

Court of Justice EU, 17 November 2022, Harman International Industries v AB SA



TRADE MARK LAW

EU law cannot preclude a judicial practice according to which the operative part of a decision upholding an action for infringement of an EU trade mark is drafted in general terms

- [Provided that the defendant enjoys the effective judicial protection of the rights that it derives from Articles 34 and 36 TFEU and Article 15\(1\) of Regulation 2017/1001.](#)

71 Therefore, if the national court is required to designate, in the operative part of its decisions upholding an action for infringement of an EU trade mark, by means of a general formulation, the products which were not previously placed on the market in the EEA by the proprietor or with its consent, the defendant should benefit, at the enforcement stage, from all the guarantees of a fair hearing for the purposes of being able effectively to contest the existence of an infringement or threat of an infringement of the exclusive rights of the trade mark proprietor and to challenge the seizure of those items of products in respect of which the trade mark proprietor's exclusive rights have been exhausted and which may therefore freely circulate within the EEA.

72 As regards the circumstance mentioned by the referring court that, without access to Harman's database, it is not objectively possible for AB to demonstrate that the products it purchased had been placed on the market in the EEA by Harman or with its consent, it may be necessary, as the Advocate General observed in point 90 of his Opinion, even in a case where no exclusive distribution is established, for the competent enforcement authority or, as the case may be, the court with jurisdiction to adjudicate on appeals brought against the acts of that authority, to reverse the burden of proof, to the extent that that authority or court finds, depending on the specific circumstances relating to the marketing of the products concerned, that the rule on the burden of proof, recalled in paragraph 50 of the present judgment, is liable to allow the trade mark proprietor to partition national markets and thus assist the maintenance of price differences between Member States.

73 Having regard to all the foregoing considerations, the answer to the question referred is that Article 15(1) of Regulation 2017/1001, read in combination with the second sentence of Article 36 TFEU, Article 47 of the Charter and Directive 2004/48, must be interpreted as not precluding a judicial practice by which the operative part of the decision upholding an action for infringement of an EU trade mark is drafted in terms which, owing to

their general nature, leaves it to the authority with competence to enforce that decision to determine the products to which that decision applies, provided that, in the context of the enforcement procedure, the defendant is permitted to contest the determination of the products covered by that procedure and that a court may examine and decide, in compliance with the provisions of Directive 2004/48, which products have in fact been placed on the market in the EEA by the proprietor or with its consent.

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Court of Justice EU, 17 November 2022

(E. Regan, D. Gratsias, M. Ilešič, I. Jarukaitis, Z. Csehi,)
JUDGMENT OF THE COURT (Fifth Chamber)
17 November 2022

(Reference for a preliminary ruling – Articles 34 and 36 TFEU – Free movement of goods – Intellectual property – EU trade mark – Regulation (EU) 2017/1001 – Article 15 – Exhaustion of the rights conferred by a trade mark – Placing on the market within the European Economic Area (EEA) – Consent of the proprietor of the trade mark – Place of first marketing of products by the proprietor of the trade mark or with its consent – Proof – Directive 2004/48/EC – Article 47 of the Charter of Fundamental Rights of the European Union – Effective judicial protection – Operative part of judicial decisions not identifying the products covered – Difficulties in implementation – Restricted scope of action before the competent court for enforcement – Fair trial – Rights of the defence – Principle of the equality of arms)
In Case C-175/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), made by decision of 3 February 2021, received at the Court on 17 March 2021, in the proceedings

Harman International Industries Inc.

v

AB S.A.,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, D. Gratsias, M. Ilešič (Rapporteur), I. Jarukaitis and Z. Csehi, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure, after considering the observations submitted on behalf of:

– Harman International Industries, Inc., by D. Piróg and J. Słupski, adwokaci,

– AB S.A., by K. Kucharski and K. Sum, radcowie prawni,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by É. Gippini Fournier, S. L. Kalèda and B. Sasinowska, acting as Agents, after hearing the Opinion of the Advocate General at the sitting on 16 June 2022, gives the following Judgment

1 This request for a preliminary ruling concerns the

interpretation of the second sentence of Article 36 TFEU, read together with Article 15(1) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p.1) and the second subparagraph of Article 19(1) of TEU.

