

Court of Justice EU, 18 May 2017, Hummel v Nike



TRADE MARK LAW – PRIVATE INTERNATIONAL LAW

A legally distinct second-tier subsidiary, with its seat in a Member State, of a parent body that has no seat in the European Union is an ‘establishment’, within the meaning of that provision, of that parent body

- if the subsidiary is a centre of operations which, in the Member State where it is located, has a certain real and stable presence from which commercial activity is pursued, and has the appearance of permanency to the outside world, such as an extension of the parent body

41. Having regard to those considerations, the answer to the question referred is that Article 97(1) of Regulation No 207/2009 must be interpreted as meaning that a legally distinct second-tier subsidiary, with its seat in a Member State, of a parent body that has no seat in the European Union is an ‘establishment’, within the meaning of that provision, of that parent body if the subsidiary is a centre of operations which, in the Member State where it is located, has a certain real and stable presence from which commercial activity is pursued, and has the appearance of permanency to the outside world, such as an extension of the parent body.

34. As the [Advocate General stated in point 80 of his Opinion](#), Article 97(1) of Regulation No 207/2009, which provides that the courts of the Member State in which there is an establishment of a company which has no seat within the European Union are to have jurisdiction, far from being an exception to the basic rule of jurisdiction at the domicile of the defendant, which follows from Article 2(1) of Regulation No 44/2001 read in the light of recital 11 of the regulation, is, rather, an implementation of that principle, which suggests that that concept should be interpreted broadly.

35. That jurisdictional rule is a general principle, which expresses the maxim actor sequitur forum rei, because it makes it easier, in principle, for a defendant to defend himself (see, to that effect, judgments of 13 July 2000, Group Josi, C-412/98, EU:C:2000:399, paragraph 35, and of 19 February 2002, Besix, C-256/00, EU:C:2002:99, paragraph 52). Such is the case, as the [Advocate General stated in point 82 of his Opinion](#), where a party is required to defend itself before the courts of a Member State in which it has an establishment and with which it is therefore more closely linked.

36. Furthermore, that interpretation does not undermine the objectives of the legislation on the EU trade mark, set out in paragraph 28 above, as the decisions of the EU trade mark courts with jurisdiction on the basis of Article 97 of Regulation No 207/2009 have effect and cover the entire area of the European Union.

37. It follows from such a broad interpretation that there must be visible signs enabling the existence of an ‘establishment’ within the meaning of Article 97(1) of Regulation No 207/2009 to be easily recognised. As the [Advocate General stated in point 52 of his Opinion](#), the existence of an establishment thus requires a certain real and stable presence, from which commercial activity is pursued, as manifested by the presence of personnel and material equipment. In addition, that establishment must have the appearance of permanency to the outside world, such as the extension of a parent body (see, to that effect, judgments of 22 November 1978, Somafer, 33/78, EU:C:1978:205, paragraph 11; of 18 March 1981, Blanckaert & Willems, 139/80, EU:C:1981:70, paragraph 12; of 9 December 1987, SAR Schotte, 218/86, EU:C:1987:536, paragraph 10; and of 19 July 2012, Mahamdia, C-154/11, EU:C:2012:491, paragraph 48).

38. In that regard, it is irrelevant whether the establishment on the territory of a Member State of an undertaking whose seat is outside the European Union has legal personality or not (see, to that effect, judgment of 15 December 2011, Voogsgeerd, C-384/10, EU:C:2011:842, paragraph 54). Third parties must thus be able to rely on the appearance created by an establishment acting as an extension of the parent body (see, to that effect, judgment of 9 December 1987, SAR Schotte, 218/86, EU:C:1987:536, paragraph 15).

39. The fact that an undertaking with its seat in a Member State before the courts of which an action is brought is a second-tier subsidiary of the undertaking whose seat is located outside of the European Union and not a direct subsidiary of that undertaking is also irrelevant, provided that the conditions set out in paragraph 37 above are satisfied.

40. Furthermore, it is, in principle, irrelevant for the purposes of Article 97(1) of Regulation No 207/2009 whether the establishment thereby determined has participated in the alleged infringement. Such a requirement, which is not laid down in Article 97(1) of Regulation No 207/2009, would, in addition, not be reconcilable with the need for a broad interpretation of the concept of ‘establishment’, set out in paragraph 34 above.

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Court of Justice EU, 18 May 2017

(M. Ilešič (Rapporteur), A. Prechal, A. Rosas, C. Toader and E. Jarašiūnas)

JUDGMENT OF THE COURT (Second Chamber)

18 May 2017 (*)

(Reference for a preliminary ruling — Intellectual property — Regulation (EC) No 207/2009 — EU trade mark — Article 97(1) — International jurisdiction —

Action for infringement brought against an undertaking with its seat in a third country — Second-tier subsidiary with its seat in the Member State of the court seised — Definition of ‘establishment’

In Case C-617/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), made by decision of 16 November 2015, received at the Court on 23 November 2015, in the proceedings

Hummel Holding A/S

v

Nike Inc.,

Nike Retail BV,

THE COURT (Second Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, A. Prechal, A. Rosas, C. Toader and E. Jarašiūnas, Judges,

Advocate General: E. Tanchev,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 6 October 2016,

after considering the observations submitted on behalf of:

– Hummel Holding A/S, by T. Bösling, Rechtsanwalt,

– Nike Retail BV and Nike Inc., by B. Führmeyer and F. Klein, Rechtsanwälte,

– the Italian Government, by G. Palmieri, acting as Agent, and A. Collabollotta, avvocato dello Stato,

– the European Commission, by J. Samnadda, T. Scharf and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2017,

gives the following

Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 97(1) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark (OJ 2009 L 78, p. 1).

2. The request has been made in proceedings between Hummel Holding A/S, on the one hand, and Nike Inc. and its subsidiary Nike Retail BV, on the other, concerning the alleged infringement by them of an international trade mark of Hummel Holding with effect in the European Union.

Legal context

Regulation (EC) No 44/2001

3. Recitals 11 to 13 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1) state:

‘(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor. ...

(12) In addition to the defendant’s domicile, there should be alternative grounds of jurisdiction based on

a close link between the court and the action or in order to facilitate the sound administration of justice.

(13) In relation to insurance, consumer and employment contracts, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules.’

4. Article 2(1) of that regulation reads as follows:

‘Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.’

5. Article 4(1) of the regulation provides:

‘If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.’

Regulation No 207/2009

6. Regulation No 207/2009 was amended by Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 (OJ 2015 L 341, p. 21), which entered into force on 23 March 2016. However, given the date of the facts at issue in the main proceedings, the present reference for a preliminary ruling will be considered by reference to Regulation No 207/2009 as in force before that amendment.

7. Recitals 15 to 17 of Regulation No 207/2009 state:

‘(15) In order to strengthen the protection of [EU] trade marks the Member States should designate, having regard to their own national system, as limited a number as possible of national courts of first and second instance having jurisdiction in matters of infringement and validity of [EU] trade marks.

(16) Decisions regarding the validity and infringement of [EU] trade marks must have effect and cover the entire area of the [European Union], as this is the only way of preventing inconsistent decisions on the part of the courts and the [European Union Intellectual Property Office (EUIPO)] and of ensuring that the unitary character of [EU] trade marks is not undermined. The provisions of [Regulation No 44/2001] should apply to all actions at law relating to [EU] trade marks, save where this Regulation derogates from those rules.

(17) Contradictory judgments should be avoided in actions that involve the same acts and the same parties and which are brought on the basis of [an EU] trade mark and parallel national trade marks. For this purpose, when the actions are brought in the same Member State, the way in which this is to be achieved is a matter for national procedural rules, which are not prejudiced by this Regulation, whilst when the actions are brought in different Member States, provisions modelled on the rules on lis pendens and related actions of Regulation ... No 44/2001 appear appropriate.’

8. Article 94 of that regulation, entitled ‘Application of Regulation ... No 44/2001’, forms part of Title X, which contains rules on jurisdiction and procedure in legal actions relating to EU trade marks. That article provides:

'1. Unless otherwise specified in this Regulation, Regulation ... No 44/2001 shall apply to proceedings relating to [EU] trade marks and applications for [EU] trade marks, as well as to proceedings relating to simultaneous and successive actions on the basis of [EU] trade marks and national trade marks.

2. In the event of proceedings in respect of the actions and claims referred to in Article 96:

(a) Articles 2 and 4, points 1, 3, 4 and 5 of Article 5 and Article 31 of Regulation ... No 44/2001 shall not apply;

(b) Articles 23 and 24 of Regulation ... No 44/2001 shall apply subject to the limitations in Article 97(4) of this Regulation;

(c) the provisions of Chapter II of Regulation ... No 44/2001 which are applicable to persons domiciled in a Member State shall also be applicable to persons who do not have a domicile in any Member State but have an establishment therein.'

9. Article 95(1) of that regulation, entitled '[EU] trade mark courts', provides:

'The Member States shall designate in their territories as limited a number as possible of national courts and tribunals of first and second instance, hereinafter referred to as "[EU] trade mark courts", which shall perform the functions assigned to them by this Regulation.'

