1. Introduction

Art 8(1) of Brussels Regulation (EU) No 1215/2012 (BR Ibis)\(^1\) provides for a rule of special jurisdiction that applies to multiparty proceedings. In particular, it allows the claimant to sue the defendants before the court of the Member State in which one of them is domiciled, thus derogating the natural forum based on the domicile of the others, when the claims are so closely connected that there is a risk of irreconcilable judgements if not determined together.\(^2\)

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2 Art 8(1) BR Ibis states that a person domiciled in a Member State may be sued, when there are multiple defendants ‘in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient...
Under this rule of jurisdiction, the anchor claim retains an attractive \textit{vis},\textsuperscript{3} addressing the purpose of consolidating connected actions, with the objective of assuring procedural economy and compatible judgments.\textsuperscript{4} The principle of \textit{forum connexitatis} in fact meets ‘the wish to facilitate the sound administration of justice, to minimise the possibility of concurrent proceedings and thus to avoid irreconcilable outcomes if cases are decided separately’.\textsuperscript{5}

The relevance of the provision has progressively increased.\textsuperscript{6} While the Regulation was grounded in the paradigm of traditional two-party litigation to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’.

\textsuperscript{3} As the claims against a number of defendants may be brought before a court of a Member State in whose jurisdiction at least one of them is domiciled, i.e. the ‘anchor defendant’, the provision establishes a kind of derived jurisdiction, based on the connection between the proceedings. See Trevor Hartley, \textit{Civil jurisdiction and judgments in Europe} (Oxford University Press 2017) 9.06; Francesco Salerno, \textit{Giurisdizione ed efficacia delle decisioni straniere nel Regolamento (UE) n. 1215/2012} (Cedam 2015) 181 ff; Christoph Althammer, ‘Die Anforderungen an die «Ankerlage» am forum connexitatis’ [2006] Praxis des Internationalen Privat- und Verfahrensrechts, 558.


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tions, its implementation has gradually faced the proliferation of multi-party proceedings.7

The actual wording of the provision is the result of the CJEU’s case-law. Under the Brussels Convention (BC), the consolidation of claims was based on the mere presence of a plurality of defendants: the ‘so close connection’ was not part of the original version of the rule.8 This requirement was set out in the judgment in Kalfelis,9 confirmed by the subsequent case-

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7 As the disposition applies by exception to the general rule laid down in art 4, it must be strictly interpreted; in fact, as the domicile of the defendant is involved as the general grounds of jurisdiction, it is only by way of derogation from it that BR Ibis provides for different (special) rules. See judgment in CDC (n 5), para 8; judgment in Profit Investment (n 5) para 63; judgment of 11 April 2013, Case C-645/11, Land Berlin v Ellen Mirjam Sapir and Others, ECLI:EU:C:2013:228, para 41; judgment in Solway (n 5) paras 19–21; judgment in Painer (n 5) para 74; judgment of 11 October 2007, Case C-98/06, Freepost plc v Olle Arnoldsson [2007] ECR I-08319, paras 34–35; judgment of 13 July 2006, Case C-103/05, Reisch Montage AG v Kiesel Baumaschinen Handels GmbH [2006] ECR I-06827, paras 22–23; in relation to the Brussels Convention see also Judgment of 27 September 988, Case C-189/87, Athanasios Kalfelis v Bankhaus Schröder and Others [1988] ECR 5565, para 8; Judgment of 27 October 1998, Case C-51/97, Réunion européenne SA and Others v Spliethoff’s Bevrachtingskantoor BV and the Master of the vessel Alblasgracht V002 [1998] ECR I-06511, para 16.

8 Art 6(1) of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1972] OJ L 299, 32 ff, stated that a person domiciled in a Contracting State ‘may also be sued’, ‘where he is one of a number of defendants, in the courts for the place where any one of them is domiciled’. See Antonietta Di Blase, Connessione e litispendenza nella Convenzione di Bruxelles (Cedam 1993) 39; Ana Quiñones Escámez, El foro de la pluralidad de demandados en los litigios internacionales (Eurolex 1996); Heredia Cervantes, Proceso internacional y pluralidad de partes (Comares 2002); Pierre Gothot and Dominique Holleaux, La Convention de Bruxelles du 27 septembre 1968 (Jupiter 1985) 62 ff.

9 In Kalfelis (n 7) para 13 the CJEU stated that between various actions brought by the same plaintiff against different defendants there must exist ‘a connection of such a kind that it is expedient to determine those actions together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings’. See also Paul Jenard, ‘Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters’ (1979) 591 OJ, 26, where it is underlined that ‘[i]n order for this rule to be applicable there must be a connection between the claims made against each of the defendants’.
law, and then expressly introduced by law in art 6(1) of Regulation (EC) No 44/2001 (BR I), as actually replaced by art 8(1) BR Ibis.

However, the scope of the rule has proven to be problematic, since the content of the ‘close connection’ remains undefined in concrete terms.

As the provision does not supply a definition, the close connection has been progressively identified through a case-by-case approach, which will be analysed in section 2.

Section 3 will conversely examine if, beyond the close connection, further requirements are involved in order to implement the rule.

Lastly, section 4 will draw some conclusions.

2. Connected Claims and Irreconcilability between Judgments

In the wording of art 8(1) the close connection between the claims is related to the risk of irreconcilable judgments.

The provision does not expressly outline the notion of irreconcilability. In particular, it does not clarify when different judgments between linked claims could be regarded as incompatible, nor specify if the meaning of

10 See Judgment in Réunion européenne (n 7) para 48.
11 Art 6(1) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12, 1 ff, stated that a person domiciled in a Member State could also be sued ‘where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’.
12 In the analysis of art 8(1), CJEU case-law referring to the previous dispositions of the rule has to be taken into consideration. See recital (34), which affirms the continuity between the 1968 Brussels Convention (BC), the Regulation No 44/2001 and the BR Ibis and their CJEU interpretation. It should be noted that the provision also matches the rule comprised in the Lugano Convention (Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October [2007] OJ L 339, 3), which at art 6(1) states that a person domiciled in a State bound by the Convention may also be sued ‘where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’.
13 At the same time the disposition must be interpreted independently, in accordance with the purpose of the Regulation, and without deriving its interpretation from the domestic law. See Judgment in CDC (n 5), para 16; CJEU Judgment in Reisch Montage (n 7) paras 29–30. On the theme of the inter-relationships between
the provision has an equivalent in other provisions of the Regulation, where the concept of irreconcilability is considered also in the context of related actions and non-recognition.  

On the one hand, irreconcilability between judgments is considered as a ground for non-recognition under art 45(1), lett c. This rule is not perfectly comparable to art 8(1), since they have different objectives: while art 8(1) seeks to avoid the risk of irreconcilable judgments before they occur, non-recognition refers to already existing judgments.

As a consequence, non-recognition, as an exceptional case, has to be narrowly interpreted, in relation to judgments entailing mutually exclusive legal consequences. Art 8(1) instead refers to judgments between the claimant and different defendants, which could not involve, by definition, European and national law under a procedural perspective, see Remo Caponi, ‘Addio ai controlimiti? (Per una tutela della identità nazionale degli Stati Membri dell’Unione Europea)’, in Elena Falletti and Valeria Piccone (eds), Il nodo gordiano tra diritto nazionale e diritto europeo (Cacucci 2012) 43, 44 ff.

For the purpose of the stay of connected actions under art 30(3), ‘actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’ (as, before, the related actions, under art 28(3) BR I, and, analogously, art 22 BC). Art 45, instead, in relation to the refusal of recognition, states that the recognition of a judgment shall be refused when characterized by irreconcilability with other judgments (similarly, art 34 BR I and, before, art 27 BC). On the concept of ‘irreconcilable judgments’ see Trevor Hartley (n 3) para 9.08; Michele Angelo Lupoi (n 4) 41–42.

According to art 45(1), lett c, on the application of any interested party, the recognition of a judgment shall be refused also ‘if the judgment is irreconcilable with a judgment given between the same parties in the Member State addressed’. This provision is equivalent to art 34(3) of BRI and 27(3) of BC.

See the opinion of AG Trstenjak in Painer, 12 April 2011, ECLI:EU:C:2011:239, para 61, in which it is affirmed that ‘Article 34(3) of the regulation and Article 6(1) concern different situations and therefore have a different objective’.