2 The request has been made in proceedings between Harman International Industries Inc., established in the United States (*‘Harman’*), and AB S.A., established in Poland, concerning the infringement of several EU trade marks.

Legal context

European Union law

Regulation 2017/1001

3 Article 9 of Regulation No 2017/1001, headed *‘Rights conferred by an EU trade mark’*, provides: *‘1. The registration of an EU trade mark shall confer on the proprietor exclusive rights therein.*

2. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the EU trade mark, the proprietor of that EU trade mark shall be entitled to prevent all third parties not having its consent from using in the course of trade, in relation to goods or services, any sign where:

(a) the sign is identical with the EU trade mark and is used in relation to goods or services which are identical with those for which the EU trade mark is registered;

(b) the sign is identical with, or similar to, the EU trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the EU trade mark is registered, if there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

(c) the sign is identical with, or similar to, the EU trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to or not similar to those for which the EU trade mark is registered, where the latter has a reputation in the Union and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the EU trade mark.

3. The following, in particular, may be prohibited under paragraph 2:

... (b) offering the goods, putting them on the market, or stocking them for those purposes under the sign, or offering or supplying services thereunder;

(c) importing or exporting the goods under the sign; ...’

4 Article 15(1) of that Regulation, entitled *‘Exhaustion of the rights conferred by an EU trade mark’*, provides:

‘An EU trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the European Economic Area under that trade mark by the proprietor or with its consent.’

5 Article 129 of the Regulation, headed *‘Law applicable’*, states:

‘1. The EU trade mark courts shall apply the provisions of this Regulation.

2. On all trade mark matters not covered by this Regulation, the relevant EU trade mark court shall apply the applicable national law.

3. Unless otherwise provided for in this Regulation, an EU trade mark court shall apply the rules of procedure governing the same type of action relating to a national trade mark in the Member State in which the court is located.’

Directive 2004/48/EC

6 Article 1 of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45, and corrigendum in OJ 2004 L 195, p. 16), entitled *‘Damages’*, provides: *‘This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purposes of this Directive, the term ‘intellectual property rights’ includes industrial property rights.’*

7 Article 2 of that directive, headed *‘Scope’*, provides in paragraph 1:

‘Without prejudice to the means which are or may be provided for in Community or national legislation, in so far as those means may be more favourable for rightholders, the measures, procedures and remedies provided for by this Directive shall apply, in accordance with Article 3, to any infringement of intellectual property rights as provided for by Community law and/or by the national law of the Member State concerned.’

8 Chapter II of that directive, entitled *‘Measures, procedures and remedies’*, contains, inter alia, Article 3 thereof, entitled *‘General obligation’*, which provides in paragraph 2:

‘Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.’

Polish law

9 Article 325 of the ustawa – Kodeks postępowania cywilnego (Law on the Code of Civil Procedure) of 17 November 1964, in the version applicable to the main proceedings (*‘the Code of Civil Procedure’*), provides:

‘The operative part of the judgment must contain the denomination of the court, the names of the judges, the registrar and the prosecutor, if it intervened in the case, the date and the place of the hearing and the pronouncement of the judgment, the names of the parties, a statement of the subject matter of the case, and the decision of the court on the parties’ claims.’

10 Under Article 758 of the Code of Civil Procedure, the sądy rejonowe (District Courts, Poland) and the bailiffs attached to those courts are competent in matters of enforcement.

11 Under Article 767 of the code: *‘1. Unless otherwise provided for under the law, acts of the bailiff may be appealed before the sądy rejonowe [(District Court)]. An appeal may also be brought*

against the failure of the bailiff to act. The appeal shall be examined by the court in the judicial district of the seat of the bailiff's office.

2. An appeal may be brought by a party or another person whose rights have been infringed or threatened by the act or omission of the bailiff.

...

12 Article 840 of the code provides, in paragraph 1 thereof:

'The debtor may seek by way of appeal, the annulment, in whole or in part, or the limitation of the enforceable effect of the enforcement instrument where:

1. *he or she disputes the facts that gave rise to the enforcement terms imposed, in particular where he or she contests the existence of the obligation found by a simple enforcement instrument, other than a judicial decision or where he or she contests the transfer of an obligation despite there being a formal document that attests to it;*

2. *following the issue of a simple enforcement instrument, a fact has occurred that led to the extinction of the obligation or the impossibility of performing it; if the instrument is a judicial decision, the debtor may equally base his or her action on the facts arising after the arguments were closed, on the objection that the service has been performed, where reliance on that objection in the case in question was inadmissible *ex lege*, and on the objection of set off. ...'*

13 Article 843(3) of the same code provides:

'In the appeal, the appellant shall present all the complaints that may be raised at that stage, failing which he or she will lose the right to rely on them at the subsequent stages of the proceedings.'