10. Article 96 of that regulation, headed 'Jurisdiction over infringement and validity', provides:

'The [EU] trade mark courts shall have exclusive jurisdiction:

(a) for all infringement actions and — if they are permitted under national law — actions in respect of threatened infringement relating to [EU] trade marks;
...

11. Article 97 of that regulation, entitled 'International jurisdiction', reads as follows:

'1. Subject to the provisions of this Regulation as well as to any provisions of Regulation ... No 44/2001 applicable by virtue of Article 94, proceedings in respect of the actions and claims referred to in Article 96 shall be brought in the courts of the Member State in which the defendant is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment.

2. If the defendant is neither domiciled nor has an establishment in any of the Member States, such proceedings shall be brought in the courts of the Member State in which the plaintiff is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment.

3. If neither the defendant nor the plaintiff is so domiciled or has such an establishment, such proceedings shall be brought in the courts of the Member State where [EUIPO] has its seat.
...

5. Proceedings in respect of the actions and claims referred to in Article 96, with the exception of actions for a declaration of non-infringement of [an EU] trade mark, may also be brought in the courts of the Member State in which the act of infringement has been

committed or threatened, or in which an act within the meaning of Article 9(3), second sentence, has been committed.'

12. Article 98(1) of that regulation, entitled 'Extent of jurisdiction', provides:

'[An EU] trade mark court whose jurisdiction is based on Article 97(1) to (4) shall have jurisdiction in respect of:

(a) acts of infringement committed or threatened within the territory of any of the Member States;
...

The dispute in the main proceedings and the question referred for a preliminary ruling

13. Hummel Holding is an undertaking with its seat in Denmark which manufactures sports goods, sports and leisure clothing and sports and leisure footwear. It is the proprietor of the international figurative trade mark registered under No 943057 with effect in the European Union for goods in Class 25 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended, corresponding to the following description: 'Clothing, footwear, headgear'.

14. Nike, which has its seat in the United States, is the ultimate holding company of the Nike Group, which sells sports goods across the world. Nike Retail, which has its seat in the Netherlands, also belongs to that group. Nike Retail operates the website on which Nike goods are advertised and offered for sale, in Germany in particular. In addition to online sales on that website, Nike goods are sold in Germany through independent dealers supplied by Nike Retail. Wholesale or retail sales in Germany are not directly conducted by the companies in the Nike Group.

15. Nike Deutschland GmbH, which has its seat in Frankfurt am Main (Germany) and is not a party to the main proceedings, is, according to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), a subsidiary of Nike Retail. Nike Deutschland does not have its own website and does not sell goods to end consumers or intermediaries. However, it negotiates contracts between intermediaries and Nike Retail, and supports Nike Retail in connection with advertising and the performance of contracts. Nike Deutschland also provides aftersales service for end consumers.

16. Hummel Holding claims that some Nike products, in particular basketball shorts, infringe the trade mark referred to in paragraph 13 above and that most of the infringements took place in Germany. It brought an action against Nike and Nike Retail before the Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany), which ruled that it had jurisdiction on the ground that Nike Deutschland was an establishment of Nike, but dismissed the action on the merits. Hummel Holding appealed to the referring court against that decision.

17. Hummel Holding seeks an order that the defendants cease from importing, exporting and advertising those goods, offering them for sale, placing them on the

market and allowing them to be placed on the market, in the European Union (in the alternative, in the Federal Republic of Germany) as regards Nike and in the Federal Republic of Germany as regards Nike Retail.

18. Nike and Nike Retail object that the German courts lack international jurisdiction.

19. The referring court considers that the international jurisdiction of the German courts to hear the action in respect of the European Union as a whole, brought against the companies in the Nike group, can be based only on Article 97(1) of Regulation No 207/2009. It states, however, that the scope of the concept of ‘establishment’ within the meaning of that provision, with regard to distinct first and second-tier subsidiaries, is disputed and has not been clarified by the Court.

20. In those circumstances, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Under which circumstances is a legally distinct second-tier subsidiary, with its seat in an EU Member State, of an undertaking that itself has no seat in the European Union to be considered as an “establishment” of that undertaking within the meaning of Article 97(1) of [Regulation No 207/2009]?’

Consideration of the question referred

21. By its question, the referring court asks, in essence, whether Article 97(1) of Regulation No 207/2009 must be interpreted as meaning that a legally distinct second-tier subsidiary, with its seat in a Member State, of a parent body that has no seat in the European Union is an ‘establishment’ of that parent body within the meaning of that provision.

22. It must be noted that the Court has consistently held that it follows from the need for uniform application of EU law and from the principle of equality that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, having regard not only to its wording but also to the context of the provision and the objective pursued by the legislation in question (see, *inter alia*, judgments of 18 January 1984, *Ekro*, 327/82, EU:C:1984:11, paragraph 11; of [3 September 2014, *Deckmyn and Vrijheidsfonds*](#), C-201/13, EU:C:2014:2132, paragraph 14; and of 16 July 2015, *Abcur*, C-544/13 and C-545/13, EU:C:2015:481, paragraph 45).

23. That applies to the concept of ‘establishment’ within the meaning of Article 97(1) of Regulation No 207/2009, since that concept is not defined in that regulation and the regulation makes no reference to national laws for the purpose of determining its meaning.

24. First of all, it should be noted that Regulation No 207/2009 provides, subject to the exceptions to which it expressly refers, for the application of Regulation No 44/2001 to proceedings relating to EU trade marks and applications for such trade marks, as is expressly stated

in recital 16 and Articles 94 and 97(1) of Regulation No 207/2009.

25. In that regard, although certain provisions of Regulation No 44/2001, such as Articles 5(5) and 18(2), also refer to the concept of ‘establishment’, so that it cannot be ruled out that the guidance from the Court’s case-law on those two provisions may to some extent be relevant for interpreting the concept of ‘establishment’ within the meaning of Regulation No 207/2009, it cannot, however, be considered that that concept must necessarily bear the same meaning, whether it is used in one or the other of the two regulations.

26. Thus, notwithstanding the principle that Regulation No 44/2001 applies to proceedings relating to an EU trade mark, the application of certain provisions of that regulation, in particular the rules in Articles 4 and 5(1), to proceedings in respect of the actions and claims referred to in Article 96 of Regulation No 207/2009 is excluded by Article 94(2) of that regulation. In the light of that exclusion, the jurisdiction of the EU trade mark courts laid down in Article 95(1) of Regulation No 207/2009 to hear the actions and claims referred to in Article 96 of that regulation results from rules directly provided for by that regulation, which have the character of *lex specialis* in relation to the rules provided for by Regulation No 44/2001 (see, to that effect, [judgment of 5 June 2014, *Coty Germany*](#), C-360/12, EU:C:2014:1318, paragraphs 26 and 27).

27. In addition, Regulation No 44/2001, on the one hand, and Regulation No 207/2009, on the other, do not pursue the same objectives. Thus, according to recitals 12 and 13 of Regulation No 44/2001, that regulation aims to lay down, in addition to the defendant’s domicile, alternative grounds of jurisdiction based on a close link between the court and the action, or in order to facilitate the sound administration of justice, or, in relation to insurance, consumer and employment contracts, to protect the weaker party by rules of jurisdiction more favourable to his interests than the general rules.

28. Regulation No 207/2009 for its part aims, according to recitals 15 to 17, to strengthen the protection of EU trade marks, to prevent inconsistent decisions on the part of the courts and to ensure that the unitary character of those trade marks is not undermined, by means of decisions of EU trade mark courts which have effect and cover the entire area of the European Union.

29. Accordingly, in order to determine the defining characteristics of the concept of ‘establishment’ within the meaning of Article 97(1) of Regulation No 207/2009, it is necessary, in accordance with the Court’s case-law set out in paragraph 22 above, to take account not only of the wording of that provision, but also of its context and objectives.

30. The wording of Article 97(1) of Regulation No 207/2009 does not explain the concept of ‘establishment’ for the purposes of its application. Nevertheless, it is apparent that a defendant who is not domiciled within the European Union is capable of having one or several establishments within the

European Union, which a priori appears to suggest that, in such a case, actions may be brought before the courts of the various Member States where those establishments are located.

31. As regards the context of which Article 97 of Regulation No 207/2009 forms part, that provision ensures that a court within the European Union always has jurisdiction to hear and determine cases concerning the infringement and validity of an EU trade mark. That article, which provides for several grounds of international jurisdiction, lists in paragraphs 1 to 4 the successive criteria for determining the Member State whose courts have jurisdiction, under Article 98(1)(a) of that regulation, in order to ensure effective protection of EU trade marks throughout the entire area of the European Union.