Ibid, para 63.

Ibid, para 62, where it is underlined that non-recognition is ‘an exceptional case, where a derogation from the principle of the virtually automatic recognition of judgments (…) is exceptionally justified. For that reason, that provision must be given a narrow interpretation and be restricted to judgments entailing legal consequences that are mutually exclusive’. In this perspective, in order to ascertain whether different judgments are irreconcilable ‘it should be examined whether they entail legal consequences that are mutually exclusive’: Judgment of 4 February 1988, Horst Ludwig Martin Hoffmann v Adelheid Krieg (Hoffman), C 145/86 [1988] ECR 645, para 22; Judgment of 6 June 2002, Italian Leather SpA v WECO Polsternmöbel GmbH & Co., C-80/00 [2002] ECR I-4995, para 40. Since the rule ‘constitutes an obstacle to the achievement of one of the fundamental objectives
mutually exclusive consequences, only existing where the two judgments are given between the same parties.\textsuperscript{19}

On the other hand, art 30(3) BR \textit{Ibis} provides for the stay of proceedings referring to the risk of irreconcilable judgments.\textsuperscript{20} This provision also does not perfectly correspond to art 8(1).\textsuperscript{21} In fact, it does not have the effect of systematically removing the defendants from their ‘natural’ jurisdiction (i.e. the one of their domicile, according to art 4 BR \textit{Ibis}): the court can decline jurisdiction only if the law of that court permits the consolidation of related actions, on the application of one of the parties. However, art

\textsuperscript{19} Referring to the previous version of art 8(1), see opinion AG Trstenjak in \textit{Painer} (n 16) para 16: ‘A case where the legal consequences of two judgments are mutually exclusive will, as a rule, exist only where the two judgments are given between the same parties. Because Article 6(1) of the regulation does not apply to this case, however, but a case where the two judgments are given, first, between the applicant and the defendant in the anchor claim and, secondly, between the applicant and another defendant, there will not, as a rule, be legal consequences that are mutually exclusive within the meaning of Article 34(3) of the regulation. Even if the judgments were irreconcilable, they could nevertheless both generally be enforced’.

\textsuperscript{20} To the extent of art 30, which provides for the staying of proceedings where related actions are pending before the courts of different Member States, any court other than the court first seised may stay its proceedings where related actions are pending in the courts of different Member States. As the provision states, ‘actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’. The article is the same as art 28(3) BRI and 22(3) BC.

\textsuperscript{21} The original provision outlined in art 6(1) BC did not contain any reference to irreconcilability, introduced by the judgment in \textit{Kalfelis} referring to the connection between the actions as considered under art 22 BC. On this point, see opinion AG Trstenjak in \textit{Painer} (n 16) para 67: ‘the wording of Article 6(1) of the regulation stems from the Court’s case-law on Article 6(1) of the Brussels Convention and the Court took the predecessor provision to Article 28(3) of the regulation, the third paragraph of Article 22 of the Brussels Convention, as its reference point’. See also the opinion of AG Léger of 8 December 2005 in \textit{Roche Nederland}, ECLI:EU:C:2005:749, para 73. Even if art 8(1) has been modelled on art 22 BC, which represents the original version of art 30 BR \textit{Ibis}, the content of the dispositions is not equivalent.
8(1) automatically leads to the result of derogating the general rule of jurisdiction.22

Furthermore, under art 30(3) the reasons for the proceedings to be consolidated are established by the court – and, thus, they should be inspired by considerations regarding the proper administration of justice – while the option rests with the claimant under art 8(1).23

Therefore, even if the Court broadly interprets the irreconcilability for the purpose of the stay of proceedings,24 as a notion which does not necessarily involve the risk of mutually exclusive legal consequences, the more invasive effects of art 8(1) on the scope of art 4 justifies a narrower interpretation of the rule.25

Accordingly, the notion of irreconcilability under art 8(1) cannot be defined by comparison to art 30(3), nor to art 45(3), since it is narrower than the former and broader than the latter. Even if the rule excludes that

22 Ibid, paras 81–82: ‘[t]he end result of such a mechanism for extending jurisdiction’ is ‘systematically’ to deprive the defendants ‘of their natural jurisdiction’, while ‘the effect of the mechanism’ provided for in the rule related to stay of proceedings on the general rule of jurisdiction ‘is not systematic’.

23 In fact, while ‘the option for the second court seised to decline jurisdiction pursuant to Article 22 of the Brussels Convention rests entirely with that court, and not with the applicant, who may only make application to that effect’, the decision ‘to apply Article 6(1) of the said Convention rests solely with the applicant, and not with the court’: Ibid, paras 92 and 95. The ‘national court will take the decisions (…) having regard to the need for the harmonious administration of justice’; on the contrary, the applicant will not ‘be guided by the need for the harmonious administration of justice, but according to the jurisdiction which is more favourable to him’: opinion AG Trstenjak in Painer (n 16) paras 70–71.

24 In Tatry (judgment of 6 December 1994, The owners of the cargo lately laden on board the ship ‘Tatry’ v the owners of the ship ‘Maciej Rataj’, C-406/92 [1994] ECR I-5439, paras 51–52 and 57), referring to art 22 BC, the Court held that ‘[t]he purpose of that provision is to avoid the risk of conflicting judgments and thus to facilitate the proper administration of justice in the Community’; ‘[i]n order to achieve proper administration of justice, that interpretation must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive’.

25 In this perspective, the difference between the provisions regarding their effect on the general rule of jurisdiction justifies ‘the different conditions of connectedness required for their respective application’; a broad interpretation of art 8(1) ‘would inevitably lead to a significant reduction’ of the situations in which the general rule of jurisdiction would be applied: opinion AG Léger in Roche Nederland (n 21) paras 88–89 and 91, where it is considered ‘preferable not to transpose […] the broad interpretation of the concept’ of related actions.
proceedings could be consolidated solely for reasons of expediency and proper administration of justice\textsuperscript{26}, it ‘may be interpreted in many ways’.\textsuperscript{27}

\textsuperscript{26} The ‘possibility for the national court to extend its jurisdiction to co-defendants domiciled abroad solely for reasons of expediency, however legitimate they may be, based on the needs of the proper administration of justice’ is excluded: opinion AG Bot of 23 April 2015 in \textit{Profit Investment} ECLI:EU:C:2015:274, para 95. As stated also by CJEU in \textit{Profit Investment} (n 5) paras 66–67, the mere fact that the result of one of the procedures may have an effect on the result of the other ‘does not suffice to characterise the judgments to be delivered in the two procedures as “irreconcilable”’. On the case, see Luca Penasa, ‘Corte di giustizia: decisioni in materia di giurisdizione’ [2016], Il Corriere giuridico, 117; Sabine Corneloup, ‘Investor Issuer Disputes under the Brussels I Regulation. The CJEU Profit Investment Sim Ruling on Enforceability of Jurisdiction Clauses’, (2016) 3 Revue Internationale des Services Financiers 24.

\textsuperscript{27} As explained by AG Maduro in the opinion of 17 January 2008 in \textit{GlaxoSmithKline, Laboratoires GlaxoSmithKline v Jean-Pierre Rouard}, ECLI:EU:C:2009:40, paras 29 ff, on a ‘strict’ interpretation, the application of the rule depends on a risk that separate judgments might give rise to mutually exclusive legal consequences, while, under a ‘broad’ interpretation, the notion would involve the risk of conflicting decisions. The strict approach seems to be adopted by AG Léger in \textit{Roche Nederland}, where it is affirmed that there could be a consolidation of claims where it is ‘expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments’ (in the perspective attributed to \textit{Kalfelis}) and not just ‘conflicting ones’ (within the meaning of the judgment in \textit{Tatry}). In the perspective of the AG there is no irreconcilability where the defendants concerned by the judgments are different, as the decisions ‘may be enforced separately and simultaneously for each of them’. At the same time, there is no mutual exclusion between the judgments when their legal consequences cover a different territory, as happens where the court rules only on the alleged infringements of the rights of the patent holder in each of the States over which these courts have jurisdiction: opinion AG Léger in \textit{Roche Nederland} (n 21) paras 101 and 109. On the contrary, in the opinion of AG Trstenjak in \textit{Painer} (n 16) para 68, the rule is considered to be interpreted ‘to the effect that it is sufficient for the existence of a connection between two questions that separate judgment would involve the risk of conflicting decisions’, without necessarily involving the possibility of giving rise to mutually exclusive legal consequences. Yet in \textit{Kalfelis}, the opinion of AG Darmon of 15 June 1988 [1988] ECR 5565, para 15 emphasized that the expression ‘contradictory decisions’ stresses ‘unequivocally, that the choice made favours a solution of sufficient breadth’ instead of requiring the impossibility of enforcing two decisions simultaneously. The same broad approach seems (incidentally) to emerge also in other cases, where the irreconcilability seems to be linked to a mere divergence between the judgments. See judgment in \textit{CDC} (n 5) para 20; judgment in \textit{Sapir} (n 7) para 43; judgment in \textit{Painer} (n 5) para 79; judgment in \textit{Freeport} (n 7) para 40; judgment of 13 July 2006, Case C-539/03, \textit{Roche Nederland BV and Others v Frederick Primus and Milton Goldenbergin} [2006] ECR I-6535, para 26.
On these bases, an analysis focused only on the notion of irreconcilability could not lead to a clear individuation of connected claims.\(^{28}\)