14 Article 1050 of the Code of Civil Procedure provides:

'1. Where a debtor is required to perform an act that cannot be performed by another person and the performance of which is solely of his or her volition, the court in whose jurisdiction the act is to be performed shall, at the request of the creditor and after hearing the parties, fix a time limit for debtor to perform the task. Should the debtor fail to do so, he or she shall be liable for a fine.

...

3. *If the time limit prescribed for the debtor to perform the act expires without the debtor having performed it, the court shall, at the request of the creditor, impose a fine on the debtor and at the same time fix a new time limit for the performance of the act, under penalty of an increased fine.'*

15 Article 1051(1) of that code provides: *'Where the debtor is under an obligation not to obstruct the creditors' acts, the court in the judicial district in which the debtor has failed to comply with its obligation imposes a fine, at the request of the creditor, after hearing the parties, and declares that the debtor has failed to comply with his or her obligation. The court follows the same procedure in the event of a new claim by the creditor.'*

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

16 Harman manufactures audiovisual equipment, including speakers, headphones and audio systems. It concluded an agreement with a distributor with a view to the sale on Polish territory of its products bearing the EU trademarks JBL and HARMAN, of which it is the proprietor.

17 AB distributes Harman's products on the Polish market, which are purchased from a supplier other than the distributor authorised by Harman in respect of that market.

18 Harman brought an action before the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), the referring court, seeking the cessation of the infringement of the rights conferred on it by its marks, by prohibiting AB, in general, from introducing or putting on the market, importing, offering, advertising and/or stocking, for those purposes, speakers and earphones and their packaging bearing those marks which had not previously been placed on the market within the European Economic Area (EEA) by Harman or with its consent. Furthermore, Harman requested that the court order AB to withdraw from the market and destroy those products and their packaging.

19 In its defence, AB relies on the principle of the exhaustion of the rights conferred by a trade mark and invokes, in essence, the assurance received from its supplier that the importation of the products at issue onto the Polish market did not infringe Harman's trademarks, as those products had been placed on the market in the EEA by Harman or with its consent.

20 The referring court observes that the marking systems used by Harman are insufficient for the destination market of each of its products to be identified. In order to determine with certainty whether a given product was destined for the EEA market, it would be necessary to have recourse to a database belonging to Harman.

21 According to that court, AB could theoretically seek to obtain from its supplier information as to the identity of the traders involved upstream in the distribution chain. However, as suppliers are not usually disposed to disclose their supply sources in order not to lose sales, it was unlikely that AB would be able to obtain that type of information.

22 The practice of the Polish courts, in the operative part of their decisions upholding an action for the infringement of an EU trade mark, is to refer to *'products which have not previously been placed on the market within EEA by the applicant (the proprietor of the EU trademark) or with its consent'*. That formulation does not make it possible, at the stage of enforcement proceedings, to identify which products are covered by those proceedings and which are covered by the exception based on the exhaustion of the rights conferred by the trade mark. Thus, the operative part of those decisions does not in fact differ from the general obligation that already flows from provisions of law.

23 As a result of that judicial practice, the defendant to an action for infringement is not in a position voluntarily to comply with a decision finding that there was an infringement and giving rise to the risk of a

penalty on the basis of Articles 1050 and 1051 of the Code of Civil Procedure. In addition, that practice leads, most often, to the seizure of all products, including those that circulate without there being any infringement of the exclusive right conferred by the mark.

24 Likewise, the result of, inter alia, Articles 767, 840 and 843 of the Code of Civil Procedure, is that, in the context of protective and enforcement procedures, the defendant to an action for infringement is confronted with a number of legal obstacles to the possibility of successfully contesting the measures ordered and has only limited procedural guarantees.