32. Article 97(1) of Regulation No 207/2009 provides, as the primary rule, for jurisdiction of the courts of the Member State in which the defendant is domiciled or, if he is not domiciled in any of the Member States, of the Member State in which he has an establishment. Only if the defendant is not domiciled in and has no establishment in a Member State of the European Union does Article 97(2) and (3) provide, as an alternative, for jurisdiction to lie with the courts of the domicile or the establishment of the plaintiff and, as a further alternative, with the courts of the Member State where EUIPO has its seat.

33. As regards Article 97(5) of Regulation No 207/2009, that paragraph provides, inter alia, that the courts of the Member State in which the act of infringement has been committed or threatened are to have jurisdiction, although in this case the extent of the jurisdiction of such courts is limited to the territory of the Member State in which they are located, as appears from Article 98 of Regulation No 207/2009.

34. As the [Advocate General stated in point 80 of his Opinion](#), Article 97(1) of Regulation No 207/2009, which provides that the courts of the Member State in which there is an establishment of a company which has no seat within the European Union are to have jurisdiction, far from being an exception to the basic rule of jurisdiction at the domicile of the defendant, which follows from Article 2(1) of Regulation No 44/2001 read in the light of recital 11 of the regulation, is, rather, an implementation of that principle, which suggests that that concept should be interpreted broadly.

35. That jurisdictional rule is a general principle, which expresses the maxim actor sequitur forum rei, because it makes it easier, in principle, for a defendant to defend himself (see, to that effect, judgments of 13 July 2000, Group Josi, C-412/98, EU:C:2000:399, paragraph 35, and of 19 February 2002, Besix, C-256/00, EU:C:2002:99, paragraph 52). Such is the case, as the [Advocate General stated in point 82 of his Opinion](#), where a party is required to defend itself before the courts of a Member State in which it has an establishment and with which it is therefore more closely linked.

36. Furthermore, that interpretation does not undermine the objectives of the legislation on the EU trade mark, set out in paragraph 28 above, as the decisions of the EU trade mark courts with jurisdiction on the basis of Article 97 of Regulation No 207/2009 have effect and cover the entire area of the European Union.

37. It follows from such a broad interpretation that there must be visible signs enabling the existence of an 'establishment' within the meaning of Article 97(1) of Regulation No 207/2009 to be easily recognised. As the [Advocate General stated in point 52 of his Opinion](#), the existence of an establishment thus requires a certain real and stable presence, from which commercial activity is pursued, as manifested by the presence of personnel and material equipment. In addition, that establishment must have the appearance of permanency to the outside world, such as the extension of a parent body (see, to that effect, judgments of 22 November 1978, Somafer, 33/78, EU:C:1978:205, paragraph 11; of 18 March 1981, Blanckaert & Willems, 139/80, EU:C:1981:70, paragraph 12; of 9 December 1987, SAR Schotte, 218/86, EU:C:1987:536, paragraph 10; and of 19 July 2012, Mahamdia, C-154/11, EU:C:2012:491, paragraph 48).

38. In that regard, it is irrelevant whether the establishment on the territory of a Member State of an undertaking whose seat is outside the European Union has legal personality or not (see, to that effect, judgment of 15 December 2011, Voogsgaard, C-384/10, EU:C:2011:842, paragraph 54). Third parties must thus be able to rely on the appearance created by an establishment acting as an extension of the parent body (see, to that effect, judgment of 9 December 1987, SAR Schotte, 218/86, EU:C:1987:536, paragraph 15).

39. The fact that an undertaking with its seat in a Member State before the courts of which an action is brought is a second-tier subsidiary of the undertaking whose seat is located outside of the European Union and not a direct subsidiary of that undertaking is also irrelevant, provided that the conditions set out in paragraph 37 above are satisfied.

40. Furthermore, it is, in principle, irrelevant for the purposes of Article 97(1) of Regulation No 207/2009 whether the establishment thereby determined has participated in the alleged infringement. Such a requirement, which is not laid down in Article 97(1) of Regulation No 207/2009, would, in addition, not be reconcilable with the need for a broad interpretation of the concept of 'establishment', set out in paragraph 34 above.

41. Having regard to those considerations, the answer to the question referred is that Article 97(1) of Regulation No 207/2009 must be interpreted as meaning that a legally distinct second-tier subsidiary, with its seat in a Member State, of a parent body that has no seat in the European Union is an 'establishment', within the meaning of that provision, of that parent body if the subsidiary is a centre of operations which, in the Member State where it is located, has a certain real and stable presence from which commercial activity is pursued, and has the

appearance of permanency to the outside world, such as an extension of the parent body.

Costs

42. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 97(1) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the European Union trade mark must be interpreted as meaning that a legally distinct second-tier subsidiary, with its seat in a Member State, of a parent body that has no seat in the European Union is an ‘establishment’, within the meaning of that provision, of that parent body if the subsidiary is a centre of operations which, in the Member State where it is located, has a certain real and stable presence from which commercial activity is pursued, and has the appearance of permanency to the outside world, such as an extension of the parent body.

[Signatures]

Opinion of A-G Tanchev

delivered on 12 January 2017 (1)

Case C-617/15

Hummel Holding A/S

v

Nike Inc.

Nike Retail BV

(Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany))

(Reference for a preliminary ruling – Intellectual Property – European Union trade mark – International Jurisdiction – Extended jurisdiction to cover the entire area of the European Union – actor sequitur forum rei – Notion of ‘establishment’ under Article 97(1) of Regulation (EC) No 207/2009 on the Community trade mark – Action for infringement of a trade mark brought against an undertaking with its seat outside of the European Union – Jurisdiction based on the seat in a Member State of the third State undertaking’s legally distinct subsidiary)

1. European trade marks need effective protection throughout the European Union. (2)

2. This can best be achieved by enabling courts to issue relief of a pan-European nature, covering trade mark infringements that occur not only in the forum Member State but also in any of the EU Member States. (3) The EU legislature has provided for comprehensive relief of this kind, (4) but grants the required extended jurisdiction (5) exclusively to a court which can base its international jurisdiction on Article 97(1) to (4) of the Community trade mark regulation (6) (‘CTMR’). This supersedes the more general jurisdictional rules of the CTMR and those of the ‘Brussels I’ (7) Regulation. (8)

3. The Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf, Germany), acting in its capacity as a Community trade mark court, queries whether it has comprehensive jurisdiction of this kind for an infringement claim brought by a Danish company against a US defendant. According to Article 97(1) CTMR, courts have international jurisdiction if a defendant, who is not domiciled in the EU, has an establishment in the forum Member State. As the US defendant has a second-tier subsidiary in Germany, the question arises whether that entity is an ‘establishment’ for the purposes of Article 97(1) CTMR.

I. Legal framework

A. CTMR

4. Recital 16 states:

‘Decisions regarding the validity and infringement of Community trade marks must have effect and cover the entire area of the Community, as this is the only way of preventing inconsistent decisions on the part of the courts and the Office and of ensuring that the unitary character of Community trade marks is not undermined. The provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters should apply to all actions at law relating to Community trade marks, save where this Regulation derogates from those rules.’

5. Article 97 is entitled ‘International jurisdiction’ and provides in subsections 1 and 2:

‘1. Subject to the provisions of this Regulation as well as to any provisions of Regulation (EC) No 44/2001 applicable by virtue of Article 94, proceedings in respect of the actions and claims referred to in Article 96 shall be brought in the courts of the Member State in which the defendant is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment.

2. If the defendant is neither domiciled nor has an establishment in any of the Member States, such proceedings shall be brought in the courts of the Member State in which the plaintiff is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment.’

6. Article 98 is entitled ‘Extent of jurisdiction’; its subsection 1 reads:

‘A Community trade mark court whose jurisdiction is based on Article 97(1) to (4) shall have jurisdiction in respect of:

(a) acts of infringement committed or threatened within the territory of any of the Member States;

(b) acts within the meaning of Article 9(3), second sentence, committed within the territory of any of the Member States.’

B. Brussels I

7. Recitals 11 and 12 state:

‘(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject matter of the litigation or the

autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.'

8. Section 1, entitled 'General provisions', of Chapter II, entitled 'Jurisdiction', comprises Articles 2 to 4, which provide in their respective first paragraphs:

'Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

'Article 4

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.'

II. The facts in the main proceedings and the question referred for a preliminary ruling

9. Hummel Holdings A/S, the plaintiff in the main proceedings, is a producer of sports goods and sports and recreational clothing and has its seat in Denmark. Hummel has instituted proceedings in Germany at the Landgericht Düsseldorf (Regional Court, Düsseldorf, Germany) against two defendants in the Nike group for selling items of sports clothing allegedly in breach of its international figurative trade mark No 943057, which has also been registered to take effect in the European Union for goods in class 25.

10. The first defendant, Nike Inc., is the ultimate holding company of the Nike Group and has its seat in the United States of America.

11. The second defendant Nike Retail BV belongs to that group and is domiciled in the Netherlands. Nike Retail operates the website www.nike.com/de, on which NIKE goods are advertised and offered in English and German for sale in Germany as well as other countries.