As indicated by case law, irreconcilability represents a part of a more comprehensive examination. From this perspective, a divergence in the outcome of the disputes does not suffice for judgments to be regarded as irreconcilable ‘but that divergence must also arise in the context of the same situation of fact and law’.\(^{29}\)

This requirement – the same situation of law and fact – seems to represent the very core issue in defining the close connection and to individuate the scope of the rule.\(^{30}\)

2.1. The Same Situation of Fact and Law: An Early “Rigorous” Approach

The interpretation of this requirement has sensibly changed in CJEU case law.

At first, the CJEU adopted a rigorous approach in assessing the existence of a same situation of fact and law, requiring a strict identity: there was not a same situation of law when the provisions of different national laws were applicable, and a same situation of fact was to be excluded in the existence of different misconducts. This approach emerges from the judgements in Réunion européenne as well as in Roche Nederland.

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28 In fact, the ‘general guidelines’ established by the Court ‘do not provide a very clear indication of the scope of the condition as to the irreconcilability of judgments’; this also because ‘the assessment of the connecting link depends in large measure on the factual circumstances of each case, which makes it difficult to establish a clear criterion’; See the opinion AG Bot of 23 April 2015 in Profit Investment (n 26) para 94.

29 Judgment in CDC (n 5) para 20; judgement in Sapir (n 7) paras 42–43; judgement in Solway (n 5) para 24; judgement in Painer (n 5) para 79; judgement in Freeport (n 7) para 40; judgment in Roche Nederland (n 27) para 26; most recently see also judgement in Profit Investment (n 5) para 65 and judgement of 27 September 2017, Joined Cases C-24/16 and C-25/16, Nintendo Co. Ltd v BigBen Interactive GmbH and BigBen Interactive SA, ECLI:EU:C:2017:724, para 45.

30 Individuating the requirement of close connection ‘is no doubt the most difficult issue of interpretation in respect of the text of Art 8 (1)’; See Horatia Muir Watt, ‘Art 8’, in Ulrich Magnus, Peter Mankowski (eds), Brussels Ibis Regulation (Otto Schmidt 2016) para 25.
In Réunion européenne the existence of a same situation of law was denied regarding claims based on contractual liability and liability in tort or delict.

Both sides of the notion were considered in Roche Nederland, where the Court equally excluded the application of what is now art 8(1), showing a similar strict approach.

31 The case was related to proceedings brought by nine insurance companies (and, as lead insurer, Réunion Européenne), which, after paying compensation for the damages suffered by a company, were subrogated to its rights; the insurers claimed that the dispute was indivisible since the proceedings involved the same transport operation. In such a context, the Court excluded the so close connection; in fact, it held that various claims ‘directed against different defendants and based in one instance on contractual liability and in the other on liability in tort or delict cannot be regarded as connected’: CJEU judgement in Réunion européenne (n 7) para 50. However, as should be noted, in that case the applicability of what is now art 8(1) was to be excluded in advance as the proceedings were not brought before the courts of the defendant’s domicile, while the forum connexitatis relies only on that grounds for jurisdiction. As the Court underlines (paras 44–45), it is clear from the very wording of the provision that it applies ‘only if the proceedings in question are brought before the courts for the place where one of the defendants is domiciled’, which was not in that case, where the jurisdiction was founded on art 5(3).


33 The case was related to proceedings brought against Roche Nederland BV and other companies of the Roche group in respect of an alleged infringement of an European patent. On this case, see Annette Kur, ‘A Farewell to Cross-Border Injunctions? The CJEU Decisions GAT v Luk and Roche Nederland v Primus and Goldenberg’ [2006] International Review of Intellectual Property and Competition Law, 844; E. Bodson, ‘Le brevet européen est-il différent?: L’arrêt Roche Nederland de la Cour de justice: vers une révision du règlement de Bruxelles en ce qui concerne la concentration de litiges transfrontaliers en matière de contrefaçon de brevets européens?’ (2007) 84 Revue de droit international et de droit comparé, 447; Michael Wilderspin, ‘La compétence juridictionnelle en matière de
In that case, related to an alleged infringement of European patent law, the Court excluded the existence of the same situation of law. Since under the Munich Convention a European patent continues to be governed by the national law of each of the Contracting States for which it has been granted, even if some common rules are laid down, any action for infringement must be examined in light of the relevant national law in force in each of these States.\(^{35}\) Thus, where infringement proceedings are brought against defendants domiciled in various Contracting States in respect of acts allegedly committed in each of those States in which the patent is granted, ‘any divergences between the decisions given by the courts concerned would not arise in the context of the same legal situation’.\(^{36}\)

At the same time, the Court also excluded the existence of the same situation of fact. This requirement could not be inferred in the case of European patent infringement proceedings involving a number of companies established in various States with respect to acts committed in various territories, as, in the adopted perspective, ‘the defendants are different and the infringements they are accused of (…) are not the same’.\(^{37}\)

It should be noted that in that case the defendants were companies belonging to the same group. Notwithstanding, the conclusion does not change even if the defendant companies have acted in an identical or similar manner in accordance with a common policy elaborated by one of

\(^{34}\) The Court in fact stated that the rule ‘does not apply in European patent infringement proceedings involving a number of companies established in various Contracting States in respect of acts committed in one or more of those States even where those companies, which belong to the same group, may have acted in an identical or similar manner in accordance with a common policy elaborated by one of them’: judgment in *Roche Nederland*, (n 27) para 41.


\(^{36}\) The context of a same situation of fact and law is excluded since ‘any action for infringement of a European patent must be examined in the light of the relevant national law in force in each of the States for which it has been granted’: Judgment in *Roche Nederland* (n 27) paras 30–31. As referred also by AG Léger (n 21) paras 114 and 117, ‘outside the scope of the common rules laid down in the Munich Convention (…), such a patent continues to be governed by the national legislation’, and, one granted, it becomes ‘a bundle of national patents’.

\(^{37}\) Judgment in *Roche Nederland* (n 27) para 27, where it is specified that the same situation of fact cannot be inferred where ‘the defendants are different and the infringements they are accused of, committed in different Contracting States, are not the same’.
them: even assuming that in this perspective ‘the factual situation would be the same’, nevertheless ‘the legal situation would not be the same’.38

In that conclusion, the predictability of the consolidation between the claims also has a role.39

Since art 8(1) derogates the natural forum of the defendant’s domicile and represents an exception to the general rule provided for in art 4,40 it is expedient that the defendants are able to foresee they may be sued in a different (and presumably more cumbersome) forum.41

According to the early strict perspective, the consolidation of the claims was not considered foreseeable if different legal bases were involved: pre-