25 First, in accordance with Article 767 of that code, an appeal against an act of the court bailiff is only possible where the bailiff has not complied with the procedural rules governing the enforcement procedure. Thus, such an appeal does not make it possible to determine whether a product bearing a mark has been placed on the market within the EEA by the proprietor of that mark or with its consent.

26 Secondly, the defendant to an infringement action does not have the option of raising, on the basis of Article 840 of the Code of Civil Procedure, an action in opposition, as that type of action cannot serve as basis for clarifying the content of a judicial decision constituting the enforcement instrument.

27 Thirdly, according to a prevailing opinion in Polish legal doctrine, while the court with jurisdiction for enforcement may certainly hear the parties, it cannot, pursuant to Article 1051 of the Code of Civil Procedure, take evidence in order to determine whether the defendant to the action for infringement has acted in accordance with the content of the enforcement instrument.

28 Fourthly, pursuant to Article 843(3) of the Code of Civil Procedure, where the debtor brings an appeal in the context of the enforcement procedure, it must raise all the complaints that it is in a position to invoke, on pain of losing the right to raise them in the subsequent course of the procedure.

29 Therefore, in the opinion of the referring court, there is a risk that the judicial protection of the free movement of goods is restricted due to that judicial practice relating to the formulation of the operative part of decisions declaring an infringement of a trade mark.

30 In those circumstances, the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling: *‘Must the second sentence of Article 36 TFEU, read in conjunction with Article 15(1) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, and in conjunction with the second sentence of Article 19(1) of the Treaty on European Union, be interpreted as precluding the practice of the national courts of the Member States, which is that the courts:*
– *when upholding claims by a proprietor of an EU trade mark to prohibit the importation, putting on the market, offering, advertising of goods bearing the EU*

trade mark, to order their withdrawal from the market or to order their destruction;

– *when ruling, in protective proceedings relating to the seizure of products bearing an EU trade mark, refer in their rulings to “goods which have not been put on the market within the [EEA] by the right holder or with its consent”, with the result that it is left to the enforcement authority, in view of the general wording of the ruling, to determine which items bearing the EU trade mark are subject to the injunctions and prohibitions granted (that is to say, which items have not been put on the market within the European Economic Area by the right holder or with its consent) which basis that determination on the statement of the right holder or tools provided by it (including its IT tools and databases), while the possibility of challenging the aforementioned findings of the enforcement authority before a court in declaratory proceedings is excluded or limited by the nature of the legal remedies available to the defendant in protective proceedings and in enforcement proceedings?’*

Consideration of the question referred

31 According to the Court’s settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. Furthermore, the Court may decide to take into consideration rules of EU law to which the national court has made no reference in the wording of its question (judgment of 8 September 2022, RTL Television, C-712/20, EU:C:2022:643, paragraph 55 and the case-law cited).

32 As regards the obligation for Member States to guarantee effective judicial protection in an area covered by EU law, provided for in the second subparagraph of Article 19(1) TEU, it is clear from the settled case-law of the Court of Justice that the right to an effective remedy may be invoked solely on the basis of Article 47 of the Charter of Fundamental Rights of the European Union (*‘the Charter’*), without there being a need for the content thereof to be made more specific by other provisions of EU law or by provisions of the domestic law of the Member States, the recognition of that right, in a given case, presupposing, as is apparent from the first paragraph of Article 47 of the Charter, that the person invoking that right is relying on rights or freedoms guaranteed by EU law (see, to that effect, judgment of 6 October 2020, État luxembourgeois (Right to bring an action against a request for information in tax matters) (C-245/19 and C-246/19, EU:C:2020:795, paragraphs 54 and 55 and the case-law cited).

33 In addition, it should be recalled, first, that, in accordance with Article 1 thereof, Directive 2004/48 concerns all the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights and, second, that, Article 2(1) of that directive provides that those measures apply to any infringement of those rights as provided for by EU law

and/or by the national law of the Member State concerned.

34 In accordance with Article 129(3) of Regulation No 2017/1001, an EU trade mark court is to apply the rules of procedure that govern an action of the same type relating to a national trade mark in the Member State in which the court is located. It follows that the procedural guarantees available to a defendant to a trade mark infringement action at the stage of the enforcement of a judicial decision must be assessed also with regard to Directive 2004/48.