12. Most of the infringements of the plaintiff's trade mark are alleged to have taken place in Germany. In Germany goods can be ordered online via Nike Retail's website or through independent dealers that are not part of the Nike Group and that themselves order those goods from Nike Retail. In addition to this, pre-sale and post-sale services are provided by Nike Deutschland GmbH. This company does not sell NIKE goods but supports customers by telephone or email when they are ordering them, and also acts as an agent of Nike Retail for contracts concluded with dealers. With regard to post-sale services, Nike Deutschland deals with questions on exchanges or complaints, and supports dealers in advertising and the performance of those contracts.

13. Nike Deutschland has its seat in Frankfurt am Main and is not a party to the main proceedings. It is however a second-tier subsidiary of the first defendant Nike Inc, and its presence in Germany is central to the

plaintiff's case on the jurisdiction of the German courts.

14. Before the Landgericht Düsseldorf (Regional Court, Düsseldorf), the plaintiff requested (I) an injunction prohibiting the import, export, advertising, offering for sale and placing on the market of the goods concerned or allowing those goods to be placed on the market, and (II) orders to disclose, inter alia, copies of invoices, and to withdraw from circulation and destroy the goods concerned, and finally (III) a declaration of a right to damages.

15. As to the first defendant, the plaintiff sought these injunctions and orders (1) with regard to the territory of the European Union, and in the alternative, (2) with regard to the territory of the Federal Republic of Germany. As to the second defendant, the cause of action appertained only to the territory of the Federal Republic of Germany. The order for reference concerns only the first claim for relief.

16. The Landgericht Düsseldorf (Regional Court, Düsseldorf), on the basis that Nike Deutschland was to be considered an establishment of the first defendant, thereby creating a link between the US defendant and Germany, affirmed that it had international jurisdiction, and with respect to the territory of the whole of the European Union. However, it dismissed the suit on the facts. On appeal by the plaintiff to the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), the defendants continue to contend that the German courts do not have international jurisdiction with respect to the first form of relief being sought.

17. It is in that context that the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) referred the following question for a preliminary ruling: *'Under which circumstances is a legally distinct second-tier subsidiary, with its seat in an EU Member State, of an undertaking that itself has no seat in the European Union to be considered as an "establishment" of that undertaking within the meaning of Article 97(1) of Regulation No 207/2009 ?'*

18. Written observations were submitted to the Court by the plaintiff and both defendants, by the Italian Government and by the European Commission. All except the Italian Government made oral submissions in the hearing which took place on 6 October 2016.

III. Assessment

A. Introduction

19. At the outset, it is important to note that, under the CTMR, only 'Community trade mark courts', which are specifically selected national courts vested with this function, (9) can decide on infringement actions. (10) The Landgericht Düsseldorf (Regional Court, Düsseldorf) and Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) have been designated as such by the German Government. (11)

20. However, not all Community trade mark courts can grant the Union-wide relief (12) claimed by the plaintiff in this case.

21. Whether or not a particular Community trade mark court has this comprehensive power depends on whether it can base its international jurisdiction on

Article 97(1) to (4) CTMR. (13) Only then 'shall' a Community trade mark court 'have jurisdiction in respect of acts of infringement committed or threatened within the territory of any of the Member States'. (14)

22. Therefore, while the plaintiff's allegation that infringements took place in Germany constitute a jurisdictional basis for a Community trade mark infringement suit in Germany under Article 97(5) CTMR, (15) this provision can only serve as a basis for jurisdiction in respect of acts of infringement committed or threatened within the territory of this forum Member State. (16) It is not a sufficient basis for granting the relief requested by the plaintiff, the effects of which extend beyond German territory. For this, jurisdiction must be based on Article 97(1) to (4) CTMR. (17)

23. As already mentioned, Article 97(1) CTMR provides such a basis of international jurisdiction if the third State defendant has an establishment in the forum Member State. (18) Therefore, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) seeks clarification of the conditions under which Nike Deutschland, with its seat in Germany, can be characterised as an establishment of Nike Inc.

B. Definition of 'establishment'

24. Article 97(1) CTMR provides that infringement proceedings in Community trade mark matters 'shall be brought in the courts of the Member State in which the defendant is domiciled or, if he is not domiciled in any of the Member States, in which he has an establishment'.

1. Autonomous definition

25. The first issue to address is whether the term 'establishment' has, as the Commission mentioned in the oral hearing, an autonomous EU-wide meaning, or whether this is to be left to the national court to determine on the basis of its domestic law. (19)

26. The latter might be suggested by the fact that the term 'domicile', under Article 59 of Brussels I (20) is to be determined in accordance with the domestic law of the Member State where the matter is brought before a court. Equally, however, Article 60 of Brussels I provides an autonomous definition of domicile for companies and associations. (21)

27. As a general rule, provisions of EU law are to be interpreted autonomously. (22) Further, an EU-wide meaning of 'establishment' is consistent with the aim of Article 97(1) to (4) CTMR to create a uniform basis for the comprehensive EU-wide jurisdiction. Therefore the approach taken in this Opinion is that an autonomous interpretation must be provided by the Court. (23)

2. 'Establishment' under the CTMR

28. While some statutory definitions have been included in the CTMR, (24) the legislature has not furnished one for the term 'establishment'.

29. In addition to this, the Court, to date, has not yet had the opportunity (25) to give an interpretation of Article 97(1) CTMR nor of the term 'establishment' as used in other provisions of the CTMR. (26)

30. In the absence of guidance in the legislative material, (27) the term 'establishment' under Article 97(1) CTMR necessarily has to be determined by recourse to sources going beyond the CTMR.

31. Prima facie the Insolvency Regulation (28) would seem to be a good source of this kind. In its Article 2(h) it provides for a statutory definition (29) of the term 'establishment', for, inter alia, the context of international jurisdiction.

32. However, in the present context this definition can neither be applied directly nor used by way of analogy. It is expressly given 'for the purposes of this Regulation' only. The purpose of attaching to establishment in the Insolvency Regulation is quite different from the context of Article 97 CTMR: Establishment based jurisdiction under the Insolvency Regulation is only operative in the context of secondary proceedings which are not based on the main centre of interest of the debtor; further, the rulings handed down in such proceedings are of limited effect. (30) In contrast, Article 97 CTMR attaches to establishment to the end of identifying a central jurisdiction in order to issue judgments with an extended effect.

3. 'Establishment' under Brussels I

33. A natural source for guidance in interpreting a jurisdictional provision of the CTMR is, however, Brussels I, as this legal instrument lays down the general rules on jurisdiction in civil and commercial matters. Brussels I applies to proceedings relating to Community trade marks, unless otherwise specified in the CTMR. (31) With its predecessor instrument (the Brussels Convention) dating back to 1968, Brussels I provides a longstanding conceptual framework, and one which also underpins more recent jurisdictional rules to be found in special regulations such as the CTMR.

34. Brussels I in its general provisions supplies some statutory definitions, (32) but it does not define the term 'establishment'.

35. However, Brussels I uses the term 'establishment' as a connecting factor for international jurisdiction under Articles 5(5) and 18.

36. The Italian Government has pointed out in its written observations, that the Italian version of the term 'establishment' as used in Brussels I ('sede d'attività') is not identical to the one used in Article 97 CTMR ('stabile organizzazione'). However, in light of the close connection between the two legal instruments, which is established by the express reference to Brussels I in recital 16 and Articles 97 and 94 CTMR, the linguistic divergence in one language version does not prevent the Court from resorting to Brussels I, which is the classical legal instrument on international jurisdiction.

37. As the participants in the preliminary ruling proceeding as well as the requesting court have pointed out, a robust body of case-law with respect to the meaning of 'establishment' exists under Brussels I.

a) Article 5(5) Brussels I

38. The first norm to be interpreted by the Court in this regard was Article 5(5) of Brussels I, (33) according to

which ‘special jurisdiction’ (34) lies ‘as regards a dispute arising out of operations of a branch, agency or other establishment in the courts for the place in which the branch, agency or other establishment is situated’.

39. The Court gave an interpretation of these notions for the first time in 1976 in its judgment in *De Bloos*, in which it stated that ‘one of the essential characteristics of the concepts of branch or agency is the fact of being subject to the direction and control of the parent body’ and that the notion of establishment is ‘based on the same essential characteristics as a branch or agency’.

(35)

40. In its judgment in *Somafer*, the Court held that ‘having regard to the fact that the concepts referred to give the right to derogate from the principle of jurisdiction of Article 2 of the Convention, their interpretation must show without difficulty the special link justifying such derogation’. (36) It added that ‘such special link comprises in the first place the material signs enabling the existence of the branch, agency or other establishment to be easily recognised and in the second place the connection that there is between the local entity and the claim directed against the parent body’.

41. With regard to the first issue, the Court stated that ‘the concept of branch, agency or other establishment implies a place of business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension’.