38 Ibid, paras 34–35.
39 Within the wording of BC no reference to the notion of predictability is made; notwithstanding, the CJEU used to link this concept to the provisions on legal certainty. In this perspective, in the judgment in Roche Nederland (n 27) para 37 the potential undermining of the predictability of the rules of jurisdiction laid down by the Convention is associated to the undermining of the principle of legal certainty. An express indication on predictability is firstly introduced in BR I, at recital(11), where it is stated that ‘[t]he rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile’. That principle, enhanced by case-law – see judgment in Painer (n 5) para 75; judgment in Freeport (n 7) para 36; judgment in Solvay (n 5) paras 19–20; judgment in Profit Investment (n 5) para 62 – is considerably implemented by BR Ibis. In this context, in addition to recital (15) BR Ibis – replacing the previous version of recital (11) – recital (16) affirms that, in relation to the alternative grounds of jurisdiction based on close connection between the court and the action or in order to facilitate the sound administration of justice, legal certainty should be ensured avoiding ‘the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen’.
40 It is underlined that the lack of predictability ‘is still a problem’ under the rule: see Thomas Pfeiffer ‘Jurisdiction’, in Burkhard Hess, Thomas Pfeiffer and Peter Schlosser (eds), Report on the Application of Regulation Brussels I in the Member States (Study JLS/C4/2005/03, Institut für ausländisches und internationales Privat- und Wirtschaftsrecht 2007, para 223.
41 In this perspective, predictability seems to have an equivalent value – when not even greater – with respect to procedural economy and to the avoidance of legal inconsistencies, objectives to be pursued without prejudice to the former. See opinion in Painer (n 16) paras 96 and 98, where AG Trstenjak notes that the avoidance of legal inconsistencies can justify a transfer of jurisdiction ‘only where this is predictable for the defendant’, and also considerations of procedural economy can be taken into account but ‘strict regard must be had to the defendant’s interest in the predictability of jurisdiction’. See Paul Torremans, ‘Jurisdiction for Cross-Border Intellectual Property Infringement Cases in Europe’ (2016) 53 Common Market Law Review 1625, 1641, where the predictability is considered ‘one of the foundations’ of the regulation.
dictability was automatically excluded if the laws applicable to the claims were not identical. In *Roche Nederland*, the CJEU stated that a rule of jurisdiction based solely on factual criteria, which are concretely set out by the national courts, would be liable to undermine the predictability of the Brussels system. The same perspective emerges from the opinion of AG Léger. To ensure predictability, it is the view of the AG that the same situation of fact will not suffice, nor in a context where the defendant companies belong to a same group and committed identical or similar infringements.

### 2.2. The Evolution of the Concept of “Same Situation of Fact and Law”

This interpretation was not completely satisfying as it could lead to the undesirable result of determining separately claims presenting a connection. Thus, at a later stage, CJEU case-law came to a less formalistic approach in relation to both the requirements.

When it could be said that the same situation of law exists, this means that a legal framework, even if not fully harmonized, would suffice for the application of the rule.

This perspective emerges from the judgement in *Freeport*. The Court, notwithstanding that it referred to its precedent case-law where it pointed out that the divergence in the outcome of the dispute must arise in the context of same law and fact, stated that the rule applies not only when a

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42 Judgment in *Roche Nederland* (n 27) paras 37–38.
43 Opinion of AG Léger in *Roche Nederland* (n 21) paras 127–129; thus, expressly rejecting ‘the spider in the web’ theory. The AG also underlines the importance of interpreting the rules of the BC ‘in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued’: *Ibid*, para 126.
44 Horatia Muir Watt (n 30) para 27, where it is underlined that the previous approach was ‘overly dogmatic’.
45 The case was related to an action brought seeking an order against two linked companies for the payment of a sum that only one of them had expressly agreed on: see Judgment in *Freeport* (n 7) paras 12–13. On this case, see Andrew Scott, ‘Réunion Revised? Freeport v. Arnoldsson’ [2008] Lloyd’s Maritime and Commercial Law Quarterly, 113.
46 As held in *Roche Nederland* (n 27) para 26.
single law is involved, but also when different legal bases are involved in the claims brought against a number of defendants.\textsuperscript{47}

In the subsequent case-law this interpretation has been confirmed\textsuperscript{48}, particularly from the judgements in \textit{Painer} and in \textit{Sapir}.

In the latter, the Court further specifies that even if the claims do not have a single legal basis, they could have an origin in a single situation of law and fact and an identical nature when directed at the same interest. In that case, the common origin and interest was represented by the repayment of an erroneously transferred surplus amount.\textsuperscript{49}

In \textit{Painer}, where the case was related to proceedings for copyright infringements\textsuperscript{50} and the actions brought against the defendants were based on differing national legal grounds, the ‘enlarged’ notion of identical legal basis has been confirmed. The Court also recognized the existence of a same situation of law, since the essential elements were the same in their substance.\textsuperscript{51}

\begin{itemize}
  \item[47] Judgment in \textit{Freeport} (n 7). As held by the Court para 38 and 47, it is not apparent from the wording of the article ‘that the conditions laid down for application of that provision include a requirement that the actions brought against different defendants should have identical legal bases’, thus the rule ‘is to be interpreted as meaning that the fact that claims brought against a number of defendants have different legal bases does not preclude application of that provision’.
  \item[48] Interpretation which has been appreciated also by legal literature; see Michele Angelo Lupoi (n 4) 42; Francesco Salerno (n 3) 186.
  \item[49] \textit{Ibid}, paras 45 and 47–48. In that case, related to a request concerning the repayment of an amount overpaid in error following an administrative procedure, the claims were based on the recovery of the sum unduly paid and, regarding one of the defendants, on a tortious act. The Court, restating that the same legal basis is not a necessary requirement for the application of the article, affirmed that the rule ‘must be interpreted as meaning that there is a close connection […] in circumstances such as those at issue in the main proceedings, rely on rights to additional compensation which it is necessary to determine on a uniform basis’.
  \item[50] The case was related to proceedings between a freelance photographer, Ms Painer, as applicant, and five newspaper publishers, as defendants, concerning some photographs produced and sold by the former without conferring on third parties any rights nor providing consent to their publication.
  \item[51] In fact, as the Court notes, ‘a difference in legal basis between the actions brought against the various defendants, does not, in itself, preclude the application’, reasoning which is even stronger if ‘the national laws on which the actions against the various defendants are based are (…) substantially identical; thus, the article ‘must be interpreted as not precluding its application solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned’: judgment in \textit{Painer} (n 5) paras 81–82 and 84. In fact, in cases governed by a law which is the same in substance even if not fully harmonized, a ‘suf-
A similar trend characterizes the factual situation. The formalistic perspective, in which differences between the plurality of infringements committed in various States could exclude the existence of a same situation of fact, appears dismissed in favour of a “substantial” appraisement of the fact. From this perspective, it seems that different misconducts could be deemed as a same situation of fact when concerted.

If in Roche Nederland the Court had already incidentally considered if the defendants acted ‘in accordance with a common policy’, in Painer it expressly holds that ‘the fact that defendants against whom a copyright holder alleges substantially identical infringements of his copyright did or did not act independently may be relevant’. Thus, in determining whether there is a connection between different claims, the evaluation has to be carried out in the light of all the elements of the case, also considering the presence of independent or concerted actions.

The more extensive approach in the evaluation of the same situation of fact and law has some consequences also on predictability. The Court explained that a difference in the legal basis does not in itself preclude the consolidation of proceedings if foreseeable by the defendants, meaning that predictability is no longer exclusively connected to the existence of the same law. Thus, when claims are not based on the same legal basis, predictability involves consideration of the fact: in these cases, the existence of concerted actions seems to become the crucial factor in the evaluation of predictability. If the defendants have previously coordinated their actions, sufficient legal connection’ may equally exist: opinion AG Trstenjak in Painer (n 16) para 80 and 105.

52 Judgment in Roche Nederland (n 27) para 34.
53 Judgment in Painer (n 5) para 83. The importance of an agreement between the defendants emerges, a contrario, also from the opinion of AG Trstenjak (n 16) para 104, where it is affirmed that a single factual situation ‘cannot be taken to exist where the contested conduct of the anchor defendant and of the other defendant appears to be unconcerted parallel conduct’. See Paul Torremans (n 41) 1642, where it is underlined that ‘after Painer, neither the first nor the second condition established in Roche Nederland remains intact.’ See also Beatriz Campuzano Diaz, ‘The CJEU Again with the Forum of the Plurality of Defendants’, (2012) 4 Cuadernos Derecho Transnacional 245, 255.

54 Judgement in Painer (n 5) para 81. In fact, ‘a difference in legal basis between the actions brought against the various defendants, does not, in itself, preclude the application’ of the article, ‘provided however that it was foreseeable by the defendants that they might be sued in the Member State where at least one of them is domiciled’. 