35 In those circumstances, it must be considered that by its sole question the referring court asks, in essence, whether Article 15(1) of Regulation 2017/1001, read in combination with the second sentence of Article 36 TFEU, Article 47 of the Charter and Directive 2004/48, must be interpreted as precluding a judicial practice by which the operative part of the decision upholding an action for the infringement of an EU trade mark is drafted in terms which, owing to their general nature, leaves it to the authority with competence to enforce that decision to determine to which products that decision applies.

36 That question should be understood as comprising three parts. The first relates to the exhaustion of the rights conferred by a trade mark and to the requirements flowing from the protection of the free movement of goods. The second part concerns the requirements that must be satisfied, in accordance with Directive 2004/48, by the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. The third part concerns the obligation, for the Member States, first, to establish the legal remedies necessary to ensure effective judicial protection in an area covered by EU law and, second, to guarantee the conditions for a fair hearing, in accordance with Article 47 of the Charter.

37 As regards the first part of the question, it should be recalled that Article 9 of Regulation 2017/1001 confers on the EU trade mark proprietor exclusive rights which entitle it to prevent any third party from, inter alia, importing goods bearing the mark, offering the goods, putting them on the market or stocking them for these purposes without its consent (see, by analogy, [judgment of 16 July 2015, TOP Logistics and Others, C-379/14, EU:C:2015:497](#), paragraph 32 and the case-law cited).

38 Article 15(1) of that regulation contains an exception to that rule in that it provides that the trade mark proprietor's rights are exhausted where goods bearing that mark have been put on the market in the EEA by the proprietor itself or with its consent (see, by analogy, [judgment of 14 July 2011, Viking Gas, C-46/10, EU:C:2011:485, paragraph 26 and the case-law cited](#)).

39 That provision is framed in terms corresponding to those used by the Court in judgments which, in interpreting Articles 30 and 36 of the EC Treaty (later Articles 28 and 30 EC, now Articles 34 and 36 TFEU), have recognised the principle under EU law that trade mark rights may be exhausted. Thus, that provision

reiterates the Court's case-law to the effect that a person holding trade mark rights protected by the legislation of a Member State may not rely on that legislation in order to oppose the importation or marketing of a product which has been put into circulation in another Member State by itself or with its consent (see, by analogy, [judgment of 20 December 2017, Schweppes, C-291/16, EU:C:2017:990, paragraph 34 and the case-law cited](#)).

40 That case-law relating to the principle that trade mark rights may be exhausted, based on Article 36 TFEU, is intended, like Article 15 of Directive 2017/1001, to reconcile the fundamental interest in protecting trade mark rights, on the one hand, with the fundamental interest in the free movement of goods within the internal market, on the other, with the result that those two provisions, which have the objective of achieving the same result, must be interpreted in the same way (see, by analogy, [judgment of 20 December 2017, Schweppes, C-291/16, EU:C:2017:990, paragraph 35 and the case-law cited](#)).

41 In order to ensure a fair balance between those fundamental interests, the possibility of relying on the exhaustion of the rights conferred by an EU trade mark, as an exception to those rights, is limited in several respects.

42 In the first place, Article 15(1) of Regulation 2017/1001 enshrines the principle of the exhaustion of rights conferred by a trade mark for products placed on the market by the proprietor or with its consent not irrespective of the place in which the products were marketed, but with regard only to products placed on the market in the EEA (see, to that effect, [judgment of 16 July 1998, Silhouette International Schmied, C-355/96, EU:C:1998:374, paragraphs 21, 26 and 31](#)).

43 By making it clear that the placing of goods on the market outside the EEA does not exhaust the proprietor's right to oppose the importation of those goods without its consent, the EU legislature has allowed the proprietor of the trade mark to control the initial marketing in the EEA of goods bearing the mark (see, by analogy, [judgment of 20 November 2001, Zino Davidoff and Levi Strauss, C-414/99 to C-416/99, EU:C:2001:617, paragraph 33 and the case-law cited](#)).

44 In the second place, goods bearing a trade mark cannot be regarded as having been 'put on the market in the EEA' where the proprietor of the trade mark has imported them into the EEA with a view to selling them there or where it has offered them for sale to consumers in the EEA, in its own shops or those of an associated company, without actually selling them (see, to that effect, [judgment of 30 November 2004, Peak Holding, C-16/03, EU:C:2004:759, paragraph 44](#)).