42. As regards the second issue, the Court ruled that ‘the claim in the action must concern the operations of the branch, agency or other establishment’ and that ‘this concept of operations comprises on the one hand actions relating to rights and contractual or non-contractual obligations concerning the management properly so-called of the agency, branch or other establishment itself such as those concerning the situation of the building where such entity is established or the local engagement of staff to work there’. (37)

43. Finally, in *Blanckaert & Willems and SAR Schotte*, the Court held that a branch, agency or establishment ‘must appear to third parties as an easily discernible extension of the parent body’ (38) and that ‘the close connection between the dispute and the court called upon to hear it must be assessed ... also by reference to the way in which these two undertakings behave in their business relations and present themselves vis-à-vis third parties in their commercial dealings’. (39)

b) Article 18(2) of Brussels I

44. In a more recent decision the Court had to give an interpretation of the same notions in the context of Article 18 of Brussels I, which provides in paragraph 2 that ‘where an employee enters into an individual contract of employment with an employer who is not

domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State’.

45. In *Mahamdia*, the Court, on the basis of an analysis of the abovementioned precedents concerning Article 5(5) of Brussels I, identified two criteria as decisive for the creation of a sufficient link to the forum Member State. The Court held that ‘first, the concept of “branch”, “agency” or “other establishment” implies a centre of operations which has the appearance of permanency, such as the extension of a parent body. It must have a management and be materially equipped to negotiate business with third parties, so that they do not have to deal directly with the parent body ... Secondly, the dispute must concern acts relating to the management of those entities or commitments entered into by them on behalf of the parent body, if those commitments are to be performed in the State in which the entities are situated’.

(40)

46. The *Mahamdia* case concerned an employment lawsuit filed by a driver employed by an embassy of the People’s Democratic Republic of Algeria against that State. In that context, the Court stated that ‘an embassy may be equated with a centre of operations which has the appearance of permanency and contributes to the identification and representation of the State from which it emanates’.

(41)

47. The Court thereby added a particular aspect to the link between the ‘parent body’ and the establishment, namely identification and representation. This corresponds to the different functions that Article 18(2) of Brussels I assumes, as compared with Article 5(5) of Brussels I: Article 18(2) concerns the special situation in which a defendant lacks EU domicile and, by then attaching to its establishment, treats that establishment as a surrogate for the lack of domicile by saying that the defendant ‘shall ... be deemed to be domiciled in that Member State’. If it is to be a surrogate, identification is the central element.

c) Synthesis

48. Both, Articles 5(5) and 18(2) of Brussels I allow the plaintiff to sue a defendant at a place which is not his domicile, but at which he has an establishment.

49. Nevertheless, both of these provisions require, beyond the mere existence of an establishment, that the dispute arose ‘out of the operations of that establishment’. Thus, under these norms, the establishment by itself is not sufficient to constitute the link to the forum State, but an additional element is needed. The second of the two criteria, which have been developed in the Brussels I case-law described above, refers exclusively to that additional element.

50. However, the text of Article 97(1) CTMR does not contain this second element, but rather contents itself with giving jurisdiction to the Member State in which the defendant has an establishment. Therefore, the second criterion of the Court’s two-pronged test as to Articles 5 and 18 of Brussels I can be ignored in the present context.

4. 'Establishment' under Article 97(1) CTMR

51. The first criterion, thus being the only one relevant to my analysis, contains two elements that point to characteristics that are independent of the particular action in which the attachment to the establishment takes place. They shed light on the essence of the notion of establishment itself. These characteristics are (a) a centre of operations, which has the (b) appearance of permanency, such as the extension of a parent body.

a) Centre of operations

52. As to the 'centre of operations' being the first characteristic, the Court has further explained that the establishment must have a management and be materially equipped to negotiate business with third parties, so that they do not have to deal directly with the parent body. (42) Abstracting from the particular given context of contracts, one may infer that some operational activity is required and a certain real and stable presence as manifested by personnel and material equipment on site is necessary. Certainly, a minimum level of organisation and a degree of stability is required; the presence of goods and bank accounts alone is not sufficient to constitute an 'establishment'. (43) Moreover the Brussels I case-law clearly requires management at local level.

53. The element of real and operative presence is evidently fulfilled in this case, where Nike Deutschland is a local company actually performing pre-sale and post-sale services for Nike customers in Germany. Nike Deutschland is a legally independent GmbH; so the element of local management is satisfied.

b) Appearance of permanency, such as an extension of a parent body

54. What, however, the defendants challenge in the present case, is whether there is indeed a sufficient link between Nike Deutschland and the first defendant. According to the case-law of the Court, that link is established by an 'appearance of permanency, such as the extension of a parent body'. (44) This suggests a certain degree of dependence and obedience on the part of the establishment.

55. The defendants make two objections in this context.

1) Legal independence of the establishment

56. First, the defendants suggest that, for formal reasons, Nike Deutschland cannot be an establishment of another firm as it is a legally independent company and, in the context of civil procedure, a formal approach needs to be taken.

57. However, as has been seen above, there is settled case-law (45) to the effect that a legally independent entity can qualify as an establishment. In the case SAR Schotte, (46) the establishment concerned was also incorporated as a German GmbH.

58. The requesting court in this context refers to Advocate General Mengozzi's opinion in Mahamdia,(47) where he stated that it was common ground that the notions of 'branch', 'agency' and 'establishment' essentially refer to entities lacking legal personality. This statement was however an obiter dictum, because the Mahamdia case concerned an embassy with no separate legal personality. The same

is true for Opinion 1/03 of the Court, (48) cited by Advocate General Mengozzi. The Opinion of the Court also did not discuss legal independence but rather added the attribute 'lacking legal personality' *colorandi causa* in the context of rules on 'branches, agencies or other establishments' in general. Whether or not an entity having legal personality could qualify as an establishment of another undertaking was not at issue there.

59. On the other hand, looking for definitions in other contexts, one can find authority, clearly saying that 'the legal form of an establishment, whether simply branch or a subsidiary with a legal personality, is not the determining factor'. (49)

60. Therefore, in the present context, there is no reason to deviate from the longstanding pertinent case-law cited above.

61. Also, the formal approach generally taken in civil procedure to which the defendants refer does not preclude the economic perspective adopted here as to whether a defendant has an establishment in a State or not. The establishment is not a party to the proceeding but merely serves as a link between the defendant and a certain territory. The argument that the establishment itself could not be bound by the judgment against its parent is irrelevant for the question of whether the place of a certain subsidiary can establish a connection between the defendant and a certain State and its courts. (50) Instead, what is decisive, is whether the subsidiary can be regarded as a base of the defendant company from which the latter can defend its interests.

2) Defendant's direction and control over the establishment

62. Secondly, Nike Deutschland does not have the same directors as the first defendant. (51) The defendants therefore argue that any control Nike Inc. has over Nike Deutschland may be weak and not immediately transparent to third parties. This argument goes to the question of how far the 'direction and control of the parent body' (52) must extend and how that can be ascertained, a question that needs to be considered against the background of the great importance of predictability (53) in jurisdictional questions.

63. Going back to the settled case-law, however, it becomes clear that actual direction and control is not at issue, but rather the perception of third parties (54) in the State where the establishment is situated. They must have the impression that the entity belongs to the parent, namely that, *'although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, [they] do not have to deal directly with such parent body but may transact business at the place of business constituting the extension'*. (55) The assessment must take place also *'by reference to the way in which these two undertakings behave in their business relations and present themselves vis-à-vis third parties in their commercial dealings'*. (56) Although a merely symbolic presence is not enough, what is decisive is that it 'contributes to the identification and

representation of the' parent 'from which it emanates'. (57)

64. In the present case, Nike Deutschland is presented as the German contact to be used concerning NIKE products (58) and it forms, by providing pre-sale and post-sale services, a relevant part of the sales organisation firmly embedded in the group's operational structure. Even though it does not act as a seller itself, it has an essential function within the management of the sales and is an integral part of the sales and merchandising organisation of Nike in Germany. An essential element of this integration is the prominent use of the name 'Nike' and also the fact that the name of the German subsidiary contains no restriction to certain tasks or businesses, but simply adds the country's name to the overall corporate name. The identity of names was also a relevant factor in the case SAR Schotte. (59)

65. The assessment of these factors needs to be carried out from the perspective of the national environment in the forum State. That is why the national court is in the best position to ascertain whether the subsidiary presents itself as a firmly-linked outpost of the defendant or not. This assessment has to be based on objective criteria that can be verified. The material factors taken into account for the purpose of assessing the characterisation as an establishment must be ascertainable by third parties. (60) They must have been public or at least made sufficiently accessible to enable third parties to be aware of them; (61) internal data about the actual direction and control within the group are not relevant for this. (62)

66. The defendants argue that insofar as a mere presumption that an entity is an establishment can be the basis of jurisdiction, the plaintiff must have necessarily acted in reliance on this presumption (subjective element). The defendants say that this is a general principle of law, that applies only when the party invoking it merits protection. (63)

67. This argument is not, however, convincing. Article 97(1) CTMR by attaching to the defendant's establishment does not aim to protect the interests of the plaintiff but those of the defendant. (64) It also needs to be stressed again that objective criteria are necessary to produce the impression of direction and control of the defendant over the entity that is potentially an establishment. In any event, the first element of a real centre of business operations is still required. Therefore, under the approach taken here, the establishment is never entirely fictitious.

