

Kluwer Patent Blog

Jurisdiction at ‘Place of Tort’ Assumed for Negative Declaratory Actions, CJEU of 25 October 2012

Thorsten Bausch (Hoffmann Eitle) · Friday, October 26th, 2012

The CJEU decided yesterday that a negative declaratory action seeking to establish the absence of liability in tort, delict, or quasi-delict does fall within the scope of the “place of tort” pursuant to Article 5 (3) of Council Regulation (EC) No 44/2001 (“Brussels Regulation” or BR), [case 133/07](#).

This question has long been in dispute, in particular in patent matters.

The lower instances of the CJEU decision, i.e. the Regional and Higher Regional Courts Hamburg, denied jurisdiction under Article 5 (3) BR since the very purpose of such actions is to establish that no tort or delict has been committed. The German Federal Court of Justice referred the question of jurisdiction to the CJEU for a preliminary ruling.

The Advocate General found in its [opinion](#) that jurisdiction for negative declaratory actions at the place of tort must be denied. The CJEU has now decided just the opposite.

The facts of the case are the following: Folien Fischer, a Swiss company, manufactures laminated paper goods and adhesive film. It distributes the basis material for continuous card forms inter alia in Germany.

Fofitec, a member of the Folien Fischer Group and also a Swiss company, holds several patents protecting special forms for sending a letter together with, inter alia, a membership card, and the basic material for these card forms.

Ritrama, an Italian company, also manufactures various kinds of laminates and multilayer film.

In its letter of March 2007, Ritrama claimed that Folien Fisher’s distribution policy and its refusal to grant patent licenses were contrary to competition law.

After receiving this letter, Folien Fischer and Fofitec brought an action before the Regional Court Hamburg for a negative declaration stating that (i) Folien Fischer was not obliged to desist from its sales practice in relation to the granting of discounts and the terms of its distribution contracts and (ii) Ritrama had no right either to have the sales practices terminated or to obtain compensation on grounds of said sales practice. Folien Fischer and Fofitec also sought a declaration that Fofitec was under no obligation to grant a license for the two patents held by that company and which protect the manufacture of forms and the basic materials for manufacture thereof.

After the action for a negative declaration had been brought, Ritrama and Ritrama AG, a Swiss subsidiary, brought an action for performance before the Tribunale di Milano. Presently the proceedings are stayed.

The CJEU first decided that the wording of Article 5 (3) BR does not exclude a negative declaratory action (note 36). Further the Court considered the special purpose of Article 5 (3), i.e. that in matters of tort, the courts of the place where the harmful event had occurred or may occur are usually the most appropriate for deciding the case, in particular on grounds of proximity and ease of taking evidence (note 38). In both cases (claim for damages and a NDA), examination undertaken by the court seized essentially relates to the same matters of law and fact (note 48).

If therefore, the relevant elements in the action for a negative declaration can either show a connection with the state in which the damages occurred or may occur or show a connection with the state in which the causal event giving rise to that damage took place, (...)the court in one of those two places, as the case may be, can claim jurisdiction to hear such an action, pursuant to Article 5(3) BR, irrespective of whether the action in question has been brought by a party against whom a claim based on that tort or delict might be made (note 52).

With this decision, the CJEU has finally clarified a question which is relevant for negative declaratory actions in patent matters and which has long been in dispute. However, jurisdiction of a negative declaratory action in patent matters filed at the “place of tort” under Article 5 (3) BR cannot include possible claims relating to other countries, but only those patents valid in the territory of the court seized (ECJ, Shevill, C-68/93).

Anja Petersen-Padberg

To make sure you do not miss out on regular updates from the Kluwer Patent Blog, please subscribe [here](#).

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.

79% of the lawyers think that the importance of legal technology will increase for next year.

Drive change with Kluwer IP Law.

The master resource for Intellectual Property rights and registration.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Friday, October 26th, 2012 at 12:00 pm and is filed under [\(Cross-border\) jurisdiction, Germany](#)

You can follow any responses to this entry through the [Comments \(RSS\) feed](#). Both comments and pings are currently closed.