45 In the third place, the Court held that the proprietor's consent must, in addition, relate to each individual item of the products in respect of which exhaustion is claimed. Accordingly, the fact that the trade mark proprietor has already put on the market in the EEA identical or similar goods to those in respect of

which exhaustion is invoked does not suffice (see, to that effect, [judgment of 1 July 1999, Sebago and Maison Dubois, C-173/98, EU:C:1999:347, paragraphs 21 and 22](#)).

46 In the fourth place, consent, which is tantamount to the proprietor's renunciation of its exclusive right under Article 9 of Regulation 2017/1001 to prevent all third parties from importing goods bearing its trade mark, must be so expressed that an intention to renounce those rights is unequivocally demonstrated (see, to that effect, [judgment of 20 November 2001, Zino Davidoff and Levi Strauss, C-414/99 to C-416/99, EU:C:2001:617, paragraphs 41 and 45](#)).

47 Such an intention will normally be gathered from an express statement of consent. However, the requirements deriving from the protection of the free movement of goods have led the Court to hold that that rule can be qualified (see, by analogy, [judgment of 15 October 2009, Makro Zelfbedieningsgroothandel and Others, C-324/08, EU:C:2009:633, paragraph 23 and the case-law cited](#)).

48 Thus, it is conceivable that in some cases, even in situations where the goods in question were first placed on the market in the EEA without its express consent, the intention to renounce those rights may be inferred from facts and circumstances prior to, simultaneous with or subsequent to the placing of the goods on the market, which, in the view of the national court, unequivocally demonstrate that the proprietor has renounced its rights (see, to that effect, [the judgments of 20 November 2001, Zino Davidoff and Levi Strauss, C-414/99 to C-416/99, EU:C:2001:617, paragraph 46](#), and of [15 October 2009, Makro Zelfbedieningsgroothandel and Others, C-324/08, EU:C:2009:633, paragraphs 25 to 27](#)).

49 However, implicit consent cannot be inferred from the mere silence of the trade mark proprietor. Similarly, it cannot be inferred from the fact that a trade mark proprietor has not communicated its opposition to marketing within the EEA or from the fact that the goods do not carry any warning that it is prohibited to place them on the market within the EEA, as the requirements to be satisfied in order to prove implicit consent make no distinction of principle according to whether marketing first occurred outside the EEA or within it (see, to that effect, [the judgments of 20 November 2001, Zino Davidoff and Levi Strauss, C-414/99 to C-416/99, EU:C:2001:617, paragraph 55 and 56](#), and of [15 October 2009, Makro Zelfbedieningsgroothandel and Others, C-324/08, EU:C:2009:633, paragraph 28](#)).

50 Fifthly, and lastly, the trader alleging exhaustion of trade mark rights bears, in principle, the burden of proving that the applicable conditions are satisfied. However, that burden must be reversed where it is liable to allow the proprietor to partition national markets and thus help to maintain price differences between Member States (see, to that effect, [judgment of 20 December 2017, Schweppes, C-291/16, EU:C:2017:990, paragraphs 52 and 53 and the case-law cited](#)).

51 Such a qualification to the burden of proof is required, inter alia, where there is an exclusive distribution system ([judgment of 8 April 2003, Van Doren + Q, C-244/00, EU:C:2003:204, paragraph 39](#)).

52 Thus it is clear from Article 15(1) of Regulation 2017/1001, read in the light of Article 36 TFEU and the case-law of the Court cited in paragraphs 38 to 40 of the present judgment, that a trader against whom an infringement action is brought by the proprietor of an EU trade mark has the right, for the purposes of its defence, to allege and prove that the products bearing that mark, referred to in the infringement action, were put on the market in the EEA by that proprietor or with its consent. As is clear from the case-law referred to in the preceding paragraph of this judgment, that trader must also be able to benefit from a reversal, in its favour, of the burden of proof where the conditions laid down in that regard by the Court of Justice are met.

53 However, it does not follow from the case-law of the Court cited in paragraphs 44 and 49 of the present judgment that the trade mark proprietor is required to adopt a marking system for its products that permits it to be established, for each product, whether it was destined for the EEA market.