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they have to be considered as being reasonably able to foresee the consolidation of the proceedings.\textsuperscript{55}

2.3. The Confirmation of the Extensive Approach in Patent and Design Cases

The more extensive approach has been recently confirmed in \textit{Solvay}, a case related to proceedings regarding alleged infringements of a European patent – i.e. the very same field where the judgment in \textit{Roche Nederland} took a strict approach – where the Court, even without overruling its precedent,\textsuperscript{56} adopted a less formalistic perspective.\textsuperscript{57}

\textsuperscript{55} While in \textit{Roche Nederland} predictability of consolidation between proceedings was exclusively related to law, excluding the possibility to foresee the consolidation of claims when the legal basis was not identical, this element is no longer necessary. As emerges from the judgment in \textit{Painer}, a difference in legal basis between the actions brought against various defendants does not preclude the application of what is now art 8(1), recognizing that such a difference does not, in itself, preclude predictability. When not related to the same law, predictability seems to be related to the fact, and, in particular, to the existence of concerted actions. On these bases, the Court states that what is now art. 8(1) ‘must be interpreted as not precluding its application solely because actions against several defendants for substantially identical copyright infringements are brought on national legal grounds which vary according to the Member States concerned’ (para 84).

\textsuperscript{56} The judgment in \textit{Solvay} (n 5) para 25 in fact recalls the principle ruled in \textit{Roche Nederland} that the existence of the same situation of fact ‘cannot be inferred where the defendants are different and the infringements they are accused of […] are not the same’. Notwithstanding, the Court distinguished the conclusion to be reached on the case in relation to its ‘specific features’, since the case was related to the ‘same national part’ of the patent. For this reason, the two cases could be distinguished: see Trevor Hartley (n 3) para 9.19.

\textsuperscript{57} In this perspective, the Court stated that ‘[i]t follows from the specific features of a case such as that in the main proceedings that potential divergences in the outcome of the proceedings are likely to arise in the same situation of fact and law’ and that connection between the different claims has to be established also taking into account ‘the dual fact that, first, the defendants in the main proceeding are each separately accused of committing the same infringements with respect to the same products and, secondly, such infringements were committed in the same Member States, so that they adversely affect the same national parts of the European patent at issue’: judgment in \textit{Solvay} (n 5) paras 27 and 29. On these bases, the CJEU held that what is now art 8(1) applies where two or more companies from different Member States are accused of committing an infringement ‘of the same national part of a European patent which is in force in yet another Member State by virtue of their performance of reserved actions with regard to the same
In this particular matter, there could not be in existence, by definition, an identical legal basis, if strictly considered since under the Munich Convention a European patent appears as a bundle of national patents. On the contrary, as the alleged infringements were related to the ‘same national part’ of a patent, if the forum connexitatis were not applicable the infringements would have been examined by the courts in the light of the different national legislations governing the various national parts of the patent.

This perspective seems to be (even more) suitable to the new Unitary Patent.58 In light of the rules laid down by the Agreement on a Unified Patent Court, the coordination between art 8(1) and the rule of exclusive jurisdiction in this matter, i.e. art 24(4) BR Ibis, could also be (re)examined;59 contrary to the previous interpretation, the question of validity of


59 Art 24(4) BR I bis (as well as its previous version in BR I, art 22(4) 4 and 16(4) BC) provides for a rule of exclusive jurisdiction in relation to proceedings concerned with the registration or validity of patents, trademarks, designs, or other similar rights, irrespective of whether the issue is raised by way of an action or as a defence. On the basis of this rule, there could be a fragmentation of the consolidated proceedings when the issue of validity of patent is raised, also determining problems of ‘torpedo’ and ‘super torpedo’ cases: Peter Schlosser, ‘Intellectual Property Rights’ in Burkhard Hess, Thomas Pfeiffer and Peter Schlosser (n 40) paras 804 ff. See also Marketa Trimble, Global Patents: Limits of Transnational Enforcement (Oxford university press 2012) 47 ff; Benedetta Ubertazzi, Exclusive Jurisdiction in Intellectual Property (Mohr Siebeck 2012) 45. The problem of ‘tor-
the patent must be expressly raised in order to fall within the scope of the rule.60

The Court also confirmed the same principle in the judgment in *Nintendo*, where the proceedings were related to an infringement of a Community design.61 In that case, the prerequisite of a same situation of law would not have been recognized according to the previous ‘strict’

pedo’ was intensified since the Court gave a wide interpretation of the rule in GAT (Judgment of 3 July 2006, *Gesellschaft für Antriebstechnik mbH & Co. KG v Lamellen und Kupplungsbau Beteiligungs KG*, Case C-4/03 [2006] ECR 2006 I-6509), para 25, where stated that the exclusive jurisdiction provided for by that provision should apply when the issue of a patent’s validity is raised by way of an action or a plea in objection. The principle was restated in *Roche Nederland* (n 27), para 40. The problem has been again faced in judgment in *Solvay* (n 5) paras 34, 36 and 40, where the Court seems to partially mitigate its previous interpretation, stating that the rule of exclusive jurisdiction must be interpreted as not precluding the request for provisional measures even if the courts of another Member State have exclusive jurisdiction as to the substance of the matter. To this conclusion the Court also considers that there is no risk of conflicting decisions since the provisional decision taken by the court before which the interim proceedings have been brought will not in any way prejudice the decision to be taken on the substance by the court having jurisdiction: *ibid*, paras 49–50. This interpretation has to be verified under the new Agreement on a Unified Patent Court: according to art 32 lett c, in fact, the Court has exclusive competence on interim measures.

60 See Paul Torremans (n 41) 1644: ‘*de facto* the Gat v. LuK approach will not be followed. Inside the common Unitary Patent Court, the division before which the validity is raised during infringement proceedings will have the option to continue with the infringement case and rule on validity too. The question does, then, need to be raised whether it makes sense to keep the strict Article 24(4) rule for national patents and other registered intellectual property rights. It should be noted also that art 32(1) of the Agreement on a Unified Patent Court, which provides for the exclusive competence of the Court, deals with claims and counterclams for revocation of patents and declaration of invalidity, without any express references to what emerges from defences as plea in objection. Art 33, instead, provides for a rule of connection very similar to art 8(1), stating that an action may be brought against multiple defendants only where the defendants have a commercial relationship and where the action relates to the same alleged infringement.

61 These proceedings referred to claims brought against two linked companies for infringement of the rights conferred by the Community designs, which were presented as connected because of a supply chain of the allegedly infringing goods. On this case see Annette Kur, ‘Unionsweite Zuständigkeit in Gemeinschaftsgeschmacksmustersachen’ [2017] Gewerblicher Rechtsschutz und Urheberrecht, 1127; Dominique Berlin, ‘La protection européenne de Super Mario’ (2017) 42 La Semaine Juridique, 1897; Sebastian Kubis, ‘Die Verletzung unionsweiter Schutzrechte in grenzüberschreitenden "Lieferketten”’ [2017] Zeitschrift für
approach’, as the infringement proceedings involved different national laws. Notwithstanding this, since by bringing the claims ‘the holder seeks to protect his exclusive right to use the Community design’, which has the same effect throughout the EU, the Court recognized the existence of the same situation of law.62

In Nintendo the appraisement of the fact also comes into consideration. The CJEU – endorsing the view of the referring court, which considered that such a requirement was met – confirmed the importance of concertation. Where the defendants are a parent company and its subsidiary, and they are accused ‘of similar, if not identical, acts that infringe the same protected designs and relate to identical allegedly infringing goods’, there exists a same situation of fact.63

As particularly emerges from the judgments in Painer, Solvay and Nintendo, the more extensive approach is undoubtedly useful in relation to cases where the plurality of parts and infringements are involved in a substantially similar situation, as when Intellectual Property (IP) rights violation cases occur. In this field of law, where both the exploitation of property rights as well as the infringements normally extend beyond national boundaries, a further improvement of the ‘close connection’ rule would be

geistiges Eigentum, 471; Laurence Idot, ‘Contrefaçon de dessins ou modèles’ (2017) 11 Europe, 54.

