschland GmbH, ... Cologne,

applicant and respondent,

... on 4 December 2019, the 20th Civil Chamber of the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf)

made the following o r d e r:

[Or. 2]

I.

The proceedings are stayed.

II.

The Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) submits the following questions to the Court of Justice of the European Union concerning the interpretation of Article 52 of Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC ('the Plant Protection Products Regulation')

for a preliminary ruling:

Can an undertaking which places a plant protection product authorised in the Member State of origin on the market of the Member State of introduction rely on the parallel trade permit granted by the competent authority of the Member State of introduction to a third undertaking, if the canisters containing the plant protection product and in which that product is placed on the market of the Member State of introduction indicate both the holder of the permit and the importing undertaking? If there are any additional requirements, what are they?

G R O U N D S:

- 1 The applicant distributes a number of plant protection products in Germany, in respect of which it has been granted an authorisation in Germany. It also distributes the plant protection products in other Member States, in which, where appropriate, they are purchased by the defendant, a company established in Poland, in order to be imported into and distributed in the Federal Republic of Germany. The defendant advertises that distribution in German on the Internet. The holder of the parallel trade permit granted by the competent German authority on the basis of identity with the plant protection products authorised for the benefit of the applicant in Germany as reference products is not the defendant but Bernbeck **[Or. 3]** LLP, a company established in the United Kingdom. The managing director of the defendant notified the appropriate register in Cardiff that he holds, directly or indirectly, more than 75% of the shares in Bernbeck LLP.
- 2 Before the canisters containing the plant protection products are imported into the Federal Republic of Germany, the defendant places a new label on them. This label indicates *inter alia* the name of the defendant as the distributing undertaking, a new name of the plant protection product in question, the name of the reference

product in the Federal Republic of Germany, and the name of the holder of the parallel [trade] permit. An example of this is displayed below. [Or. 4]

WORKING DOCUMENT



[Or. 5]

- 4 The applicant considers the distribution of those canisters in the Federal Republic of Germany to be impermissible. It argues that the defendant is not the holder of the parallel trade permit.
- 5 Against this, the defendant claims that it can rely on the parallel trade permit granted to Bernbeck LLP where — as in the present case — that permit is indicated on the canisters. It maintains that this is also the view taken by the competent authority.
- 6 In accordance with the form of order sought, the Landgericht (Regional Court, Germany) imposed an injunction on the defendant and ordered it to provide information; it also found that the defendant is under an obligation to pay damages. The Landgericht (Regional Court, Germany) proceeded from the assumption that the defendant cannot rely on the parallel trade permit granted to Bernbeck LLP. According to that court, that permit is, as is clear from the second sentence of Article 52(4) of the Plant Protection Products Regulation, personal.
- 7 The defendant has appealed against that judgment. It relies in particular on the opposite view taken by the competent German authority as well as on the practice in other Member States.

The question referred for a preliminary ruling

- 8 The resolution of the dispute hinges on the question referred for a preliminary ruling. If it were found that the defendant cannot rely on the parallel trade permit granted to Bernbeck LLP, the appeal would have to be dismissed. Under German law, the applicant, as a competitor of the defendant, can seek an injunction from the courts with respect to the distribution of the plant protection products in the Federal Republic of Germany, if that distribution is impermissible. Whether that distribution is impermissible depends on the interpretation of Article 52 of the Plant Protection Products Regulation. [It is true that the Court of Justice, in its judgment of 14 November 2019, *Vaselife International and Chrysal International* (C-445/18, EU:C:2019:968), has already ruled on Article 52 of the Plant Protection Products Regulation; it has not, however, ruled on the issues relevant to the present case.
- 9 The requirements set out in Article 52 of the Plant Protection Products Regulation, which are not the subject matter of the reference made, are met. It is not disputed that the plant protection products are authorised in the Member States in which the defendant purchases them. The plant production products are also the subject of a **[Or. 6]** parallel import permit granted by the competent German authority. However, it is unclear what consequences follow from the fact that the holder of the parallel trade permit is not the defendant but Bernbeck LLP.
- 10 The Court of Justice has held, with respect to the legal situation prior to the entry into force of the Plant Protection Products Regulation, in its judgment of

8 November 2007, *Escalier and Bonnarel* (C-260/06 and C-261/06; EU:C:2007:659), that there is no objection to national provisions according to which a simplified procedure for import in the context of parallel trade is required and the authorisation is personal (paragraph 37 et seq.). In Germany, the courts and academic writers conclude from *inter alia* the second sentence of Article 52(4) of the Plant Protection Products Regulation that that case-law continues to apply, namely, that it is clear from that provision that it is possible for a number of parallel trade permits to be granted in respect of the same product.

- 11 However, that is doubtful as, according to recital 9 of the Plant Protection Products Regulation, the obstacles to trade between the Member States should be reduced further. According to the practice of the competent authorities of a number of Member States (United Kingdom, Lithuania), set out by the defendant, it seems possible for undertakings to rely on a parallel trade permit granted to a third undertaking; this is because ... the authorisation documents distinguish between the holder of the [parallel trade] permit and the importer. That is a possibility in particular where the holder of the parallel trade permit — as in the present case — is indicated on the canisters and therefore, a contact person and responsible party is known; in that manner, the reasons given in the judgment of 8 November 2007, *Escalier and Bonnarel* (C-260/06 and C-261/06, EU:C:2007:659) for the parallel trade permit being personal are thus taken into account. The competent authority of the Federal Republic of Germany (Bundesamt für Verbraucherschutz und Lebensmittelsicherheit (Federal Office for Consumer Protection and Food Safety)) also assumes such a possibility under certain circumstances.
- 12 Even if that is generally permissible, it remains unclear whether there are further requirements in that respect. For instance, it is conceivable that that undertaking must be indicated at the time when the application for a parallel trade permit is made, in order that the competent authority is aware of which undertaking is in fact responsible. The competent German authority stated that distribution by the [Or. 7] defendant in Germany is permissible where — as in the present case — the holder of the [parallel trade] permit is indicated on the label and that holder of the [parallel trade] permit is the ‘first one to place the product on the market in Germany’; that authority therefore appears to proceed from the assumption that it is only further distribution within Germany that may then be carried out by any other undertaking. Whether any possible further requirements are in fact met can only be determined once the court is aware of what those requirements are.

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