68. Against this background, legal certainty and predictability (65) are ensured, from the plaintiff's as well as from the defendant's perspective. In the present case, Nike Inc., the first defendant, being the head of Nike Group, is in a position to make clear statements and correct wrong impressions. Nike Inc. therefore bears the risk of clarifying the legal and commercial connections between it and the alleged establishment, by means of explicit public messages, by restructuring its merchandising organisation or by restricting the use of its brand name by the German subsidiary, if it

wishes to avoid submission to comprehensive German jurisdiction under Article 97(1) CTMR.

c) No further element required

69. Even though Article 97(1) CTMR does not expressly require that the dispute arose 'out of the operations of that establishment', (66) in the defendants' view, (67) some involvement of the establishment in the tortious conduct for which the defendant is sued nevertheless needs to exist. (68)

1) Not an 'alternative ground of jurisdiction'

70. Recital 12 of Brussels I could support the contention that, beyond the mere presence of an establishment, a further element is necessary. Recital 12 states that '*alternative grounds of jurisdiction are generally based on a close link between the court and the action or in order to facilitate the sound administration of justice*'. (69)

71. In order to ascertain whether Article 97(1) CTMR establishes an 'alternative ground of jurisdiction' of this kind, due account must be afforded to the rationale underpinning the norm, its nature and the function of the term 'establishment' within the broader norm.

72. Article 97(1) to (4) CTMR enumerate criteria for determining the Member State, whose courts are to be entrusted with granting in one single judgment effective protection of Community trade marks throughout the European Union. (69)

73. In order to provide at least one Member State with competent courts for every situation, the legislature has constructed in Article 97(1) to (3) CTMR (70) a 'ladder of attachment' for international jurisdiction establishing a hierarchical order comprised of several points of attachment. One of these points of attachment is the 'establishment' of the defendant.

74. The ladder of attachment for international jurisdiction has a total of five steps, the first one being the defendant's EU domicile, and the second being the defendant's EU establishment. (71) The third is the plaintiff's EU domicile, and the fourth the plaintiff's EU establishment. (72) Finally, the seat of the Office for Harmonisation in the Internal Market can determine the competent court. (73)

75. 'Establishment' comes into play at the second level of attachment. It is only applicable if the defendant is not domiciled within the EU, given that this is the first step. Thus, domicile maintains its position as the primary connecting factor for jurisdiction, while establishment is secondary.

76. Under the general regime of Brussels I, in which the defendant's EU domicile is also the primary point of attachment, (74) the determination of international jurisdiction for third-State defendants is left to the national law of the forum Member State. (75) This would be undesirable under the extended pan-European jurisdiction of the CTMR. Protection of a uniform trade mark across the Union in one judgment through comprehensive jurisdiction requires a uniform basis of jurisdiction. That is why under the CTMR the rules on general jurisdiction provided by Brussels I were declared inapplicable in the CTMR (76) and replaced

by the specific autonomous ladder of attachment in Article 97(1) to (3) CTMR.

77. As to the nature of Article 97(1) to (3) CTMR, it can be seen from the above that it constitutes a specific rule of general jurisdiction rather than a rule of special jurisdiction. It does not create an 'alternative ground' of jurisdiction (77) but defines the general jurisdiction for the purposes of the CTMR, thereby replacing the general rules that would otherwise be applicable. 'Establishment' in Article 97(1) CTMR does not furnish a ground of jurisdiction 'in addition to the defendant's domicile'. (78) Rather, it applies 'instead of the defendant's domicile', where the latter is not available. It is therefore better viewed as a surrogate than as an 'alternative'.

78. Consequently, no further element is required.

2) Broad interpretation in light of 'actor sequitur forum rei'

79. Moreover there is no reason to follow the defendants' view that Article 97(1) CTMR needs to be narrowly interpreted. This would only be required for special jurisdictions, given they are exceptions carved out of the general rule. (79)

80. The term 'establishment' under Article 97(1) CTMR should rather be afforded a wide interpretation. It does not constitute an exception to the general rule but rather implements it. This general rule is laid down in recital 11 of Brussels I, which states 'that jurisdiction is generally based on the defendant's domicile and must always be available on this ground save in a few well-defined situations'.

81. Article 97(1) CTMR with its primary attachment to the defendant's domicile, backed up by the secondary attachment to its establishment, implements exactly that principle, which is (for general civil cases) codified in Article 2 of Brussels I and which follows the maxim 'actor sequitur forum rei'. (80)

82. This general principle of jurisdiction is designed to protect the procedural interests of the defendant, who is deemed to be not only physically closer to the place of his domicile but also more familiar with the language and the procedural and substantive laws of that country. Although it is not a universal principle, this longstanding maxim, inspired by continental European approaches, is basic and typical for European jurisdictional rules. (81)

83. The principle clearly favours the jurisdictional interests of the defendant over those of the plaintiff. The Court in *Dumez France* and *Tracoba*, (82) in interpreting the Brussels Convention as the predecessor instrument of the Brussels I Regulation, (83) even referred to a 'hostility of the Convention towards the attribution of jurisdiction to the court of the plaintiff's domicile'. (84)

84. The ladder of attachment that the legislature has constructed in Article 97(1) to (3) CTMR is perfectly in line with this general approach in European civil procedure, as there is no step which attaches jurisdiction to the plaintiff's domicile or establishment before ensuring that the defendant does not have any relevant connection to one of the Member States - a

connection which, in the absence of a domicile, can be its establishment.

85. The twofold function of this secondary attachment to the defendant's establishment is to provide at least some protection to that party by attaching to a place where the defendant is deemed to have a certain minimum presence, even though this would not amount to a full-scale presence, which only a domicile (85) can provide. Thus 'establishment' as a connecting factor in this context serves (1) as a last resort of putting into effect the principle of attaching jurisdiction to the place of the defendant, and at the same time (2) as a threshold preventing an overly hasty switch to the place of the plaintiff.

86. When the Court is asked to interpret Article 97(1) CTMR, and more precisely the notion of 'establishment' therein, the definition provided by the Court will therefore influence whether or not the next, less favoured third step on the ladder will be triggered, a point at which international jurisdiction will shift from a Member State with a connection to the defendant to one with a connection to the plaintiff. This is a shift that needs to be prevented if possible. The central conceptual schism described above lies between these two steps. A broad interpretation of the term 'establishment' is thus required in order to put into effect the central principle of 'actor sequitur forum rei'.

3) Establishments in more than one Member State

87. The broad interpretation that has been suggested here may lead to a situation where the defendant is deemed to have more than one establishment within the EU. In the present case, it is likely that not only Nike Deutschland but also Nike Retail will qualify as an establishment.

88. This raises the question whether all establishments are on an equal footing or whether only one of them can serve as a connecting factor pursuant to Article 97(1) CTMR. As the defendants indicated in the oral hearing before the Court, Nike Retail is the principal establishment of the Nike organisation in Europe. Thus, if international jurisdiction could only attach to the place of the principal establishment, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) could not issue the pan-European relief that has been requested. This could only be done by a Dutch court.

89. However, instead of providing for an attachment to the 'principal establishment', (86) Article 97(1) CTMR simply speaks of 'the courts of the Member State in which the defendant ... has an establishment'. (87) Moreover the 'principal place of business' already comes under the definition of a company's 'domicile'. (88) It would make no sense to have in Article 97(1) CTMR two categories, with 'domicile' being the primary one and 'establishment' the secondary, if 'establishment' comprised only the principal establishment. (89)

90. That being so, any establishment in a Member State can serve as a connecting factor to establish international jurisdiction under Article 97(1), second alternative, CTMR. This situation has a parallel in

Article 97(1), first alternative, CTMR in that, in the context of domicile of companies, a company also can have more than one domicile. (90) In such cases of alternative jurisdiction, according to general principles of civil procedure, the choice between several competent courts is to be left to the plaintiff.

91. However, in light of the aim of limiting the number of competent courts in Community trade mark cases, (91) which is particularly important in the context of extended international jurisdiction, (92) the prospect of a plurality of qualifying Member States could be used as a counter argument against the broad interpretation of ‘establishment’ under Article 97(1) CTMR.

92. The fact that extended jurisdiction over Nike Inc. could be exercised by courts in the Netherlands and in Germany creates a risk of forum shopping, albeit a limited one. However, inconsistent decisions will be prevented (93) by the mechanisms of Brussels I, in particular by that regulation’s provisions on *lis pendens*, (94) which also apply under the CTMR. Ultimately, this situation is to be accepted for the higher value of upholding the idea of the defendant’s procedural protection that is secured by vesting ‘establishment’ under Article 97(1) CTMR with a broad meaning.