62 In fact, even if ‘it follows from the Court’s case-law on patents that, where infringement proceedings are brought before a number of courts in various Member States in respect of a European patent granted in each of those States, against defendants domiciled in those States in respect of acts allegedly committed in their territory, any divergences between the decisions given by the courts concerned would not arise in the context of the same situation of law’. Since that right ‘has the same effect throughout the European Union, the fact that some of the orders that may be adopted by the court having jurisdiction with a view to ensuring that that right is respected depend on provisions of national law is irrelevant to the existence of the same situation of law’: Judgment in Nintendo (n 29) paras 46, 48–49.

63 In relation to the same situation of fact, ‘it is apparent from the orders for reference that the referring court starts from the premise (…) that requirement is met’. The existence of a same fact ‘must in such circumstances — if proven, which is for the referring court to verify, and where an application is made to that effect — cover all the activities of the various defendants, including the supplies made by the parent company on its own account, and not be limited to certain aspects or elements of them’: Ibid, paras 50–52.
convenient. In this perspective, in relation to IP cases, it has been proposed to amend the rule taking into consideration if the defendants have acted in an identical or similar manner in accordance with a common policy. What is more, it has been suggested to enhance the role of the management epicentre of the group in the individuation of the grounds of jurisdiction according to the ‘spider in the web’ theory. Thus, if one defendant has coordinated the relevant activities or is otherwise more closely connected with the dispute in its entirety, jurisdiction would be only conferred on the courts in the State where that defendant is habitually domiciled.

2.4. The Position of the CJEU on Cartels

The implementation of the rule could also be developed in relation to competition law.

In this field of law, since the infringements are normally put in place under a coordinated policy involving several jurisdictions, the forum connexitatis is also particularly useful even if not considerably enhanced by the

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64 Paul Torremans (n 41) 1637. It is in fact ‘easily intelligible that it would be particularly cumbersome and costly to institute proceedings for infringement of patents in several jurisdictions’: Peter Schlosser, ‘Intellectual Property Rights’ in Burkhard Hess, Thomas Pfeiffer and Peter Schlosser (n 40) para 729.


67 Principles on Conflict of Laws (n 65) art 2:206.
legislator.68 With respect to the CDC case – the first in which the CJEU has adjudicated concerning the interaction between competition law and jurisdictional aspects in regard to damages actions against cartel members – it has been affirmed that the Brussels system ‘is not fully geared towards ensuring effective private implementation of the Union’s competition law’.69


69 Opinion AG Jääskinen in CDC, ECLI:EU:C:2014:2443, para 7–8 and 10. The suggestion drawn by the AG is that, de lege ferenda, it would be advisable to incorporate in the Regulation a rule of jurisdiction that is apt to cover cross-border anti-competitive practices; in fact, the AG proposes to take into consideration the lines of the conflict-of-laws provision which applies to obligations deriving from acts restrictive of competition under the Rome II Regulation, art 6(3). In cases related to cartel agreements it has also been suggested to take into consideration the unity of various misconducts, even if concerning a different spatial and temporal context, when they are coordinated by one of the firm’s companies, even accepting the domicile of the parent company as the sole ground for jurisdiction. Michael Wilderspin (n 68) 51–52; Wolfgang Wurmnest, ‘International Jurisdiction in Competition Damages Cases Under the Brussels I Regulation: CDC Hydrogen Peroxide’ (2016) 53 Common Market Law Review 225, 233, where it is considered the ‘more controversial (…) question whether also a subsidiary of a firm has participated in a cartel – and which has distributed the cartelized product in a Member State without being aware of the cartel agreement concluded by its parent company – may serve as an anchor defendant’. On these matters, see also Mihail Danov, ‘Jurisdiction in Cross-Border EU Competition Law Cases: Some Specific Issues Requiring Specific Solutions’, in Mihail Danov, Florian Becker, Paul Beaumont (eds), Cross-Border EU Competition Law Actions (Hart Publishing 2013) 170–173; Mihail Danov, Florian Becker, ‘Conclusion: Proposing Specific Solutions To Promote Regulatory Competition And Address The Enforcement Gap’, ibidem, 287; Richard Whish, David Bailey, Competition law (8th edn, Oxford University Press 2015) 330; Jürgen Basedow, ‘Jurisdiction and
The case was related to proceedings concerning actions for damages – which were directly or indirectly transferred to CDC by 71 damaged subjects – linked to an infringement of art 101 TFEU and art 53 of the Agreement on the European Economic Area. Before the introduction of the proceedings, a decision of the Commission had already established the existence of a singular infringement of EU law and found the participation of several undertakings in a single and continuous cartel.70

The Court stated that the requirement of the same situation of fact and law was satisfied.

On the one side, since different misconducts were involved in the proceedings, the presence of the decision of the Commission finding a singular infringement seems sufficient to recognize the same situation of fact.71 At the same time, the Court considered that predictability is also satisfied in the case of a decision of the Commission finding the existence of a single infringement of EU law and holding each participant liable for the consequent loss resulting from the infringement. In fact, in such circumstances, the participants could have expected to be sued in the courts of a Member State in which one of them is domiciled.72


71 As the Court states, ‘[t]he requirement that the same situation of fact and law must arise is satisfied in circumstances such as those of the case in the main proceedings. Despite the fact that the defendants in the main proceedings participated in the implementation of the cartel at issue by concluding and performing contracts under it, in different places and at different times’, according to the decision of the Commission ‘upon which the claims in the main proceedings are based, the cartel agreement amounted to a single and continuous infringement’: Judgment in CDC (n 5) para 21.

72 In this case, predictability is directly linked to the decision of the Commission. In fact, the condition ‘is fulfilled in the case of a binding decision of the Commis-
On the other side, regarding the same situation of law, the Commission’s decision did not specify the requirements for holding the defendants liable in tort, which were to be determined by national law. Notwithstanding, the Court confirmed the principle that the same situation of law is not excluded by the presence of different legal bases. In fact, ‘even in the case where various laws are, by virtue of the rules of private international law of the court seised, applicable to the actions for damages brought by CDC against the defendants in the main proceedings’, such a different legal basis does not, in itself, preclude the application of what is now art 8(1).73

The Court’s thinking seems to go even further. Since the requirements for determining the liability for cartel infringement may differ between the various national laws, there would be a risk of irreconcilable judgments if the actions were not determined together. Thus, from the previous standpoint where the difference in the legal bases would necessarily exclude the application of the rule, that divergence becomes an element that may be relevant for the consolidation of the claims, when it could lead to irreconcilable judgments.74

73 Even if the decision of the Commission did not determine the requirements for holding the defendants liable in tort, ‘such a difference in legal basis does not, in itself, preclude the application’ of the rule: ibid, para 23.
74 Judgment in CDC (n 5) para 22. On this basis, the Court held that the article in comment must be interpreted as the rule on centralisation of jurisdiction in the case of several defendants ‘can apply in the case of an action for damages (…) brought jointly against undertakings which have participated in different places and at different times in a single and continuous infringement, which has been established by a decision of the Commission’: ibid, para 33. See Wolfgang Wurmnest (n 69) 235, underlying the ‘CJEU’s victim-friendly interpretation’ which ‘opens ample possibilities for persons harmed by horizontal cartels to shop for the best forum’. See also Marcella Negri, ‘Una Pronuncia a Tutto Campo sui Criteri di Allocazione della Competenza Giurisdizionale nel Private Antitrust Enforcement Transfrontaliero: il Caso Esemplare delle Azioni Risarcitorie c.d. Follow-on Rispetto a Decisioni Sanzionatorie di Cartelli pan-europei [2015] Int’l lis 78, 80.
2.5. An Interim Conclusion

The foregoing considerations lead to some interim conclusions.

Firstly, the ‘so close connection’ represents an objective element of connection,\textsuperscript{75} existing when the claims lie on a same substantial situation of fact and law.\textsuperscript{76} Thus, irreconcilability between the judgments emerges from a comprehensive evaluation that has to be related to the same situation of fact and law, as defined by case law in a non-formalistic but substantial approach.

There is a same situation of fact also in the presence of different misconducts, when concerted, and concertation could also occur when the defendants are companies of the same group that have acted in a similar manner in compliance with a common policy, as is particularly shown by Nintendo. What is more, when the unity of fact had already been found before the introduction of the proceedings, as happened in CDC in relation to the decision of the Commission, the same situation of fact can be assumed as unitary without requiring further investigations by the referring court.

At the same time, a legal framework could be relevant even if not fully harmonized.

