



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-291/16  
Schweppes SA v Red Paralela SL and Red Paralela BCN SL

**Advocate General Mengozzi defines the criteria that determine whether Schweppes SA, the Spanish subsidiary of the Orangina Schweppes Group, can oppose the importation into and/or marketing in Spain of Schweppes goods coming from the United Kingdom, where that mark is owned by Coca-Cola**

*According to the Advocate General, EU law precludes reliance on an exclusive right if, given the economic links between their respective proprietors, it is clear that the marks are under unitary control and that Schweppes has the possibility of determining directly or indirectly the goods to which the mark 'Schweppes' in the United Kingdom may be affixed and of controlling the quality of those goods*

Schweppes International Ltd is the proprietor of the mark 'Schweppes' in Spain, where the company Schweppes SA has an exclusive right to exploit that mark.<sup>1</sup> In 2014, Schweppes SA initiated infringement proceedings against Red Paralela for importing into and marketing in Spain bottles of tonic water from the United Kingdom bearing the mark 'Schweppes'. In the United Kingdom, the mark 'Schweppes' is owned by Coca-Cola, which acquired the rights to it by assignment.<sup>2</sup>

According to Schweppes SA, those actions are unlawful, in that the bottles of tonic water were put up and placed in the market not by itself or with its consent, but by Coca-Cola, which has no connection with the Orangina Schweppes Group. It maintains that, given the fact that the signs and goods at issue are identical, consumers will be unable to identify the commercial origin of those bottles. In its defence against those infringement proceedings, Red Paralela has argued exhaustion of the trade-mark rights resulting from tacit consent, in so far as concerns goods bearing the mark 'Schweppes' coming from Member States of the European Union in which Coca-Cola is the proprietor of the mark. Red Paralela also asserts that there are undeniable legal and economic links between Coca-Cola and Schweppes International in the common exploitation of the sign 'Schweppes' as a universal mark.

Against that background, the Juzgado de lo Mercantil nº8 de Barcelona (Commercial Court No 8, Barcelona, Spain) referred a question to the Court of Justice in order to ascertain whether or not EU law<sup>3</sup> precludes Schweppes SA from invoking the exclusive right that it enjoys under Spanish law to oppose the importation into and/or marketing in Spain of 'Schweppes' goods which come from the United Kingdom, where the mark is owned by Coca-Cola.

In his Opinion delivered today, Advocate General Paolo Mengozzi points out, first, that **the Court has already stated that the principle of exhaustion of the rights conferred by the trade mark 'applies where the owner of the trade mark in the importing State and the owner of the trade mark in the exporting State are the same or where, even if they are separate persons, they**

<sup>1</sup> Schweppes International Ltd and Schweppes SA are, respectively, the English and the Spanish subsidiaries of Orangina Schweppes Holding, the ultimate parent company of the Orangina Schweppes Group.

<sup>2</sup> In Europe, Cadbury Schweppes (now Orangina Schweppes Group) was, for many years, the sole proprietor of various national registrations of the sign 'Schweppes'. However, in 1999, it sold to Coca-Cola Group the rights relating to the mark 'Schweppes' in 13 States belonging to the Economic European Area, including the United Kingdom, but retained ownership of those rights in the other 18 States.

<sup>3</sup> Article 36 TFEU and Article 7(1) of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (OJ 2008 L 299, p. 25).

**are economically linked'**,<sup>4</sup> as is the case for a manufacturer and its distributor, a licensor and its licensee, or companies belonging to the same group. The Court held that, accordingly, the goods bearing the trade mark were manufactured under the control of a single body, and so the free movement of those goods did not call into question the function of the mark.

According to the Advocate General, in the light of the Court's case-law, the nature of the relations between the entities concerned is of less importance than the circumstance that, as a result of those relations, the trade mark happens to be under unitary control. In that respect, **the Advocate General is of the opinion that that criterion is capable of covering** not only the situations mentioned by the Court, in which use of the mark is under the control of a single person (the licensor or the manufacturer) or of an entity which constitutes an economic unit, but **also situations in which use of the mark is subject to the joint control of two separate persons (each of them being the proprietor of rights recognised nationally) that act, in the exploitation of the mark, as one and the same centre of interests.** In such situations, that unitary control means that national laws on trade marks may not be relied upon to restrict the movement of the goods at issue.

The Advocate General then goes on to point out that, for the purposes of the application of the principle of exhaustion, the proprietors of parallel marks which arise from the fragmentation of a single mark may be regarded as 'economically linked' when they coordinate their commercial policies with a view to exercising joint control over the use of their respective marks. However, in order for the right to be exhausted, such unitary control of the mark must allow the entities which exercise that control the possibility of determining directly or indirectly the goods to which the mark may be affixed and of controlling their quality.

With regard to proof of existing coordination between the proprietors of parallel marks such as might give rise to unitary control, the Advocate General considers that it is, in principle, for the parallel importer to bear the burden of such proof. Whilst it would be excessive, in situations such as that at issue in the present case, to require the parallel importer to prove unitary control, it must nevertheless put forward a body of precise and consistent evidence showing the existence of such control. If there is such a body of precise and consistent evidence, it would then be for the proprietor, if it intends to oppose the importation of the goods concerned into its territory, to prove that it has not reached any agreement, and that it is not collaborating with the proprietor of the mark in the exporting State in order to bring the mark under unitary control.

Lastly, **the Advocate General concludes that EU law precludes reliance on an exclusive right, where it is clear from the economic links existing between the proprietor of the mark in the importing State and the proprietor of the mark in the exporting State that those marks are under unitary control and that the proprietor of the mark in the importing State has the possibility of determining directly or indirectly the goods to which the mark in the exporting State may be affixed and of controlling their quality.** Against that background, it will fall to the national court, in the light of all the circumstances of the case at issue and after shedding light on the connections between the proprietors of the parallel marks (Schweppes International and Coca-Cola), to determine whether the conditions for the exhaustion of Schweppes International's right have been met with regard to the bottles of tonic water at issue.

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**NOTE:** The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of EU law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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<sup>4</sup> Case [C-9/93](#) IHT Internationale Heiztechnik and Danzinger.

*Unofficial document for media use, not binding on the Court of Justice.*

The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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