93. The legal protection afforded to the defendant by attaching jurisdiction to its establishment is, admittedly, not as strong as the protection achieved by attaching to its domicile, where the defendant disposes of the full panoply of its resources. Yet when the defendant does not have a domicile in the EU, basic minimum protection in a dispute based on extended jurisdiction is provided through its establishments in Member States.

IV. Conclusion

94. I therefore propose that the Court answer the request for a preliminary ruling as follows:

In circumstances such as those in the main proceedings, a legally distinct second-tier subsidiary, with its seat in an EU Member State, of an undertaking that itself has no seat in the European Union is to be considered an ‘establishment’ of that undertaking within the meaning of Article 97(1) of Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1) if that legally distinct second-tier subsidiary is a centre of operations which, in the Member State where it is situated, has the appearance of permanency, such as an extension of the third State parent body.

1. Original language: English.

2. The concept underlying intellectual property law is traditionally the ‘*Schutzlandprinzip*’ (rule of the country of protection), which is based on the assumption that an intellectual property right is a territorial right which thus can be enforced in the country that has created it and for whose territory it is valid, see Ruhl, O., *Gemeinschaftsgeschmacksmuster*, Kommentar, 2nd ed., 2010, Article 82 no 4.

3. As to this see the first sentence of recital 16 CTMR.

4. According to the first sentence of recital 16 CTMR, decisions ‘must have effect and cover the entire area of the Community’. The operative part of the judgment may thus refer to the complete territory of the European Union. The cross-border recognition and enforcement however is still subject to the general rules, i.e. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) (OJ 2001 L 12, p. 1) or 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 (recast) (Brussels Ia) (OJ 2012 L 351, p. 1). The Court has more specifically interpreted this effect in its judgment of 12 April 2011, *DHL Express France* (C-235/09, EU:C:2011:238).

5. See Article 98 CTMR.

6. Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (OJ 2009 L 78, p. 1). This regulation has been amended by Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OJ 2015 L 34, p. 21). Substantive changes that the amendment has brought about are not relevant in the present case. However a terminological modernisation has taken place insofar as the term ‘Community trade mark’ is henceforth replaced by ‘European Union trade mark (EU trade mark)’. According to its Article 4, the recast regulation entered into force on 23 March 2016.

7. For cases brought before the courts since 10 January 2015, Brussels Ia is applicable: see its Article 81(2). As the main proceeding was instituted in 2013, Brussels I is applicable in the present case. It is however noteworthy that, according to Article 108 CTMR, the updated version of Brussels I is to be applied at any given time also in the framework of the CTMR.

8. This legal instrument otherwise provides the jurisdictional rules for Community trade mark actions, see e.g. the second sentence of recital 16 and Articles 94(1) and 97(1) CTMR.

9. See Article 95 CTMR.

10. See Article 96 CTMR. Infringement and validity issues are in their exclusive jurisdiction (see also recital 15 CTMR). These courts are the only ones who can hold a Community trade mark to be invalid; according to Article 107 CTMR, national courts, except in actions under Article 96 CTR, are to treat the trade mark as valid.

11. See Article 95(1) read in conjunction with the *Verordnung vom 10.10.1996* (Regulation of 10 October 1996) GV NW 1996, 428 (Landgericht Düsseldorf (Regional Court, Düsseldorf)) and § 125 e (2) *DE-MarkenG* (German Law on trade marks)

(Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf)).

12. See above paragraph 2.

13. See Article 98(2) read in conjunction with (1) CTMR.

14. See Article 98(1)(a) CTMR.

15. Thus, in casu, this constitutes a sufficient basis for the two other claims of action that the plaintiff made against the defendants.

16. Article 98(2) CTMR.

17. See Article 98 CTMR.

18. See Article 97(1), second alternative, CTMR. As the parties have not agreed to a choice of forum, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) cannot base its jurisdiction on Article 97(4) CTMR. Article 97(2) or Article 97(3) CTMR cannot provide a basis for jurisdiction as long as they are preempted by Article 97(1) CTMR.

19. This question was discussed as to the term ‘establishment’ under Article 5(5) of the Brussels Convention in the judgment of 22 November 1978, Somafer (33/78, EU:C:1978:205, paragraphs 3 to 7).

20. This rule has not changed under Brussels Ia: see Article 62 of Brussels Ia.

21. See also the second sentence of recital 11 of Brussels I. According to Article 97(1), read in conjunction with Article 94(1) CTMR, read, in turn, in conjunction with Article 60(1) of Brussels I, ‘domicile’ in the context of Article 97 CTMR thus has to be defined as ‘the place where it has its (a) statutory seat, or (b) central administration, or (c) principal place of business’.

22. See e.g. the judgments of 14 January 1982, Corman (64/81, EU:C:1982:5, paragraph 8); of 14 December 2006, Nokia (C-316/05, EU:C:2012:789, paragraph 21); and of 22 November 2012, Bank Handlowy and Adamiak (C-116/11, EU:C:2012:739, paragraph 49).

23. See also the judgment of 19 July 2012, Mahamdia (C-154/11, EU:C:2012:491, paragraph 42), stating that ‘an independent interpretation common to all the States’ must be given to the terms ‘branch, agency or other establishment’ in Article 18 of Brussels I, and the judgment of 22 November 1978, Somafer (33/78, EU:C:1978:205, paragraph 7 et seq.), on Article 5(5) of the Brussels Convention.

24. Cf. e.g. Articles 1 (‘Community trade mark’), 2 (‘Office’) and 95 (‘Community trade mark courts’).

25. Nor has the predecessor norm, which is Article 93(1) of Regulation No 40/94, been the subject of the Court’s interpretation. The judgment of 5 June 2014, Coty Germany (C-360/12, EU:C:2014:1318) deals with Article 93(5) of Regulation No 40/94.

26. The Commission has mentioned in its observations Article 92 CTMR, a provision that also uses the term ‘establishment’ in the context of a Community trade mark procedure, the particular context being however representation before the Office for Harmonisation in the Internal Market. Article 92(2) CTMR provides: ‘... natural or legal persons not having either their domicile or their principal place of business or a real and

effective industrial or commercial establishment in the Community must be represented before the Office ...’.

27. The Proposal for a Council regulation on Community trade marks submitted by the Commission to the Council on 25 November 1980 (COM(80) 635) uses, instead of ‘establishment’, the term ‘place of business’, providing in the first and fourth sentences of Article 74(1): ‘Actions for infringement of a Community trade mark shall be heard by the courts of the Member State in which the defendant has his habitual residence or, if he has no habitual residence in the Community, in which he has a place of business. ... The court hearing the action shall have jurisdiction in respect of acts of infringement alleged to have been committed in any Member State.’ The first version of the Community trade mark regulation that came into effect was Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1). In Article 93(1) this instrument already used, instead of ‘habitual residence’ and ‘place of business’, the terms ‘domicile’ and ‘establishment’ that the updated and consolidated version of the CTMR applicable in the present case still uses in its Article 97(1). As far as can be seen, neither definitions nor explanations as to the terminology are available.

28. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (Insolvency Regulation) (OJ 2000 L 160, p. 1).

29. Article 2(h) of the Insolvency Regulation reads as follows: ‘For the purposes of this Regulation “establishment” shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.’

30. See Article 3(2) of the Insolvency Regulation.

31. See recital 16 and Articles 94(1) and 97(1) CTMR. That is why, although the CTMR, as the defendants contend, is the *lex specialis*, it in no way generally preempts Brussels I.

32. See definition of the terms ‘domicile’ and ‘statutory seat’ of companies in Article 60 of Brussels I.

33. More precisely its predecessor norm in the Brussels Convention, which was applicable in most cases cited below. Recital 19 of Brussels I urges continuity of interpretation between these legal instruments.

34. Cf. the title of section 2 of Brussels I, of which Article 5 forms a part.

35. Judgment of 6 October 1976, De Bloos (14/76, EU:C:1976:134, paragraphs 20 and 21).

36. Judgment of 22 November 1978, Somafer (33/78, EU:C:1978:205, paragraph 11).

37. Judgment of 22 November 1978, Somafer (33/78, EU:C:1978:205, paragraphs 12 and 13).

38. Judgment of 18 March 1981, Blanckaert & Willems (139/80, EU:C:1981:70, paragraph 12).

39. Judgment of 9 December 1987, SAR Schotte (218/86, EU:C:1987:536, paragraph 16).

40. Judgment of 19 July 2012, Mahamdia (C-154/11, EU:C:2012:491, paragraph 48).

41. Judgment of 19 July 2012 Mahamdia (C-154/11, EU:C:2012:491, paragraph 50).

42. Judgments of 22 November 1978, Somafer (33/78, EU:C:1978:205, paragraph 12); of 18 March 1981, Blanckaert & Willems (139/80, EU:C:1981:70, paragraph 11); and of 19 July 2012, Mahamdia (C-154/11, EU:C:2012:491, paragraph 48).