There could be a unitary consideration of the matter, also having regard to the interest pursued by the defendants, as stated in Sapir. Furthermore, there are identical facts justifying a consolidation between the claims without the necessity of a sole legal basis. Independently from the applicable law, there are differences between the judgments on linked cases that can be attributed exclusively to a different appraisal of a fact; with respect

\begin{footnotesize}
\textsuperscript{75} In the view of AG Trstenjak in Painer (n 16) para 97, a close connection ‘first and foremost’ emerges in ‘cases where the outcome of one claim is dependent on the outcome of the other claim’ as where there is a ‘contingent liability (alternative liability)’ or ‘the defendants are jointly and severally liable, co-owners or a community of rights’. The relevance of joint liability is also underlined in the opinion AG Jääskinen (n 69), para 68.

\textsuperscript{76} On these bases, the disposition regulates the jurisdiction referring to an element of objective connection that excludes a joinder of parties in merely cumulative proceedings: see Caterina Silvestri, ‘Il regolamento (CE) n. 44/2001 del Consiglio, del 22 dicembre 2000, concernente la competenza giurisdizionale, Il riconoscimento e l’esecuzione delle decisioni in materia civile e commerciale. La competenza giurisdizionale’, in Michele Taruffo and Vincenzo Varano (eds), \textit{Manuale di diritto processuale europeo} (Giappichelli 2011) 28.
\end{footnotesize}
to them the difference of the law does not retain any significance.\textsuperscript{77} Thus, as underlined in \textit{Painer}, the identical legal basis, which in the previous ruling represented an essential element, becomes only one of the relevant factors, thus relegated to a possible one.\textsuperscript{78} There are cases in which the connection between claims hardly depends on whether the same law is applicable.\textsuperscript{79}

The rule can not be applied when the defendants are not able to reasonably foresee the consolidation of the claims. So far as concerns predictability, from a starting point where this condition was to be excluded if different laws were applicable, the consolidation between the claims is foreseeable even when a single law is not involved.\textsuperscript{80} In such cases, the concertation seems to represent the crucial factor, compensating for the lack of the same legal basis.\textsuperscript{81} Thus, predictability may depend on concerted actions, which could also be supposed as existent when the defendants belong to a same group of companies or when the unity of the misconducts had already been found.

\begin{footnotesize}
\begin{enumerate}
\item As underlined by AG Trstenjak, opinion in \textit{Painer} (n 16) para 79; thus, even if different courts apply essentially comparable laws, they can reach different conclusions because they differently appraise the facts.
\item See judgment in \textit{Painer} (n 5) para 80; in \textit{Freeport} (n 7) para 41; in \textit{Sapir} (n 7) para 44. The CJEU in fact underlines that the identical legal basis between the actions brought against different defendants is not included among the conditions laid down for application of the provision in the wording of art 6(1): Judgment in \textit{Painer} (n 5) para 76 and in \textit{Freeport} (n 7) para 38.
\item AG Trstenjak, opinion in \textit{Painer} (n 16) para 78, considers the requirement of the same legal situation as based on the incorrect ‘mental assumption’ that no irreconcilable judgments ‘can exist where different laws are applicable to the actions and those laws are not fully harmonised’. This assumption would be correct only where all inconsistencies between the judgments could be attributed solely (which is not) ‘to the differences between the two applicable laws’. In cases of contingent liability (alternative liability) in which one of the defendants is liable only where the other defendant is not liable, there is (...) a clear interest that the case is decided by the same court in order to avoid the risk of irreconcilable judgments. In such a case, the legal connection between both claims is not dependent on whether the same law is applicable to both claims': \textit{Ibid}, para 83.
\item See Paul Torremans (n 41) 1641 where it is noted that the Court links the predictability ‘specifically to a discretional appreciation of the legal situation and to the absence of the requirement of an identical legal basis’.
\item As emerges \textit{a contrario} also from the opinion of AG Trstenjak in \textit{Painer} (n 16) paras 91–92, in the case of ‘unconcerted parallel conduct’ this condition is not fulfilled since for the other defendants it is not sufficiently predictable that they can also be sued ‘at a court in the place where the anchor defendant is domiciled’.
\end{enumerate}
\end{footnotesize}
The risk of irreconcilable judgements has to be assessed in concrete by the referring court according to the indications given by the CJEU: where the conditions defined by case law for the existence of a same situation of fact and law are met, the outcomes of the proceedings could be irreconcilable if separately determined.82

3. **The Relevance of the Abuse in Excluding the Close Connection**

The analysis would not be complete without considering if the consolidation of the claims is based solely on the objective element of connection outlined above or if the application of the rule further requires any subjective condition.

Art 8(1) does not specify what happens if the choice of forum amounts to an abuse.83 While to the extent of art 8(2) BR Ibis the proceedings could not be consolidated if they were instituted solely with the purpose of unlawfully removing the defendants from their natural forum,84 art 8(1) does not contain any express wording on this point.85

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82 In order for art 8(1) to apply, such a risk of irreconcilable judgments has to be established in concrete by the national court: judgment in CDC (n 5) para 20; judgment in Solvay (n 5) para 23; judgment in Profit Investment (n 5) para 66; judgment in Painer (n 5) para 42; judgment in Freeport (n 7) para 39; judgment in Kalfelis (n 7) para 12 also stated that it is for the national court ‘to verify in each individual case whether that condition is satisfied’.


84 As well as the previous versions contained in art 6(2) BR I and BC.

85 The opportunity to extend the provision contained in the wording of what is now art 8(2), by analogy, to art 8(1) has also been affirmed, thus precluding its application ‘to situations which do not fall within its natural scope as well as to prevent the basis for jurisdiction which it lays down being relied on if that is designed to serve interests which do not merit protection’: see opinion AG Mengozzi in Freeport [2009] ECR I-03327, paras 64–65. In fact, the AG sees ‘no reason – linked
Notwithstanding this, the Jenard Report stated that the actions cannot be brought with the sole object of ousting the general rule of jurisdiction.86 The same principle was upheld in Kalfelis87 and then restated in the subsequent case-law.88

Even if the relevance of an abuse is stated in terms of principles, the Court shows some hesitation in concretely implementing the proposition that an abusive misconduct in the introduction of the proceedings against a plurality of defendants could preclude the applicability of art 8(1).

In this perspective, the judgment in Reisch Montage considered the special rule of jurisdiction to also be applicable when one of the linked claims has to be regarded as inadmissible from the time it is brought against the defendant under a national provision.89 Notwithstanding, in this way it would be very easy to oust the general rule of jurisdiction by bringing inadmissible claims, which would create the appearance of a connection with the purpose of choosing the forum. Where under national law a claim must be ruled inadmissible at the outset, the plurality of defendants is based on artificial reasons: ‘there are not a number of defendants in the

in particular to the need for a uniform application and independent interpretation of the regulation’s provisions – that would prevent it from applying to the cases regulated by Article 6(1)’, and, thus, by actual art 8(1).

86 Paul Jenard (n 9) 26.
87 In that case the CJEU excludes the possibility for the plaintiff to make a claim against a number of defendants, before the court of the anchor defendant, with the sole object of ousting the jurisdiction of the courts of the States where the others are domiciled: see judgment in Kalfelis (n 7) para 8.
88 In fact, the Court held that the exceptional rule of jurisdiction provided for in what is now art 8(1) ‘must be construed in such a way that there is no possibility of the very existence of that principle being called in question, in particular by allowing a plaintiff to make a claim against a number of defendants with the sole purpose of ousting the jurisdiction of the courts of the State where one of those defendants is domiciled’: see judgment in Réunion européenne (n 7) para 47. In the same perspective, see the judgment in Painier (n 5) para 78 and in Solvay (n 5) para 22.
89 In this case, concerning the repayment of a debt, the action brought against one of the defendants was dismissed as inadmissible by the time the claim was brought because of the commencement of bankruptcy proceedings. The CJEU stated that the rule must be interpreted as meaning that it ‘may be relied on in the context of an action brought in a Member State against a defendant domiciled in that State and a co-defendant domiciled in another Member State even when that action is regarded under a national provision as inadmissible from the time it is brought in relation to the first defendant’: judgment in Reisch Montage (n 7) para 33.
true sense and, therefore, the prerequisite for the choice of jurisdiction is not satisfied’.