54 As the Advocate General observed, in essence, in point 76 of his Opinion, in the absence of a provision of EU law whose interpretation could lead to that solution, taking into account, inter alia, its wording, its context and the objectives pursued by the legislation of which it is part, a mere finding of the difficulties experienced by a defendant to an infringement action in obtaining information about the original supplier in a parallel distribution network does not amount to a basis in law justifying the imposition of that obligation on the proprietor.

55 Moreover, any obligation to that effect would unduly limit the possibility for the proprietor to change, at the last minute, the market destination planned for a given product.

56 As regards the second part of the question referred, it must be observed that the procedural aspects of compliance with intellectual property rights, including the exclusive right under Article 9 of Regulation 2017/1001 are governed, in principle, by national law, as harmonised by Directive 2004/48 which, as is clear from Articles 1 to 3 in particular, concerns the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights. Therefore, any national procedure relating to an action for the infringement of an EU trade mark must comply with the provisions of that directive.

57 However, it must be observed that the procedural aspect that is the specific object of the referring court's question in the present case is not governed by Directive 2004/48, as that directive does not contain any provision concerning the formulation of the operative part of judicial decisions relating to an infringement action. That question therefore raises the principle of procedural autonomy, which is the object of the third part of the question referred.

58 As regards the third part of the question, the referring court appears to perceive a causal link between the formulation of the operative part of the decision to be taken to terminate the main proceedings and the alleged difficulties with which the defendant could be confronted at the stage of its enforcement. However, it must be observed that those difficulties result from the enforcement proceedings, brought after the infringement action.

59 It is therefore necessary to examine whether, at the enforcement stage, the limited legal remedies and procedural guarantees that are available to the defendant, under national law, fail to meet the requirements of effective judicial protection imposed by EU law and therefore the unity and effectiveness of that law.

60 The principle of the effective judicial protection of individual parties' rights under EU law is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter (see judgment of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraph 57 and the case-law cited).

61 The essence of the right to an effective remedy enshrined in Article 47 of the Charter includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed to that person by EU law and, to that end, to consider all the issues of fact and of law that are relevant for resolving the case before it (judgment of 6 October 2012, *État luxembourgeois* (Right to bring an action against a request for information in tax matters) (C-245/19 and C-246/19, EU:C:2020:795, paragraph 66 and the case-law cited).

62 Furthermore, the principle of equality of arms, which is a corollary of the very concept of a fair hearing and has the aim of ensuring a balance between the parties to proceedings by guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings, is an integral part of the principle of the effective judicial protection of the rights that parties have under EU law, enshrined in Article 47 of the Charter. That principle implies, in particular, that each party must be afforded a reasonable opportunity to present its case, including its evidence, under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent (see, to that effect, the judgments of 17 July 2014, *Sánchez Morcillo and Abril García*, C-169/14, EU:C:2014:2099, paragraph 49 and the case-law cited, and of 10 February 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld* (Limitation period), C-219/20, EU:C:2022:89, paragraph 46 and the case-law cited).

63 Furthermore, the principle of respect for the rights of the defence is a fundamental principle of EU law. That principle would be infringed if a judicial decision were to be based on facts and documents of which the parties

themselves, or one of them, have not been able to take cognisance and in relation to which they have not therefore been able to formulate an opinion (judgment of 12 November 2014, *Guardian Industries and Guardian Europe v Commission*, C-580/12 P, EU:C:2014:2363, paragraph 30 and the case-law cited).

64 According to settled case-law, the observance of the rights of the defence in all proceedings initiated against a person and liable to culminate in a measure adversely affecting that person must be guaranteed even in the absence of a specific law (see, to that effect, judgment of 13 September 2007, *Land Oberösterreich and Austria v Commission*, C-439/05 P and C-454/05 P, EU:C:2007:510, paragraph 36 and the case-law cited).

65 However, subject to there being EU rules on the matter, such as those laid down in Directive 2004/48, it is, in accordance with the principle of procedural autonomy, for the national legal order of each Member State to establish procedural rules for the remedies, on condition, however, that those rules are not – in situations governed by EU law – less favourable than in similar domestic situations (principle of equivalence) and that they do not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (principle of effectiveness) (judgment of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraph 58 and the case-law cited).

66 It would seem, having regard to the information provided in the order for reference, that the relevant provisions of national procedural law do not infringe the principle of equivalence.