43. See judgments of 20 October 2011, Interedil (C-396/09, EU:C:2011:671, paragraph 62), and of 4 September 2014, Burgo Group (C-327/13, EU:C:2014:2158, paragraph 31), concerning the Insolvency Regulation. This regulation defines the term ‘establishment’ in Article 2(h). Although the field of application of this definition is expressly limited to that regulation (see point 32 above), so that the definition cannot be applied directly here, it can still provide elements to be considered when discussing the same term in other contexts and thus it can have an indirect effect.

44. Judgments of 22 November 1978, Somafer (33/78, EU:C:1978:205, paragraph 11); of 9 December 1987, SAR Schotte (218/86, EU:C:1987:536 paragraph 10); of 18 March 1982, Blanckaert & Willems (139/80, EU:C:1981:70, paragraph 12); and of 19 July 2012, Mahamdia (C-154/11, EU:C:2012:491, paragraph 48).

45. Judgment of 9 December 1987, SAR Schotte (218/86, EU:C:1987:536, paragraph 15), and, in the context of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), see the judgments of 13 May 2014, Google Spain and Google (C-131/12, EU:C:2014:317, paragraphs 48 and 49), interpreting Article 4(1)(a) of that directive, and of 4 September 2014, Burgo Group (C-327/13, EU:C:2014:2158, paragraph 32), interpreting Article 2(h) of the Insolvency Regulation.

46. Judgment of 9 December 1987, SAR Schotte (218/86, EU:C:1987:536, paragraph 15).

47. Opinion in Mahamdia (C-154/11, EU:C:2012:309, point 43), referring to Opinion 1/03 of 7 February 2006 (EU:C:2006:81, paragraph 150).

48. Opinion 1/03 of 7 February 2006 (EU:C:2006:81, paragraph 150).

49. See in recital 19 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

50. The Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) in its judgment of 31 January 2012 – I-20 U 175 paragraph 47, notes that the parent company has a connection to the State where its legally independent subsidiary has its seat, at least insofar as through its subsidiary it is confronted with the legal order of that State. In this judgment the Oberlandesgericht (Higher Regional Court) interprets the term ‘establishment’ in Article 82(1) of the Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, which has an identical text and

analogous ratio as Article 97(1) CTMR, as including legally independent companies.

51. This was however the case in of 9 December 1987, SAR Schotte (218/86, EU:C:1987:536, paragraph 13), where both had the same name and identical management.

52. Required under the judgment of 6 October 1976, De Bloos (14/76, EU:C: 1976:134, paragraph 20).

53. See recital 11 of Brussels I.

54. Judgment of 22 November 1978, Somafer (33/78, EU:C:1978:205, paragraph 12).

55. Judgment of 22 November 1978, Somafer (33/78, EU:C:1978:205, paragraph 12).

56. Judgment of 9 December 1987, SAR Schotte (218/86, EU:C:1987:536, paragraph 16).

57. Judgment in Mahamdia (C-154/11, EU:C:2012:491, paragraph 50), saying that about an embassy in relation to the state that it represents.

58. See the indications on the website of Nike group www.nike.com and also in the general contract terms in German that can be found on this website.

59. Judgment of 9 December 1987, SAR Schotte (218/86, EU:C:1987:536, paragraph 16).

60. See the judgment of 20 October 2011, Interedil (C-396/09, EU:C:2011:671, paragraph 49), concerning the establishment of the centre of main interest under the Insolvency Regulation.

61. See the judgment of 20 October 2011, Interedil (C-396/09, EU:C:2011:671, paragraph 49).

62. The Italian Government refers to the well-established interpretation of ‘establishment’ in the context of international taxation. Tax law also does not look to formalities, but holds the subsidiary to be independent only if it operates under its autonomous organisation and on its own account and entrepreneurial risk. However, these are elements that, although ascertainable by a tax agency, are typically not known to the public.

63. For this contention the defendants rely on Leible, St. / Müller, M., ‘Der Begriff der Niederlassung im Sinne von Art. 82 Abs. 1 Alt. 2 GGV und Art. 97 Ab. 1 Alt. 2 GMV’, *Wettbewerb in Recht und Praxis*, 2013, 1, 9.

64. See in more detail points 81 to 85 below. It would be more beneficial for the plaintiff to assume that there was no establishment of the defendant under Article 97(1) CTMR because then, under Article 97(2) CTMR the plaintiff’s domicile would be decisive for international jurisdiction (see point 83).

65. Recital 11 of Brussels I demands that rules of jurisdiction be highly predictable.

66. As to this see point 50 above.

67. Also, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf) in its judgment of 31 January 2012 – I-20 U 175 - interpreting the term ‘establishment’ in Article 82(1) of the Regulation on Community Designs- which has an identical text and analogous ratio as Article 97(1) CTMR, seems to hold that some participation of the establishment is required and that this usually is fulfilled by the subsidiary’s sales activities.

68. It needs to be stressed, however, that the question that we are dealing with here is not a question of substantive law, e.g. holding the subsidiary responsible for the parent's tortious conduct or conversely imputing an establishment's tortious conduct to the parent. Instead, it is a procedural question.

69. Under Article 98(1)(a) CTMR.

70. The bases of jurisdiction codified in Article 97(4) CTMR, read in conjunction with Articles 23 and 24 of Brussels I, are by nature exclusive and thus can be considered an additional, even more dominant, step on that ladder which pre-empt all others. In the present case, this step can, however, be ignored, as the defendant opposes the jurisdiction claimed by the plaintiff.

71. Both in Article 97(1) CTMR.

72. Both in Article 97(2) CTMR.

73. Article 97(3) CTMR.

74. Article 2(1) of Brussels I.

75. Article 4(1) of Brussels I. For criticism of this application of national rules see e.g. Mills, A., *Private International Law and EU External Relations: Think local act global, or think global act local?*, ICLQ, vol. 65, 2016, pp. 541-571. In essence the criticism derives from the fact that the judgments issued on the basis of these national rules on international jurisdiction, although they might be exorbitant, benefit nevertheless from alleviated recognition and enforcement under the Brussels regime.

76. See Article 94(2)(a) CTMR and the reference therein to Articles 2 and 4 of Brussels I.

77. However special jurisdictions also exist under the CTMR, see e.g. Article 97(5) CTMR.

78. Recital 12 of Brussels I.

79. See e.g. judgment of 22 November 1978, *Somafer* (33/78, EU:C:1978:205, paragraph 8), cited in paragraph 40 above concerning the derogation from the principle of jurisdiction of Article 2 of Brussels I, which is the general rule.

80. See e.g. judgments of 13 July 2000, *Group Josi* (C-412/98 EU:C:2000:399, paragraph 35), and of 19 February 2002, *Besix* (C-256/00 EU:C:2002:99, paragraph 52); Opinion of Advocate General Bot in *A* (C-112/13 EU:C:2014:207, point 37).

81. See Bell, A., *Forum Shopping and venue in transnational litigation*, Oxford 2003, No 3.60 et seq., according to whom the principle of 'actor sequitur forum rei' embodied in the Brussels Convention and Regulation No 44/2001 has as its central philosophy the prima facie appropriateness of suing the defendant in its place of domicile. The principle is rooted in the common legal heritage of the original – continental European – parties to the Brussels Convention (No 3.66). Bell calls the 'actor sequitur forum rei' principle the Brussels Convention's 'Grundnorm'.

82. Judgment of 11 January 1990 (C-220/88, EU:C:1990:8, paragraph 16).

83. As to the relevance of the case-law on the Brussels Convention for the regulation, see recital 19 of Brussels I.

84. See also judgment of 19 January 1993, *Shearson Lehmann Hutton* (C-89/91, EU:C:1993:15, paragraph 17).

85. Domicile being defined in Article 60 of Brussels I as the statutory seat, the central administration or the principal place of business.

86. As the legislature for the CTMR was familiar with Brussels I, which in Article 60(1)(c) employs the term 'principal place of business', it must have been aware of that possibility of specifying which establishment should be decisive, if it had intended to choose one of several establishments. Moreover, even the legislature for the CTMR itself takes up the term 'principal place of business' in Article 92(2) CTMR.

87. My emphasis.

88. According to Article 60 of Brussels I.

89. See Leible, St. / Müller, M., 'Der Begriff der Niederlassung im Sinne von Art. 82 Abs. 1 Alt. 2 GGV und Art. 97 Abs. 1 Alt. 2 GMV', *Wettbewerb in Recht und Praxis*, 2013, 1, 4.

90. See the broad definition of a company's 'domicile' in Article 60 of Brussels I (see footnote 85). See also point 75 of the Schlosser Report (OJ 1979 C 59, p. 71, at p. 97).

91. See recital 15 CTMR ('as limited a number as possible').

92. That is one of the reasons behind the strict hierarchy that the attachment in Article 97(1) to (4) CTMR provides for.

93. As to this aim, see recital 16 CTMR.

94. See Section 9 of Brussels I comprising Articles 27 to 29. In the context of a plurality of 'seats', point 75 of the Schlosser Report also refers to the provisions on *lis pendens* and related actions to overcome the problems that might arise from such a situation.