In Freeport the relevance of abuse is put into discussion also as a matter of principles, since the Court excluded the consideration of abusive misconducts. The judgment states that what is now art 8(1) applies where the claims brought against different defendants are connected ‘without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled’. As an argument, it also considered the different wording between art 8(1) and art 8(2).

This approach has been reconsidered in CDC, where the Court for the first time finds a precise misconduct that is deemed to reveal, if proved, a circumvention of the rule.

In that particular case, some of the parties alleged that, before bringing the action in the main proceedings, the applicant and the anchor defendant had reached an out-of-court settlement, but the formal conclusion of the agreement was ‘purposefully delayed’ until the institution of the proceedings to the extent of securing the jurisdiction of the court. Then, after the introduction of the proceedings, the claimant withdrew the anchor claim.

90 See the opinion AG Colomer in Reisch Montage of 14 March 2006 [2006] ECR I-06827, paras 42–45. In the same manner, the consolidation of proceedings does not fulfil its function: the possibility of conflicting decisions is excluded by the same fact that there will be no decision from the court of the disqualified defendant’s domicile. On these bases, the AG concludes that it is not possible to rely on the article when the claim against the anchor defendant ‘must be ruled inadmissible at the outset of the proceedings’: ibid, para 52. See Horatia Muir Watt (n 30) para 35.

91 Judgment in Freeport (n 7) para 54.

92 The possibility of a circumvention of the rule is found after recalling its previous ruling on the matter: Judgment in CDC (n 5) paras 27–28. On the one side, the Court affirms that the provision cannot be interpreted as allowing an applicant to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts related to the domicile. On the other side, if claims brought against various defendants are connected within the meaning of the article ‘when the proceedings are instituted, the rule of jurisdiction laid down in that provision is applicable without there being any further need to establish separately that the claims were not brought with the sole object of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled’.

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Even if it is certain that a transaction where intentionally postponed with the aim of obtaining a prolongation of the applicability of the rule may be regarded as abusive, the Court denied the concrete relevance of that specific agreement in order to exclude the applicability of the special rule of jurisdiction. In fact, allegations concerning an abusive behaviour of the claimant must be supported by ‘firm evidence’ of collusion: the defendants have to demonstrate that ‘at the time that proceedings were instituted, the parties concerned had colluded to artificially fulfil, or prolong the fulfilment of, that provision’s applicability’. Notwithstanding, ‘simply holding negotiations with a view to concluding an out-of-court settlement’ does not in itself prove a collusion.

3.1. Abuse and Real Claims: How to Apportion the Burden of Proof?

The judgment in CDC shows that cases involving abuse raise a problem regarding the allocation of the burden of proof. On the one side, it seems very tough to prove collusion in the introduction of the proceedings if the burden of proof lying on the defendants requires a ‘firm evidence’ related to such a collusive intent: the possibility that the defendants could ever realistically supply such evidence could be questionable.

93 Wolfgang Wurmnest (n 69) 238–239 considers that ‘[f]or good reasons, the CJEU set the hurdles very high for showing such a circumvention’ as ‘[a]ny rule that weakens the willingness of the parties to settle would have a negative impact on the sound administration of justice’.

94 Judgment in CDC (n 5) paras 29–31.

95 Ibid, para 32. Thus, the Court held that there is no concrete circumvention of the rule where the applicant withdraws its action ‘against the sole co-defendant domiciled in the same State as the court seised, unless it is found that, at the time the proceedings were instituted, the applicant and that defendant had colluded to artificially fulfil, or prolong the fulfilment of, that provision’s applicability’: Judgment in CDC (n 5) para 33. As also expressed by AG Jääskinen, opinion in CDC (n 69) paras 78 ff, the applicant’s withdrawal of its action against the anchor defendant does not in itself have the effect of terminating the jurisdiction established under what is now ar 8(1). That withdrawal does not retain any relevance when it is subsequent to the date on which the court was validly seised and a connecting link between the claims against several defendants had been established at the time the action was brought.

96 Horatia Muir Watt (n 30) para 49 underlines that the burden of proving by the defendant represents ‘a very demanding task’.
On the other hand, if an abusive misconduct is alleged by the defendants, it appears equally hard for the claimant to demonstrate the absence of the abuse.

In this perspective, it could be asked whether, when an abusive misconduct is alleged, and proved in its objective content, the burden of proof could be shifted to the claimant, who should demonstrate that the claim is ‘real’.  

For a ‘real claim’ to exist, there must be an effective interest at the time of institution of proceedings, which is not the case when the action against the anchor defendant appears to be ‘manifestly unfounded in all respects […] or devoid of any real interest for the claimant’.  

It is self-evident that when there is no real claim, there is neither a plurality of claims and consequently there could not be a connection between them.

In this perspective the existence of a ‘real claim’ could represent a limit to the scope of art 8(1), whose application has to be excluded when the close connection between the claims is the result of an abuse. In fact, if the plurality of claims and their connection is the result of an abusive mis-

97 See Mihail Danov (n 68) 103, where it is underlined that to rely on the article ‘a plaintiff has to show that there is a “real issue”’. See also Thomas Pfeiffer ‘Jurisdiction’, in Burkhard Hess, Thomas Pfeiffer and Peter Schlosser (n 40) para 221, where it is underlined that ‘[t]here must be a “real claim” against the anchor defendant’, even if without ‘need to show a good arguable case on the merits against the anchor defendant’. In that perspective, it has been proposed to add ‘a requirement that the claim against the anchor defendant should not be manifestly inadmissible or unfounded’: Michael Wilderspin (n 68) 53. On evidence and burden of proof see Paolo Biavati, *Diritto processuale dell’Unione Europea* (5th edn, Giuffrè 2015) 217 ff; Paolo Biavati, ‘Il diritto delle prove nel quadro normativo dell’Unione europea’ [2006] Rivista trimestrale di diritto e procedura civile 483.

98 Opinion AG Mengozzi in *Freeport* (n 85) para 66. If considered solely from an objective view, the element of connection between the claims does not prevent the claimant from bringing an action against a fictitious co-defendant, with the exclusive purpose of removing the other defendants from the courts of their domicile. The risk of a fraud or abuse could emerge from the institution of proceedings which, even if objectively connected, are ‘manifestly unfounded’ or of ‘no real interest’ for the claimant: *Ibid*, paras 61 and 54, where the AG underlines that ‘there must be a real and current interest in the disputes being heard together’.

99 AG Mengozzi (n 85) paras 62 and 63, suggests the consideration of a general limit to the applicability of the uniform rules on conflict laid down in the Brussel system, whose implementation has to be excluded by ‘fraud relating to the jurisdiction of the courts’; this fraud also occurs in the presence of ‘manipulation on the part of the claimant’ with the effect of ousting the rules of jurisdiction. Thus, the interpretation of art 8(1) would require an additional element, avoiding its application ‘to situations which do not fall within its natural scope as well as to pre-
conduct, the application of the rule would be based on artificial reasons since the requirement for the choice of forum under art 8(1) does not concretely exist.

4. Some Final Remarks

The irreconcilability between judgments arising in the context of a same situation of fact and law, if properly considered according to CJEU interpretation, also seems a suitable concept for those fields where a plurality of parties and infringements are naturally involved. Accepting the notion of close connection with respect to the requirement of the same situation of fact and law, as it emerges from the abovementioned case-law, would ensure greater certainty in the concrete application of the rule. To deal with the increasing occurrence of multi-party proceedings, an improvement of the rule also may be convenient, even enhancing the relationship between the defendants, as where they are companies belonging to the same group and acting in accordance with a common policy.

Concerning the relevance of the abuse, a clarification of the applicability of the rule would be advisable, specifying if the existence of abusive misconducts in the introduction of the proceedings has the effect of excluding the close connection between claims and, thus, the special rule of jurisdiction.

A clarification on the scope of art 8(1), according to the abovementioned case-law, would pursue the aim of preventing national courts from applying the rule in accordance to their procedural concepts; which seems remarkable even considering that the concept of derived jurisdiction in cases of connected claims ‘is not familiar to all national systems’ and that ‘connexion as a procedural concept does not necessarily coincide with categories of substantive law’: Horatia Muir Watt (n 30) para 26.

In this perspective, according to the rules laid down by the Brussels system, it is necessary to avoid the exercise of that choice ‘in a fraudulent or wrongful manner’: see the opinion AG Mengozzi in Freeport (n 85) paras 52–53 and 72.