67 As regards the principle of effectiveness, it must be borne in mind that EU law does not have the effect of requiring Member States to establish remedies other than those established by national law, unless it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law, or the sole means of obtaining access to a court is effectively for individuals to break the law (judgment of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraph 62).

68 In addition, it must be underlined that, in accordance with the Court's case-law, every case in which the question arises as to whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its operation and its particular features, viewed as a whole, before the various national bodies. In that context, it is necessary to take into consideration, where relevant, the principles which lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings (judgments of 10 March 2022, *Grossmania*, C-177/20, EU:C:2022:175, paragraph 51 and the case-law cited, and of 17 May 2022, *SPV Project 1503 and Others*, C-693/19 and C-831/19, EU:C:2022:395, paragraph 60 and the case-law cited).

69 A trader that holds products bearing an EU trade mark placed on the market in the EEA by the proprietor of that trade mark or with its consent derives rights under the free movement of goods, guaranteed by Articles 34 and 36 of the TFEU and Article 15(1) of Regulation 2017/1001, which the national courts must safeguard (see, to that effect, the judgments of 19 December 1968, *Salgoil*, 13/68, EU:C:1968:54 and of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 105 and the case-law cited).

70 However, having regard to the principle of procedural autonomy, recognised in the case-law cited in paragraph 65 of this judgment, subject to the provisions of Directive 2004/48, EU law cannot preclude a judicial practice according to which the operative part of a decision upholding an action for infringement of an EU trade mark is drafted in general terms, provided that the defendant enjoys the effective judicial protection of the rights that it derives from Articles 34 and 36 TFEU and Article 15(1) of Regulation 2017/1001.

71 Therefore, if the national court is required to designate, in the operative part of its decisions upholding an action for infringement of an EU trade mark, by means of a general formulation, the products which were not previously placed on the market in the EEA by the proprietor or with its consent, the defendant should benefit, at the enforcement stage, from all the guarantees of a fair hearing for the purposes of being able effectively to contest the existence of an infringement or threat of an infringement of the exclusive rights of the trade mark proprietor and to challenge the seizure of those items of products in respect of which the trade mark proprietor's exclusive rights have been exhausted and which may therefore freely circulate within the EEA.

72 As regards the circumstance mentioned by the referring court that, without access to Harman's database, it is not objectively possible for AB to demonstrate that the products it purchased had been placed on the market in the EEA by Harman or with its consent, it may be necessary, as the Advocate General observed in point 90 of his Opinion, even in a case where no exclusive distribution is established, for the competent enforcement authority or, as the case may be, the court with jurisdiction to adjudicate on appeals brought against the acts of that authority, to reverse the burden of proof, to the extent that that authority or court finds, depending on the specific circumstances relating to the marketing of the products concerned, that the rule on the burden of proof, recalled in paragraph 50 of the present judgment, is liable to allow the trade mark proprietor to partition national markets and thus assist the maintenance of price differences between Member States.

73 Having regard to all the foregoing considerations, the answer to the question referred is that Article 15(1) of Regulation 2017/1001, read in combination with the second sentence of Article 36 TFEU, Article 47 of the Charter and Directive 2004/48, must be interpreted as not precluding a judicial practice by which the operative

part of the decision upholding an action for infringement of an EU trade mark is drafted in terms which, owing to their general nature, leaves it to the authority with competence to enforce that decision to determine the products to which that decision applies, provided that, in the context of the enforcement procedure, the defendant is permitted to contest the determination of the products covered by that procedure and that a court may examine and decide, in compliance with the provisions of Directive 2004/48, which products have in fact been placed on the market in the EEA by the proprietor or with its consent.

Costs

74 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 (Fifth Chamber) hereby rules:

Article 15(1) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, read in combination with the second sentence of Article 36 TFEU, Article 47 of the Charter of Fundamental Rights of the European Union. and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, must be interpreted as not precluding a judicial practice by which the operative part of the decision upholding an action for infringement of an EU trade mark is drafted in terms which, owing to their general nature, leaves it to the authority with competence to enforce that decision to determine the products to which that decision applies, provided that, in the context of the enforcement procedure, the defendant is permitted to contest the determination of the products covered by that procedure and that a court may examine and decide, in compliance with the provisions of Directive 2004/48, which products have in fact been placed on the market in the EEA by the proprietor or with its consent.